

U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216



Reply to the Attention of:
Pension and Welfare Benefit Programs

OPINION 80-7A
3(2)

FEB 1 1980

Mr. Walter J. Fessler
Lum, Biunno & Tompkins
550 Broad Street
Newark, New Jersey 07102

Dear Mr. Fessler:

This is in reply to your letters of January 29, 1979, and October 3, 1979. In your letters you requested an advisory opinion on the question whether the proposed Fairleigh Dickinson University Voluntary Termination Program (VTP) is a severance pay plan which is not deemed to be an employee pension benefit plan within the meaning of section 3(2) of the Employee Retirement Income Security Act of 1974 (ERISA). In your letter of October 3, 1979, you specifically requested that the advisory opinion be addressed to the VTP described in the collective bargaining agreement effective September 1, 1979, between the Fairleigh Dickinson University (the University) and the Fairleigh Dickinson University Council of American Association of University Professors Chapters. Accordingly, our response is based on the VTP described in the portion of the 1979 collective bargaining agreement furnished with your letter dated October 3, 1979. In addition to your letters, the Department has received a letter from Mr. John Tesauro dated September 11, 1979, on behalf of the New Jersey State Board of Mediation and a letter from Mr. Lawrence M. Sapadin dated October 2, 1979, on behalf of the Fairleigh Dickinson University Council of American Association of University Professors Chapters, both expressing an interest in our opinion with regard to the VTP. Accordingly, we are furnishing copies of this letter to those individuals.

You advise that the VTP is designed to promote the voluntary termination of highly-paid, tenured faculty and thereby create available positions for persons seeking academic employment. You also advise that the University has a pension plan to which it contributes and of which VTP is not a part. Under the VTP, any faculty member who is between age 60 and 65 and has completed 10 years full-time continuous service with the University immediately preceding the date of voluntary termination is eligible for benefits upon voluntary termination. In addition, a faculty member who terminates employment with the University under VTP waives any right to future employment by the University. If an eligible faculty member does terminate under VTP, he or she is entitled to life insurance coverage until age 65, Blue Cross/Blue Shield coverage

until age 65, major medical insurance coverage for life (dependent coverage cost, if elected, will be shared equally by the participant and the University), and 30 percent of his or her final salary for each year that the faculty member is less than age 65, up to a maximum of 5 years, paid in three equal installments -- the payments will be made on July 15th of the year the employee terminates employment and on January 15th of each of the two following years. You further advise that VTP provides for its expiration on August 31, 1982, unless changes in Federal or state law would require earlier termination. Based on the foregoing, you inquire whether, under 29 CFR §2510.3-2(b) (44 FR 11761, March 2, 1979), VIP constitutes a severance pay plan which is not deemed to be an employee pension benefit plan within the meaning of ERISA section 3(2).

Section 3(2) of ERISA defines the term "employee pension benefit plan" to include:

... any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program --

(A) provides retirement income to employees, or

(B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

In 29 CFR §2510.3-2 the Department of Labor identified certain programs that would not be considered to constitute employee pension benefit plans within the meaning of section 3(2) of ERISA. Regulation 29 CFR §2510.3-2(b)(1) provides in relevant part that an arrangement will not be deemed to constitute a pension plan solely by reason of the payment of severance benefits on the termination of an employee's service, provided that, among other conditions, such payments are not contingent, directly or indirectly, on the employee's retiring. Although the VTP does not directly condition benefits upon retirement, we think that it is apparent that benefits under the VTP are conditioned upon retirement in view of the fact that benefits are available only to faculty members who are between age 60 and 65 and the fact that a faculty member who elects to receive benefits under the VTP waives any right to future employment by the University. Moreover, while the preamble to the Federal Register notice adopting 29 CFR §2510.3-2(b) indicated that under certain circumstances a severance pay plan which does not meet the conditions of 29 CFR §2510.3-2(b) might nevertheless not be deemed to be a pension plan, we think that in light of the provisions regarding eligibility for benefits noted above, the terms of the VTP contemplate that it is intended to provide retirement income to employees. Accordingly, it is the opinion of the Department that the VTP is an employee pension benefit plan within the meaning of section 3(2) of ERISA.

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

Sincerely,

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs

cc: Mr. John F. Tesauro
Mr. Lawrence M. Sapadin