U.S. Department of Labor

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

OPINION 80-58A
408(c)(2)

OCT 1 1980

Mr. Martin R. Ganzglass
Delson & Gordon
1900 L Street, N.W.
Washington, D.C. 20036

Dear Mr. Ganzglass:

This is in response to your letter in which you ask whether the Graphic Arts International Union Supplemental Retirement and Disability Fund (the Fund) may pay its trustees a per diem allowance under section 408(c)(2) of the Employee Retirement Income Security Act of 1974 (ERISA) in lieu of reimbursing the trustees for actual expenses incurred in the performance of their duties for the plan.

Under section 408(c)(2) of ERISA, a fiduciary may, notwithstanding the prohibited transaction provisions of section 406, receive reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred in the performance of his duties with a plan; except that a fiduciary 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 are participants in such plan may not receive compensation from such plans, except for reimbursement of expenses properly and actually incurred.

In addition, as you have noted in your letter, ERISA Interpretive Bulletin 75-6, 29 CFR §2509.75-6, states that a prohibited transaction under ERISA section 406 does not occur with respect to an advance to a fiduciary or other party in interest to cover expenses to be properly and actually incurred if -

> (a) the amount of such advance is reasonable with respect to the amount of the expense which is likely to be properly and actually incurred in the immediate future (such as during the next month), and
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> (b) the party in interest accounts to the plan at the end of the period covered by the advance for the expenses actually incurred (whether computed on the basis of actual expenses incurred or on the basis of actual transportation costs plus a reasonable per diem allowance, where appropriate).

However, the Department's final regulations under section 408(c)(2) (29 CFR 2550.408c-2) provide in part that:

> Under sections 408(b)(2) and 408(c)(2) of the Act, the term "reasonable compensation", as applied to a fiduciary or an employee of a plan, includes an advance to such a fiduciary or employee by the plan to cover direct expenses to be properly and actually incurred by such person in the performance of such person's duties with the plan if:
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> (i) The amount of such advance is reasonable with respect to the amount of the direct expense which is likely to be properly and actually incurred in the immediate future (such as during the next month); and
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> (ii) The fiduciary or employee accounts to the plan at the end of the period covered by the advance for the expenses properly and actually incurred.

In your letter, you ask whether, in view of the Department's adoption of regulations under section 408(c)(2) which do not contain an express reference to a per diem allowance, the Fund may continue to pay such an allowance to its trustees or whether it may reimburse them only for actual expenses incurred in the performance of services for the Fund.

If the limitations in section 408(c)(2) on the receipt of compensation do not apply to a fiduciary, that section permits such fiduciary to receive reasonable compensation from a plan for services rendered. In addition, section 408(c)(2) does not specify the manner in which such compensation must be determined, and, therefore, a plan may pay a fiduciary who is permitted to receive compensation from the plan a reasonable amount determined on a daily (or per diem) basis.

Section 408(c)(2) also permits a plan to reimburse expenses incurred by a fiduciary in the performance of services for a plan, including expenses incurred by a fiduciary who also 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 are participants in the plan. However, such reimbursement is permitted only for expenses that are properly and actually incurred. Therefore, because a fiduciary who is paid a per diem allowance as a means of reimbursement may receive an amount in excess of his actual expenses, such a method of reimbursement is not permitted under section 408(c)(2). This position is reflected in the Department's regulations under that section which do not refer to payment of a per diem allowance. Further, in adopting these regulations, the Department specifically stated that §2550.408c-2 replaces Interpretive Bulletin 75-6 42 FR 32389, 32390, June 24, 1977. Accordingly, plan officials may not authorize reimbursement of expenses by payment of a per diem allowance in reliance on the terms of that interpretive bulletin.

However, as noted above, the Department's regulations under section 408(c)(2) permit a plan to pay an advance to a fiduciary to cover direct expenses to be properly and actually incurred, provided certain conditions are met. Therefore, in our view, a plan would not engage in a prohibited transaction solely because it advances funds to a fiduciary of the plan if, as provided in the regulation, the amount of the advance is reasonable with respect to the direct expenses that are likely to be properly and actually incurred by the fiduciary during the period covered by the advance, and provided that the fiduciary accounts to the plan at the end of such period for the expenses properly and actually incurred and refunds to the plan the amount, if any, by which the advance exceeds the fiduciary's actual expenses.

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.

Sincerely,

Alan D. Lebowitz
Assistant Administrator for Fiduciary Standards
Pension and Welfare Benefit Programs