

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



APR 12 1979

Mr. Kenneth L. Maher
Williams & Brooke, P.C.
One Financial Plaza
Hartford, Connecticut 06103

OPINION 79-24 A

3(2)

Dear Mr. Maher:

This is in response to your letter of November 3, 1978, and enclosure, requesting an advisory opinion regarding coverage under the Employee Retirement Income Security Act of 1974 (ERISA). Specifically you ask whether certain payments by the Mechanics Savings Bank, Hartford, Connecticut, constitute an employee pension benefit plan within the meaning of ERISA section 3(2).

You advise that Mechanics Savings Bank (the Bank) has a qualified defined benefit pension plan. However, to help compensate retirees for increases in the cost of living, the Bank has also provided additional payments to retirees from the general assets of the Bank. These payments, you further represent, have always been "expressly understood to be gratuitous and not part of any continuing or obligatory program." You argue that, since there is no continuing guarantee that any payments will be made in a given year to the retirees, the payments made in a given year can be considered to be a lump sum distribution representing the entire balance of the retirees' credit under the program you describe. You conclude that, pursuant to the provisions of Department of Labor regulation section 2510.3-3, there are no employees covered by the plan after such payments are made, and that, therefore, there is no plan in existence (except possibly for the period between the time the bank determines that it will make a payment in a given year and the time such payment is made). In addition, you allege that there is a conflict between regulation section 2510.3-3 and regulation section 2510.3-2(e) (relating to payments to pre-ERISA retirees). You suggest that this alleged conflict can be removed by a determination that the supplemental payments you describe do not constitute an employee pension benefit plan for ERISA purposes.

Section 3(3) of ERISA defines the term employee benefit plan to include both employee welfare benefit plans and employee pension benefit plans. With limited exceptions not relevant here, regulation section §2510.3-3(b) provides that, for the purposes of title I of ERISA, any plan, fund, or program under which no employees are participants covered under the plan

- 2 -

will not constitute an employee pension benefit plan. Regulation section 2510.3-3(d)(2)(ii) provides in part that ". . . (ii) An individual is not a participant covered under an employee pension plan or a beneficiary receiving benefits under an employee pension plan if - . . . (B) the individual has received from the plan a lump-sum distribution or a series of distributions of cash or other property which represents the balance of his or her credit under the plan."

Regulation section 2510.3-3 sets forth certain circumstances under which a plan will not be deemed to be an "employee benefit plan" for purposes of title I of ERISA. One such circumstance, to which you refer in your letter, is where a plan has no participants by reason of subparagraph (d)(2)(ii)(B) of that section. That subparagraph provides, in part, that an individual is not a participant under an employee pension plan if he has received one or more distributions representing the balance of his credit under the plan. Thus, such a person would not look to the plan for benefits in the future. In the case of supplemental payments described in section 2510.3-2(e), in contrast, additional payments may be granted in the future, but there is no assurance that the payments will or will not continue. Thus, it is the opinion of the Department that regulation sections 2510.3-3(b) and (d) are not germane to the situation you describe. Regulation section 2510.3-2(e), however, might be applicable to such a situation. That regulation provides that, under the conditions specified therein, certain supplemental payments to retirees who separated from service prior to September 2, 1974 will not be deemed to constitute an employee pension plan for purposes of title I of ERISA.

Notwithstanding the preceding, this letter should not be deemed to be an opinion as to whether the payments by the Bank do or do not constitute an employee pension benefit plan within the meaning of section 3(2) of ERISA. Although the payments you describe are of a nature similar to those described in regulation section 2510.3-2(e) in that there is no assurance that those payments will or will not continue in the future, your letter does not indicate whether such payments satisfy the criteria set forth in that regulation. It might be noted that failure to satisfy those criteria would not necessarily result in the supplemental payments being deemed an employee pension plan as defined in ERISA section 3(2): see, for example, news release USDL 76-707, April 27, 1976, to which you refer in your letter. However, if supplemental payments proposed by the bank are made in a manner inconsistent with the principles enunciated in the regulation or the news release, we are unable at the present time to assure you that we would not consider those payments to be an employee pension plan for purposes of title I of ERISA.

- 3 -

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 thereof relating to the effect of advisory opinions.

Sincerely,

Ian D. Lanoff
Administrator
of Pension and Welfare
Benefit Programs