

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



OPINION 80-26A
403(c)(1), 403(d)(2)

APR 24 1980

Steven Bloom
Kaplan, Sicking, Hessen, Sugarman, Rosenthal & Zientz, P.A.
P.O. Drawer 520337
Miami, Florida 33152

Dear Mr. Bloom:

This letter responds to your two letters of June 18, 1979, and letter of September 7, 1979, requesting an advisory opinion of the Department of Labor. Specifically, you request our opinion pertaining to the applicability of various provisions of Part 4 of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to three alternative proposals for the distribution of the assets upon termination of the Painters Palm Coast District Council No. 76 Health and Hospitalization Trust Fund (Health Trust) and the Painters Palm Coast District Council No. 76 Joint Apprenticeship and Training Trust Fund (Apprenticeship Trust).

The following is a summary of the information contained in your letters and accompanying documents. The Health Trust and the Apprenticeship Trust are welfare plans which were established and are jointly administered in accordance with section 302(c) of the Labor Management Relations Act, 1947. The Health Trust was originally established on April 21, 1966 pursuant to a collective bargaining agreement between the Painting and Decorating Contractors Association, Palm Beach County Chapter (Association) and Local Union #452, International Brotherhood of Painters and Allied Trades (Local 452), which was thereafter dissolved and incorporated into the Painters Palm Coast District Council No. 76, International Brotherhood of Painters and Allied Trades (District Council). The Association and the District Council established the Apprenticeship Trust on September 1, 1973 pursuant to a collective bargaining agreement. On August 31, 1977 the most recent collective bargaining agreement between the District Council and the Association expired. While the parties were unable to agree upon a new collective bargaining agreement, an agreement between certain members of the Association and the District Council to extend the expired agreement until June 30, 1978 resulted in some employers continuing to contribute to the Health Trust and the Apprenticeship Trust until June 30, 1978. Neither of the trusts received contributions after June 30, 1978; the Health Trust has provided no health benefits since January 1, 1979, and the Apprenticeship Trust has provided for no training since July 1, 1978. The Association has not been a party to a collective bargaining

agreement with the District Council or Local 452 since August 31, 1977, and, since at least July 1, 1978, the District Council has been dissolved and Local 452 has been reestablished.

Subsequent to its reestablishment, Local 452 became party to a collective bargaining agreement with various employers, including many, but not all, of the employers who had been parties to the prior collective bargaining agreement with the District Council. The new agreement provides for the creation of the Painters and Decorators Local Union 452 Health and Hospitalization Trust Fund (Local 452 Health Trust) and the Painters and Decorators Local Union 452 Joint Apprenticeship and Training Trust Fund (Local 452 Apprenticeship Trust). Since January 1, 1979, the Local 452 Health Trust has provided the same schedule of benefits, with the same insurance carrier, as the Health Trust. The Local 452 Apprenticeship Trust, which has operated since September 1, 1978, has used the instructors and training facility formerly used by the Apprenticeship Trust.

In meetings of the Health Trust and the Apprenticeship Trust conducted on November 6, 1978 and December 5, 1978, each of the boards unanimously agreed to terminate the trusts. Neither board agreed upon the manner in which to distribute the assets remaining in the trusts, but the following three alternative methods, pertaining to the distribution of the assets of both the trusts after payment of expenses, were proposed:

- (1) Transfer all assets of the Health Trust to the Local 452 Health Trust, and all assets of the Apprenticeship Trust to the Local 452 Apprenticeship Trust.
- (2) Allocate a percentage of the assets of the Trust Fund and the Apprenticeship Fund to either the employers not party to a collective bargaining agreement with the District Council after August 31, 1977, or newly created trust funds managed by the Association for such purposes as such employers or the new trust funds deem proper, including, but not limited to, the provision of health benefits and apprenticeship training for employees of such employers. The portion of assets transferred to such employers or the new trust funds managed by the Association pursuant to this proposal would be based on the ratio of the total contributions of such employers for the three years prior to August 31, 1977, to the total contributions of all contributing employers for the same three year period. The remaining assets of the Health Trust and the Apprenticeship Trust would be transferred to the Local 452 Health Trust and the Local 452 Apprenticeship Trust, respectively.
- (3) From the assets of the Health Trust, purchase health insurance for twelve months for all participants in the Health Trust who did not become participants in the Local 452 Health Trust. The remaining assets of the Health Trust would be transferred to the Local 452 Health Trust.¹

