

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



JUN 11 1979

Harold Baer, Jr, Esq.
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80 Pine Street
New York, New York 10015

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Re: I.B.T. Local 237 Teamsters - Brentwood
School District Health and Welfare Fund

I.B.T. Local 237 Teamsters - Town of
Babylon Health and Welfare Trust Fund

I.B.T. 237 Teamster - Town of Islip
Health and Welfare Trust Fund

I.B.T. Local 237 Teamsters - Plainview-Old
Bethpage Central School District Health and
Welfare Trust Fund

Dear Mr. Baer:

This is in regard to your letters dated March 20, 1975 and March 7, 1979, and intervening and subsequent communications, on behalf of the plans listed above (collectively referred to in this letter as "the Plans"). In your letters, an opinion was requested from the Department of Labor (the Department) on the question whether the subject Plans are "governmental plans," within the meaning of section 3(32) of the Employee Retirement Income Security Act of 1974 (ERISA). By letter dated May 29, 1979, you withdrew your previous requests for our opinion on this question, citing as the reason for your withdrawal the fact that this matter is now the subject of an action instituted on April 27, 1979 by the trustees of the Plans against the New York State Superintendent of Insurance in the United States District Court of the Southern District of New York. The trustees have also named the Secretary of Labor as a party in that action. Under the circumstances, we think that despite the withdrawal of your request for an advisory opinion, it is appropriate to make known to you the Department's views on the issue which was the subject of your request and which is now the subject to the trustees' action.

The following is a summary of representations made in materials submitted to the Department in this matter. Each of the Plans was established in accordance with a collective bargaining agreement between an employer and Teamsters Union Local 237 (the Union). Each such employer is either a town or public school district, and the employees covered by each such plan are employees of the respective town or public school district. In all cases employer contributions provide the exclusive source of funding. Each plan is jointly administered by trustees appointed by the Union and trustees appointed by the employer in equal numbers. The terms of the Plans provide that in the event of a deadlock between the employer and Union trustees, the matter is to be submitted for decision to an arbitrator.

Section 3(32) of ERISA, in relevant part, defines the term "governmental plan" to mean "a plan established or maintained for its employees by . . . the government of any State or political subdivision thereof, or by an agency or instrumentality of any of the foregoing." Section 4(b)(1) of ERISA states that the provisions of Title I of ERISA shall not apply to a governmental plan described in section 3(32). We assume that each of the towns and school districts whose employees are covered by the Plans is a political subdivision of a state or an agency or instrumentality of such a political subdivision.

In the materials submitted on behalf of the Plans to the Department in this matter, the argument is made that, because the Plans were established pursuant to collective bargaining agreements between the employers and the Union, and not by the unilateral acts of the employers, the Plans were not "established" by governmental entities within the meaning of section 3(32). The argument is also made that, because the Plans are administered by boards of trustees which are comprised of equal numbers of employer and Union trustees, they are not "maintained" by governmental entities within the meaning of section 3(32) since the employer trustees do not control the boards or policies of the Plans, and, according to the Plans' submissions, the employer trustees do not play a substantial or leading role in the daily administration of the Plans.

Notwithstanding these arguments, it is the view of the Department that the Plans in question are governmental plans within the meaning of section 3(32).

In our view, the term "governmental plan," as defined in section 3(32) of ERISA, is not so narrow as to include only plans established by the unilateral action of employers which are governmental entities and plans which are ultimately within the exclusive control of governmental entities. Neither the language of section 3(32), nor the legislative history relevant to that section indicate that the definition of "governmental plan" set forth in that section was intended to embrace only such plans. ^{1/} In the absence of clear expression of legislative intent regarding the scope of the term "governmental plan," as defined in section 3(32), that term must be interpreted in light of such evidence as is available regarding the reasons underlying Congress' exclusion in section 4(b)(1) of plans that meet the definition from coverage under Title I of ERISA. The available evidence does not suggest that

1/ Congressional committee reports, in passages relating to the coverage provisions of predecessor bills of ERISA, discuss the issue of whether plans sponsored by governmental entities should be subject to pension reform legislation in broad, general terms such as "coverage of public employee plans," "reform in the public sector," and "plans sponsored by state and local government." H.R. Rep. No. 93-533 93d Cong., 1st Sess. (1974), at 9; H.R. Rep. No. 93-779 93d Cong., 2d Sess. (1974), at 46. Remarks of individual legislators on this issue are equally general. In his additional views to H.R. Rep. No. 93-533 (at pp. 43-44), Representative Erlenborn supported the coverage under the fiduciary responsibility and disclosure provisions of H.R. 2 of "public retirement plans," but suggested that such plans should have been made subject to the proposed minimum vesting and funding standards as well, referring to the desirability of "blanketing . . . public employees under Federal pension legislation." Similarly, in the House of Representatives discussions of the Conference Report accompanying ERISA, Representative Broyhill stated that he "felt that Government employees should at least be entitled to the same protections granted those in the private sector." Congressional Record-House, August 20, 1974, reprinted in Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess., at 4685 (Comm. Print 1976).

this section was intended to encompass only plans established by the unilateral action of a governmental entity and plans "controlled" solely by a governmental entity. Under these circumstances, we do not believe it is appropriate to exclude collectively bargained plans and plans jointly administered by trustees appointed by governmental entities and by labor unions from the "governmental plan" definition, if these plans are funded by and cover only employees of governmental entities.

