

U.S. Department of Labor

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



Reply to the Attention of:

OPINION 80-16A
3(32), 3(1), 3(4)

APR 2 1980

Mr. Robert W. Wild
Nixon, Hargrave, Devans & Doyle
Post Office Box 1051
Rochester, New York 14603

Dear Mr. Wild:

This is in reply to your request for an advisory opinion regarding applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to the death benefit plan (the Plan) sponsored by the Rochester Police Benevolent Association (the Association). Specifically, your request concerns whether the Plan is an employee welfare benefit plan within the meaning of section 3(1) of ERISA title I and, if so, whether it is a governmental plan within the meaning of section 3(32) of ERISA. We regret the delay in responding to your inquiry due to the volume of correspondence concerning ERISA.

You represent that the Association's purpose is to provide comfort and assistance, including the payment of a death benefit, to family members upon the death of a member of the Association. Membership in the Association is voluntary and restricted to current and retired police officers of the Rochester, New York Police Department who satisfy the Association's eligibility requirements as set forth in Article II of the Association's constitution.

Article VI, section 2, of the Association's constitution provides that in the event of ordinary death of a member \$7,000 will be paid to a named beneficiary or beneficiaries. Article VI, section 3, states that in the event of accidental death \$10,000 will be paid. Article VI, section 5, provides that in the event of death in the line of duty \$15,000 will be paid. You also state that, apart from such death benefits, the Association's expenses include the cost of flowers and administrative expenses. The Association's income is derived from initiation fees, dues, bequests, and income on investments. All assets are held in trust by Security Trust Company, Rochester, New York, in accordance with a trust agreement entered into with the Association on January 1, 1975. Article V, section 2, of the constitution provides for a board consisting of 13 trustees to govern the Association. Article V, section 2, also provides that 10 of the 13 trustees are to be members of the Association. The remaining three board members are civilian members appointed by the board from the community. The Association bylaws provide for the election of Association officers and elected trustees.

You also state that the City of Rochester did not participate in setting up the Plan, has no power to amend or terminate it, and provides no funds or personnel for its operation. However, you assert that the following facts indicate the close relationship between the City of Rochester and the Plan: (1) all Association members and 10 of 13 trustees are necessarily employees of the City of Rochester; (2) the police chief of the City of Rochester is ordinarily president of the Association if he or she is an Association member; and (3) the business of the Association is ordinarily conducted on property of the City of Rochester.

Section 3(1) of ERISA defines the term "employee welfare benefit plan" to mean:

. . . 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 such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

There is no question that the Association maintains a program for the purpose of providing benefits in the event of death. At issue, therefore, is whether the program was established or is maintained by an employee organization.

Section 3(4) of ERISA defines the term "employee organization" to include an employees' beneficiary association. The term "employees' beneficiary association" as used in section 3(4) is not defined in ERISA. Substantially identical language, however, was used in the definition of the term "employee organization" in section 3(3) of the Welfare and Pension Plans Disclosure Act (the WPPDA), Pub. L. No. 85-836, 72 Stat. 997 (1958). (The WPPDA was repealed by ERISA section 111(a)(1).) In interpreting section 3(3) of the WPPDA, the Department developed certain criteria to be used in construing the term "employees' beneficiary association." Those criteria, which are set forth in §315.100 of the WPPDA Interpretive Manual (1965), are:

1. Membership in an employees' beneficiary association is conditioned on employment status -- for example, membership might be limited to employees of a certain employer or members of one union;
2. An employees' beneficiary association has a formal organization, with officers, by-laws, or other indications of formality;

3. An employees' beneficiary association which is an "employee organization" within the meaning of the statute is organized for the purpose, in whole or in part, of establishing a welfare or pension plan.

Based on your representations and on the Association's constitution and bylaws, it appears that the Association meets these criteria for the following reasons: (1) membership in the Association is limited to certain current and retired police officers of the Rochester, New York Police Department; (2) the Association has a formal organization with a board of trustees, officers, a constitution and bylaws; and (3) according to its constitution the Association is organized to provide a program of welfare benefits. Accordingly, the Department of Labor is of the opinion that the Association is an employees' beneficiary association and, therefore, an "employee organization" within the meaning of ERISA section 3(4).¹ Thus, the program of death benefits it maintains is an "employee welfare benefit plan" within the meaning of ERISA section 3(1).

ERISA section 4(a) provides that ERISA title I applies to any employee welfare benefit plan established or maintained by, among other entities, an employee organization, except as provided in ERISA section 4(b), and with certain other exceptions not here relevant. ERISA section 4(b)(1) provides that ERISA title I requirements do not apply to an employee benefit plan which is a governmental plan within the meaning of ERISA section 3(32).

Section 3(32) defines the term "governmental plan" to mean a plan established or maintained for its employees by the government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. Although the Association's membership and some of the Association's officers and trustees are employed by the City of Rochester, and conduct the Association's business transactions on City property, the Association itself is not a governmental entity described in section 3(32). Your letter indicates that the City of Rochester did not set up the Plan, has no power to amend or terminate it, and provides no funds or personnel for its operation. Under these circumstances, we do not think that

¹ In your letter you suggest that the term "employees' beneficiary association" as used in section 3(4) of ERISA is coextensive with the term "voluntary employees' beneficiary association" as used in section 501(c)(9) of the Internal Revenue Code of 1954 (the Code). You assert that the Association is not a voluntary employees' beneficiary organization within the meaning of section 501(c)(9) of the Code and you suggest that it is, therefore, not an employees' beneficiary association within the meaning of section 3(4) of ERISA.

In using the term "employees' beneficiary association," section 3(4) of ERISA does not refer to section 501(c)(9) of the Code. Accordingly, we do not think that in using that term in title I of ERISA, Congress intended to restrict it by excluding organizations which are not, or have not been determined to be voluntary employees' beneficiary associations within the meaning of section 501(c)(9) particularly in view of the independent body of interpretations which the Department had issued under language in the WPPDA virtually identical to that of ERISA.

the program of benefits provided by the Association is a governmental plan within the meaning of ERISA section 3(32).

For the above reasons, we have concluded that the Association is maintaining an employee welfare benefit plan within the meaning of ERISA section 3(1) which is subject to ERISA title I.

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. We have considered your request for a conference under section 8 of the procedure and have decided that a conference is not necessary in providing this advisory opinion.

Sincerely,

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs