

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



JUL 5 1979

OPINION 79-42 A

Mr. Peter Kaiser
Law Offices of Thomas W. Gleason
One State Street Plaza
New York, New York 10004

Re: Identification Number: F-1230A

408(b) (2)
408(c) (2)
402(c) (1)
406
406(b) (1)

Dear Mr. Kaiser:

This is in reply to your letter concerning the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA).

Specifically, you ask the following questions:

1. Is it permissible under ERISA for Mr. Walter Sullivan to continue as the salaried Welfare Director of the NYSA-ILA Welfare Fund (the Fund) even though Mr. Sullivan is also one of the Fund's trustees?
2. Is it permissible under ERISA for the Fund to continue to reimburse the International Longshoremen's Association (the ILA) for part of the total salary of Mr. Sullivan as Welfare Director of the Fund (i.e., to continue the current method of payment of Mr. Sullivan's salary as Welfare Director of the Fund)?
3. Is it permissible under ERISA for Mr. Sullivan to continue as full-time Welfare Director of the Fund and to continue to receive payments from the Atlantic Coast District (the ACD) of the ILA for services rendered to the ACD where said duties or services do not interfere with the full-time position held by him as Welfare Director of the Fund?

You state the following facts:

(a) Mr. Sullivan, a former longshoreman and Welfare Director of the Fund since 1948, currently receives \$33,852 annual salary as Welfare Director plus compensation of \$130 per month for auto expense. The Fund pays Mr. Sullivan directly \$18,852 of his annual salary; the remaining \$15,000 is paid to him by the ILA, which is fully reimbursed for this amount by the Fund. In addition, the ILA contributes approximately \$2,300 per year

under the Railroad Retirement system on behalf of Mr. Sullivan. The Fund reimburses the ILA for these contributions also. This reimbursement arrangement was entered into many years ago to protect Mr. Sullivan's pension rights and/or entitlement to his pension under the Railroad Retirement Act of 1937. If his entire salary were paid to him by the Fund, he would lose his entitlement and eligibility to a pension under such Act because the Fund is not a proper contributor to the Railroad Retirement system. The Fund has received waivers from the Department of Insurance of the State of New York regarding this arrangement. In your opinion, the payment and reimbursement arrangement involving the ILA, the Fund, and Mr. Sullivan does not in any way interfere with Mr. Sullivan's fiduciary duty of undivided loyalty to the Fund. The ILA does not benefit in any way from this method of payment of Mr. Sullivan's salary as Welfare Director of the Fund.

(b) The position of Welfare Director of the Fund is a full-time position whose duties include the administration and management of the Fund and its offices. Mr. Sullivan serves as Welfare Director of the Fund at the pleasure of the Fund's Board of Trustees, and his employment arrangement is not in writing. In addition to his salary, he is entitled to vacation and holidays and receives welfare and pension coverage similar to that given to the other 69 employees of the Fund, whom he supervises.

(c) Mr. Sullivan is also one of the 20 trustees of the Fund. He receives no compensation for his services as a trustee. He had received \$25 per meeting attended, in lieu of expenses, as did all other trustees, but such payments ceased as of June 30, 1977.

(d) Mr. Sullivan is also the Secretary of the ACD, which pays him \$14,555 per year plus \$50 per week for expenses incurred in coordinating matters involving the ILA and the ACD. Mr. Sullivan attends several meetings per year for the ACD; his attendance in no way interferes with his duties as Welfare Director of the Fund. There is no written service contract between Mr. Sullivan and the ACD. His office with the ACD is an elected position.

(e) Mr. Sullivan gives counsel and advice to ILA Locals on welfare programs and benefits and bloodbanks. There is no written agreement as to the functions he performs for the ILA. For these services, he receives approximately \$3,500 per annum.

(f) As a Fund trustee, Mr. Sullivan does not participate in the determination of the level of compensation he is to receive as Welfare Director of the Fund. At any time matters pertaining to the Welfare Director's duties, salaries, advances, etc., are discussed, Mr. Sullivan withdraws from these meetings at the request of the Board Chairman. Therefore, he has no voice in any decision regarding this position.

First and Third Questions

Section 402(c)(1) of ERISA permits any person to serve in more than one fiduciary capacity with respect to an employee benefit plan (including service both as trustee and administrator, provided the plan documents so provide). Section 406(a)(1)(C) and (D) of ERISA prohibits the furnishing of goods, services, or facilities between the plan and a party in interest; and the transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. Mr. Sullivan is a party in interest with respect to the Fund under section 3(14)(A) of ERISA because he is a fiduciary with respect to the Fund. However, section 408(b)(2) states that the prohibitions provided in section 406 shall not apply to contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if not more than reasonable compensation is paid therefor.

Regulations under this section, copy enclosed, explain that section 408(b)(2) does not contain an exemption from acts described in section 406(b)(1) (relating to fiduciaries dealing with the assets of plans in their own interest or their own account), section 406(b)(2) (relating to fiduciaries in their individual or any other capacity acting in any transaction involving the plan on behalf of a party (or representing a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries), or section 406(b)(3) (relating to fiduciaries receiving consideration for their own personal account from any party dealing with a plan in connection with a transaction involving the assets of the plan) (section 2550.408b-2(a) of the regulations). In this regard, section 2550.408b-2(e)(2) of the regulations states that a fiduciary does not engage in an act described in section 406(b)(1) of ERISA if the fiduciary does not use any of the authority, control or responsibility which makes such person a fiduciary to cause a plan to pay additional fees for a service furnished by such fiduciary.