In this connection, the legislative history and the statute itself contain indications that Congress was reluctant to extend the requirements of ERISA to plans covering employees of governmental entities without first collecting further information on these plans and on the possible need for, and effects of, federal legislation in this area.

In the passage including the remarks quoted in footnote 1 above, Representative Broyhill stated that he "reluctantly agreed it would be a mistake to take hasty action in this area [i.e., plans covering employees of government entities]" and that he "supported the provisions which provided for a study of this entire question." Section 3031 of ERISA directs appropriate House and Senate Committees to "study retirement plans established and maintained or financed (directly or indirectly) by the Government of the United States, by any State (including the District of Columbia) or any political subdivision thereof, or by any agency or instrumentality of any of the foregoing." Such study is to include an analysis of --

- (1) the adequacy of existing levels of participation, vesting and financing arrangements,
- (2) existing fiduciary standards, and
- (3) the necessity for Federal legislation and standards with respect to such plans.

We do not think that a narrow interpretation of section 3(32) to exclude from the "governmental plan" definition plans which are collectively bargained or jointly administered would be consistent with Congress' reluctance in the absence of extensive information, to apply federal regulatory standards in this area. In view of the questions that the report required under section 3031 was directed to

address, it appears that when ERISA was enacted, available information was not sufficient to serve as a basis for determining the precise circumstances in which federal regulation of plans covering public employees would be necessary and appropriate. Accordingly, we believe that section 3(32) should not be so narrowly interpreted as the materials submitted to the Department on behalf of the Plans suggest.

Among other considerations which led Congress not to impose federal regulatory standards on governmental plans when ERISA was enacted, the legislative history indicates that Congress was specifically concerned about the possible effects of requiring State and local governments to meet federal funding requirements. H.R. 12855 would have required the House Ways and Means Committee to undertake a study "to determine whether requiring governmental plans to adhere to the new [funding] standards . . . would entail unacceptable cost implications to governmental entities." 2/ Although the Plans at issue in this matter are not pension or retirement plans, an interpretation of section 3(32) under which a plan would not be deemed to be a governmental plan if its administration is not "controlled" by a governmental entity (as you have used that expression) would lead to the result that any defined benefit or money-purchase pension plan administered by a joint board composed in equal numbers of employee representatives and individuals appointed by a governmental entity would be subject to the minimum funding standards set forth in Part 3 of Title I of ERISA. The Congressional report that was prepared pursuant to section 3031 indicates that employee representatives constitute a board majority in about one-third of all federal, state and local retirement systems. 3/ Thus, if section 3(32) were interpreted to mean that a plan would not be deemed to be a governmental plan if its administration is not controlled by a governmental entity, a significant portion of retirement plans covering employees of governmental entities would not be deemed to be governmental plans. In our view, such an interpretation would be

2/ H.R. Rep. No. 93-807 93d Cong., 2d Sess. (1974), at 165.

3/ Pension Task Force Report on Public Employee Retirement Systems 95th Cong., 2d Sess. (Comm. Print, 1978), at pp. 66-67.

inconsistent with Congress' reluctance to impose federal minimum funding requirements on state and local governmental entities without further study of the effects that such requirements would have.

The Department has previously interpreted the phrase "established or maintained" in the context of regulations under the definitions of "welfare plan" and "pension plan" in sections 3(1) and section 3(2) of ERISA, respectively, in a manner consistent with the view that a plan is "established or maintained" by an employer who makes contributions to it or who is involved to a significant degree in its administration. Specifically, in 29 CFR §2510.3-1(j), relating to certain group or group-type insurance programs, §2510.3-2(d), relating to certain individual retirement accounts, and §2510.3-2(f), relating to tax sheltered annuity programs, the Department has taken the position that certain types of arrangements are established or maintained by an employer if, among other factors, such arrangements are funded at least in part through contributions made by the employer, or if the employer is involved in the discretionary administration of the arrangement. ^{4/} We believe that similar considerations are applicable in interpretation of the words "established or maintained" as used in section 3(32).

^{4/} Each of the relevant regulations provides that an arrangement of the specified type is not established or maintained by an employer, and, therefore, is not a welfare plan or pension plan within the meaning of section 3(1) or (2), as the case may be, if, among other conditions, such arrangement is not funded through employer contributions, and if participation of the employer is limited to certain specified activities, none of which involves, as here, the exercise of fiduciary duties.

7

Finally, we note that in ERISA Opinion 75-36 (December 31, 1975), the Department concluded that a plan covering employees of a fire protection district and administered by a board of trustees consisting of municipal officials and members of the fire department in equal numbers was deemed to be a "governmental plan" as defined in section 3(32). A copy of that letter is enclosed herewith.

Sincerely,

Ian D. Lanoff
Administrator

Enclosure