

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



JUL 27 1978

Mr. Wayne L. Horvitz
Director
Federal Mediation and Conciliation Service
Washington, D.C.

OPINION 78-14 A

3(21) (A)

Attention: Alice L. Everitt, Special Assistant to the Director

Dear Mr. Horvitz:

This is in reply to your letter requesting an opinion whether Mr. Eric J. Schmertz is acting as a fiduciary within the meaning of section 3(21) of the Employee Retirement Income Security Act of 1974 (ERISA) in deciding, as an arbitrator, the employers' contribution rate to the New York City Nursing Home--Local 144 Welfare Fund (the Fund), pursuant to the terms of a collective bargaining agreement under the circumstances you describe.

In this regard, you make the following representations and arguments:

- a. Mr. Schmertz was originally appointed factfinder and mediator by the Federal Mediation and Conciliation Service in connection with the collective bargaining negotiations for the contract commencing December 1, 1976 between the Metropolitan New York Nursing Home Association, Inc., and Local 144, Hotel, Hospital, Nursing Home and Allied Health Services Union, SEIU, AFL-CIO (the Union).
- b. These negotiations resulted in a contract on June 16, 1977 in accordance with Mr. Schmertz's recommendations as fact finder and mediator. The contract includes the following provisions:
 - (1) Mr. Schmertz is appointed arbitrator of disputes arising under the collective bargaining agreement, (2) from April 1, 1977 to October 1, 1977, the employers' monthly contributions to the Fund would be five percent of payroll, and (3) the employers' contribution rate for the period October 1, 1977 was left open, and if the employers and the Union could not agree on a contribution rate for those six months, Mr. Schmertz would arbitrate the issue with the authority to decide on a contribution rate of not less than five percent and not greater than nine percent of payroll.
- c. In dollars, the difference between the five percent and nine percent rate is about \$300,000 a month, or \$1,800,000 for the six-month period. Mr. Schmertz fears that he may incur personal fiduciary liability under ERISA with respect to his determination

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of the contribution rate if his award should cause an insufficiency in the Fund so that it cannot pay benefits. He has completed the arbitration hearings on the matter but is withholding his decision in apprehension of this possible fiduciary liability.

- d. Unlike trustees and other fiduciaries, Mr. Schmertz, in his role as arbitrator, is not deciding a trust administration question. Article I, Section 7 and Article V, Sections 1 and 3(a) of the Fund agreement specifically provide that the employers' contributions to the Fund shall be made in accordance with the collective bargaining agreement and that complaints in this respect shall be handled in the same manner as provided for in the grievance and arbitration provisions contained in the collective bargaining agreement. It was not the intent of the parties to impose potential fiduciary liability on an impartial arbitrator or on those persons negotiating the terms of a contract.
- e. In his role as arbitrator in this matter, Mr. Schmertz is not rendering investment advice as defined in section 3(21)(A)(ii) of ERISA and the regulations under that section.

Section 3(21)(A) of ERISA defines the term "fiduciary" with respect to an employee benefit plan (with an exception relating to plan investments in registered investment companies, not relevant to this case) as a person who (i) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B) (relating to designation of certain fiduciary responsibilities to persons other than named fiduciaries).

Although an arbitrator would be a plan fiduciary if he performed any of the functions described in section 3(21)(A) of ERISA, it does not appear from the information you have submitted that Mr. Schmertz performs any such functions. Rather, it appears that, in his role as arbitrator in deciding the rate of the employers' contributions to the Fund in accordance with the terms of the collective bargaining agreement, Mr. Schmertz does not have and does not exercise any discretionary authority, discretionary control, or discretionary responsibility respecting management of the Fund, management or disposition of Fund assets, or the administration of the

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Fund; neither does he render or have authority or responsibility to render investment advice with respect to any moneys or other property of the Fund.

Accordingly, based solely upon your representations, we conclude that in his role as arbitrator in deciding the rate of the employers' contributions to the Fund, pursuant to the terms of the collective bargaining agreement, Mr. Schmertz is not a fiduciary within the meaning of section 3(21)(A) of ERISA.

This letter should not be construed as indicating any view on the part of the Department that arbitrators in other circumstances, or arbitrators generally, are not fiduciaries.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10, relating to the effect of advisory opinions.

Sincerely,

Fred W. Stuckwisch
Director
Office of Regulatory Standards
and Exceptions