U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210

MAY 18 1993

93-16A
Section 406(b)(2)

Robert M. Archer, Esq.
Meyer, Suozzi, English & Klein, P.C.
1505 Kellum Place
Mineola, NY 11501

Dear Mr. Archer:

This is in response to your request for an advisory opinion concerning the application of the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 (ERISA) to the termination and proposed transfer of the excess funds of one employee welfare benefit plan to a related employee welfare benefit plan.

You represent that the Nassau County Carpenters Legal Fund (the Legal Plan) and the Nassau County Carpenters Welfare Fund (the Welfare Plan) are jointly-administered, labor-management trust funds established under collective bargaining agreements between the Nassau County District Council of Carpenters and various employer associations and individual employers pursuant to section 302(c) of the Labor Management Relations Act. As of July 1, 1989, the Legal Plan had assets of approximately $72,000, and the Welfare Plan had assets of approximately $3 million.

The Welfare Plan was established in 1948, and provides medical, hospitalization and related benefits to employees covered under the collective bargaining agreements who are eligible to participate in the program. The Legal Plan was established on July 1, 1986, and provided legal services to eligible participants through a contractual arrangement with a law firm.

According to your representations, since July 1, 1986, those individuals comprising the Board of Trustees (the Trustees) of the Legal Plan are the same persons who comprise the Board of Trustees of the Welfare Plan, with the exception of one person. Neither the Legal Plan nor the Welfare Plan has been a service provider with respect to the other.

You further represent that employer contributions were made to the Legal Plan from its inception through December 31, 1988.[1]

Pursuant to a resolution of the Trustees and in accordance with its Agreement and Declaration of Trust, the Legal Plan was terminated as of June 30, 1989, subject to the Department of Labor's approval and the winding up of certain matters which are set forth in a termination agreement executed between the Legal Plan and its prepaid legal services provider.[2] At that time, any excess assets would be transferred to the Welfare Plan. The termination of the

[1] We note that your request refers solely to employer contributions, and accordingly, we assume for purposes of this opinion that no assets of the Legal Plan were derived from participant contributions or withholdings, whether after-tax contributions or pre-tax salary reductions.

[2] The termination agreement with the legal services provider, based on an agreed stipend, will allow for the provision of legal services for those participants who had matters pending at the time of the termination.

Legal Plan by its Board of Trustees was undertaken pursuant to a provision of its Agreement and Declaration of Trust which allows such termination upon a discontinuance of employer contributions, so long as any excess assets are transferred into a fund which is tax-exempt under the Internal Revenue Code.

In addition, you propose that the Legal Plan consider conditioning the transfer of the remaining assets of the Welfare Plan on an indemnification agreement whereby the Welfare Plan would agree to indemnify and hold the Legal Plan and its Trustees harmless for all costs and damages, including attorneys' fees, which could be assessed against the Legal Plan as a result of the termination and transfer of assets. In this regard, the termination agreement between the legal services provider and the Legal Plan provides that the legal services provider agrees to become totally liable for any services rendered by them to the Legal Plan participants.

You have requested advisory opinions with respect to the following questions:

1. Are the Legal Plan, the Welfare Plan or the Trustees of either, parties in interest as defined in section 3(14) of ERISA with respect to each other and the other Plan?

2. Is the contemplated transfer of assets from the Legal Plan to the Welfare Plan, a transaction prohibited under section 406(a) of ERISA?

3. Will the involvement of the Trustees of the Legal Plan and Welfare Plan in the contemplated transfer of assets result in actions which are prohibited under section 406(b)(2) of ERISA?

4. Is the proposed indemnification agreement an exculpatory provision proscribed by section 410(a) of ERISA?

Section 5.04 of ERISA Procedure 76-1 (41 Fed. Reg. 36281, 36282, August 27, 1976) provides that the Department of Labor (the Department) ordinarily will not issue advisory opinions on the form or effect in operation of a plan, fund or program or a particular provision or provisions thereof subject to Title I of ERISA. Accordingly, the Department makes the following determinations based on the assumptions that the Legal Plan will be properly terminated and all claims paid or properly forfeited so that there are no longer any participants or beneficiaries of the Legal Plan.