¹ Your submissions fail to indicate the manner in which the assets of the Apprenticeship Trust would be disposed pursuant to the third proposal. We assume that, under the third proposal, such assets would be transferred to the Local 452 Apprenticeship Trust.

The trustees appointed by the District Council advocate implementation of the first or third proposals; the trustees appointed by the Association urge adoption of the second proposal. Since the trustees of both trust funds are deadlocked, the arbitration provisions contained in each of the trust agreements have been invoked. All the trustees of the two trust funds, however, have agreed to stay arbitration pending receipt of the Department's opinion regarding permissibility under ERISA of any of the three proposals described above.

The termination clause of the Health Trust Agreement and Declaration of Trust, a copy of which you furnished the Department, provides that, upon termination of the trust, "the Trustees shall ... distribute and apply any remaining surplus in such a manner as will best effectuate the purposes of the Trust and the requirements of law" Similarly, the Apprenticeship Trust Agreement and Declaration of Trust, a copy of which you also supplied the Department, provides as follows:

In the event of termination, the remaining funds available, after providing for all outstanding obligations, shall be used in such a manner as will, in the opinion of the Trustees, best effectuate the purposes of this Trust.

Thus, the terms of both the Health Trust and the Apprenticeship Trust impose upon the trustees the duty to distribute the assets of the trusts in a manner which "best effectuate[s] the purposes" of the trusts. In this context, the Health Trust Agreement and Declaration of Trust recites that contributions to the trust "are for the purposes of providing health and welfare benefits as are now or may hereafter be authorized or permitted by law for eligible employees, their families and dependents" The Apprenticeship Trust Agreement and Declaration of Trust generally states that the purpose of that trust is to train and educate journeymen and apprentices, and to engage in activities directly related to that goal.

Section 403(c)(1) provides in relevant part that, except as provided in subsection (d) of section 403 and certain other provisions not here relevant, the assets of a plan shall not inure to the benefit of any employer. Section 403(d)(2) provides that the assets of a welfare plan which terminates shall be distributed in accordance with the terms of the plan, except as otherwise provided in regulations of the Secretary of Labor. To date, the Department has not issued regulations under section 403(d)(2).

With regard to the second alternative proposal described above, however, you should be aware that to the extent that assets of the trusts would be transferred directly to the employers who are not party to a collective bargaining agreement with the District Council after August 31, 1977, such a transfer would, in our view, amount to an inurement of these assets to the benefit of such employers, except to the extent the assets were transferred to an express trust to provide health and apprenticeship benefits. Any transfer other than a distribution in accordance with the terms of the trusts, as contemplated under section 403(d)(2), would contravene section 403(c)(1).

In regard to the first and third alternative proposals described above, and to the second alternative to the extent that the assets in question might be transferred to any express trust, any distribution of the remaining assets of the trusts, under section 403(d)(2) of ERISA, must comport with the terms of the trusts. In view of the requirement in both of the trusts that, in the event of termination, the remaining assets be distributed in a manner which best effectuates the purposes of the trusts, any of these alternatives may be adopted if the trustees determine that it would best effectuate the trusts' purposes, as stated in the Trust Agreements and Declarations of Trust. The Department expresses no opinion as to whether any of these alternatives, or any other alternative, would best effectuate the trusts' purposes.

The Department expresses no opinion in this letter on the application of section 302 of the Labor Management Relations Act, 1947 to any of the three alternative proposals described above.

This letter constitutes an opinion rendered pursuant to 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,

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cc: Mr. Herbert B. Mintz
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