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If Mr. Sullivan withdraws from meetings of the Board of Trustees of the Fund and does not otherwise involve himself when any matters regarding the Welfare Directors' duties, salary, advances, etc. are discussed, he does not use any of his authority as a trustee to cause the Fund to pay additional fees for his services as Welfare Director. Therefore, we believe that, pursuant to section 2550.408b-2(e)(2) of the regulations, Mr. Sullivan is not engaging in an act described in section 406(b)(1) of ERISA with regard to the determination of his duties and compensation as Welfare Director of the Fund.

Section 2550.408b-2(a)(2) of the regulations requires the contract or arrangement under which services are furnished to a plan to be reasonable. Section 2550.408b-2(c) of the regulations states that no contract or arrangement is reasonable within the meaning of section 408(b)(2) of ERISA and section 2550.408b-2(a)(2) of the regulations if it does not permit termination by the plan without penalty to the plan on reasonably short notice under the circumstances to prevent the plan from becoming locked into an arrangement that has become disadvantageous. Since Mr. Sullivan serves as Welfare Director of the Fund at the pleasure of the Fund's Board of Trustees under an unwritten arrangement, it appears that this arrangement may be terminated without penalty to the Fund on reasonably short notice under the circumstances, as required by section 2550.408b-2(c) of the regulations. Furthermore, since Mr. Sullivan, as Welfare Director of the Fund, is responsible for the administration and management of the Fund, his services in this capacity appear to be necessary for the operation of the Fund, as required by section 2550.408b-2(b) of the regulations.

Section 2550.408b-2(d) of the regulations explains that a plan may pay a party in interest reasonable compensation for providing services described in section 408(b)(2) of ERISA and that section 2550.408c-2 of the regulations contains provisions relating to what constitutes reasonable compensation for the provision of services. In this regard, section 408(c)(2) of ERISA permits a fiduciary to receive reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of a fiduciary's duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members

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are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred. Further, section 2550.408c-2(b)(1) of the regulations states that generally, whether compensation is "reasonable" under section 408(b)(2) and (c)(2) of ERISA depends on the particular facts and circumstances of each case. Pursuant to section 5.01 of the ERISA advisory Opinion Procedure (ERISA Proc. 76-1, 41 FR 36281), the Department generally will not issue opinions in areas in which the question raised is inherently factual in nature. You represent that Mr. Sullivan receives only part-time pay from the ACD and the ILA. We make no determination as to the accuracy of such assertion. However, if Mr. Sullivan is not receiving full-time pay from the ACD and from the ILA, we believe that he may receive reasonable compensation from the Fund for his services to it, pursuant to section 408(c)(2) of ERISA.

Based upon the foregoing, we conclude that, pursuant to sections 402(c)(1) and 408(b)(2) of ERISA and the regulations under the latter section, the Fund may continue to retain Mr. Sullivan as its Welfare Director and pay him a salary even though Mr. Sullivan is also one of the Fund's trustees, provided that such salary and the arrangement under which Mr. Sullivan serves as Welfare Director are reasonable within the meaning of section 408(b)(2) and (c)(2). Again, please note that section 5.01 of ERISA Procedure 76-1 (copy enclosed) states that there are certain areas where, because of the inherently factual nature of the problem involved, the Department ordinarily will not issue advisory opinions. We believe that determining whether compensation and an arrangement to provide services are reasonable within the meaning of section 408(b)(2) and (c)(2) are problems of this type--see section 2550.408c-2(b)(1) of the regulations. Accordingly, we will not issue an opinion as to whether Mr. Sullivan's compensation and arrangement to provide services to the Fund are reasonable for purposes of section 408(b)(2) and (c)(2) of ERISA.

Similarly, without expressing any opinion as to whether the ACD is an employee organization for purposes of section 408(c)(2) or whether Mr. Sullivan's services to the ACD are part-time services, we conclude further that, if the ACD is an employee organization and if the services are part-time, Mr. Sullivan may continue to serve as full-time Welfare Director of the Fund while continuing to receive payments from the ACD for his part-time services to the ACD, which you represent do not interfere with his duties as Welfare Director of the Fund, provided that his salary as Welfare Director is reasonable within the meaning of section 408(b)(2) and (c)(2) and that the arrangement under which he serves as Welfare Director is reasonable within the meaning of this section, and provided further that his services for both the Fund and the ACD do not contravene the requirements of section 406(b)(2) and (3) of ERISA.

Second Question

We note that the ILA is a party in interest with respect to the Fund under section 3(14)(D) of ERISA. However, based upon the facts and representations in your letter, including the representation that the ILA does not benefit in any way from paying \$15,000 of Mr. Sullivan's annual salary of \$33,852 as Welfare Director of the Fund and subsequently being reimbursed in the amount of \$15,000 by the Fund for such payment, it is our view that such payment and reimbursement is not one of the types of transactions described under sections 406 and 407 of ERISA unless credit is extended between the ILA and the Fund. Because it is unclear whether the Fund is obligated to the ILA to reimburse it, we are not commenting on whether there may be an extension of credit between the ILA and the Fund in violation of section 406(a)(1)(B) of ERISA.

In this regard, we are expressing no opinion as to whether such payment and reimbursement is consistent with the provisions of the Railroad Retirement Act or the Labor-Management Reporting and Disclosure Act of 1959, as amended, or as to whether Mr. Sullivan's participation in the NYSA-ILA Pension Fund meets the requirements of section 401(a)(3) of the Internal Revenue Code of 1954.

Finally, we are expressing no opinion as to whether any of the arrangements described above meet the requirements of section 404 of ERISA (see section 5.02(o) of ERISA Proc. 76-1).

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

Sincerely,

Assistant Administrator
Office of Fiduciary Standards