With regard to your first question, the Department has addressed the issue of whether related plans are parties in interest with respect to one another in Prohibited Transaction Exemption 76-1 (41 Fed. Reg. 12740, 12744, March 26, 1976). As explained in the preamble to that exemption, two or more plans are not parties in interest with respect to each other merely because they are maintained by the same plan sponsors or have trustees or fiduciaries who are common to the plans. A plan may be a party in interest with respect to another plan, however, if it has a relationship to the plan as defined in section 3(14) of ERISA. For example, a plan may be a party in interest with respect to another plan under section 3(14)(B) of ERISA if it provides services to such plan.[3]

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[3] A plan may also be a party in interest to another plan:

(a) Under section 3(14)(H) of ERISA, if it holds directly or indirectly 10 percent or more of the shares of a person described, with respect to the other plan, in subparagraph (B), (C), (D), (E) or (G) of section 3(14) of ERISA, or

(b) Under section 3(14)(I) of ERISA, if it was a 10 percent or more (in capital or profits) partner or joint venturer of a person described, with respect to the other plan, in subparagraph (B), (C), (D), (E) or (G) of section 3(14) of ERISA.

Based on your representations that neither Plan has been a service provider to the other, and assuming that there is no other relationship between the Plans to cause them to be parties in interest to each other, we have determined that neither the Legal Plan nor the Welfare Plan is a party in interest with respect to the other. However, individuals who serve as trustees for both Plans are parties in interest with respect to both Plans (see Section 3(14)(A) of ERISA).

Concerning your second question, section 406(a) of ERISA provides, in part, that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he or she knows or should know that the transaction constitutes a direct or indirect (1) lending of money or other extension of credit between the plan and a party in interest, or (2) a transfer to, or use by or for the benefit of, a party in interest, of any asset of the plan. As the transaction between the Legal Plan and the Welfare Plan is not a transaction between an employee benefit plan and a party in interest with respect thereto, it is the Department's view, based upon your representations, that the transaction is not prohibited by section 406(a) of ERISA.

With respect to your third question, section 406(b)(2) of ERISA provides that a fiduciary with respect to a plan shall not in his or her individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. If the Legal Plan has been properly terminated and all claims have either been paid or properly forfeited so that there are no longer any participants or beneficiaries of the Legal Plan, the proposed subsequent transfer of excess funds by the trustees of that Plan would not violate section 406(b)(2) because, at that time, the Legal Plan will no longer exist, and therefore, no transaction will be occurring on behalf of that Plan. If neither further claims nor participants or beneficiaries of the Legal Plan exist, the Trustees of the Welfare Plan would not be representing interests adverse to that Plan and, thereby, violating section 406(b)(2) by receiving the transferred monies.

In response to your fourth question, section 410(a) of ERISA provides generally that any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation or duty under Part 4 of Title I of ERISA shall be void as against public policy. Section 410(a) has been augmented by an interpretive bulletin, ERISA IB 75-4, 29 C.F.R. 2509.75-4, which provides, in pertinent part, that the Department interprets this section to permit indemnification agreements which do not relieve a fiduciary of responsibility or liability under Part 4 of Title I of ERISA. If the indemnification agreement contemplated in this case purports to reimburse the Legal Services Plan for any sums which it may have to pay as a result of this transaction, but does not relieve the Trustees of any liability for their breach of fiduciary responsibility, we are of the opinion that such agreement is not prohibited by section 410(a) of ERISA.

Although you have limited your inquiry to sections 406 and 410 of ERISA, we note that on page two you state that the Trustees request advice as to whether their contemplated actions will violate sections 403 and 404 of ERISA. Section 403(c)(1) of ERISA provides, in part, that except as provided in section 403(d), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan. Similarly, section 404(a)(1) of ERISA provides, in part, that subject to sections 403(c) and 403(d), a fiduciary shall discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries. In addition, section 404(a)(1)(B) and (D) of ERISA require plan fiduciaries to act prudently, and in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of Titles I and IV of ERISA.

Section 403(d)(2) provides that the assets of a welfare plan which terminates shall be distributed in accordance with the plan documents, except as otherwise provided in regulations of the Secretary. To date, the Department has not

issued regulations under section 403(d)(2). Accordingly, a transfer other than a distribution in accordance with the terms of the Legal Plan's documents, as contemplated under section 403(d)(2), may contravene sections 403(c)(1) and 404(a)(1) of ERISA.

This letter is an advisory opinion under ERISA Procedure 76-1 (41 Fed. Reg. 36281, August 27, 1976). Section 10 of the Procedure describes the effect of an advisory opinion.

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations