

U.S. Department of Labor

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



November 7, 1997

97-26A
ERISA SEC. 3(32)

Mr. Richard J. Tuggle, Jr.
Tuggle Duggins & Meschan, P.A.
P.O. Box 2888
228 West Market Street
Greensboro, North Carolina 27402

Dear Mr. Tuggle:

This responds to your correspondence on behalf of the Beaufort County Hospital Association, Inc. (hereinafter, BCHA) in Washington, North Carolina. You request an advisory opinion concerning the applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to the BCHA Employees' Pension Plan (hereinafter, the Plan). Specifically, you request that we conclude that the Plan is a governmental plan within the meaning of ERISA § 3(32), and therefore excepted from ERISA Title I by § 4(b)(1), because BCHA, which established and maintains the Plan for its employees, is an "agency or instrumentality" of Beaufort County, North Carolina (the County).

Your submission includes facts and representations concerning the County's governing body, the County's establishment of a hospital facility, and the County's arrangements for BCHA's operation of the hospital on its behalf. You also describe BCHA's establishment and maintenance of the Plan for its employees.

The County is governed by a five-member commission (hereinafter, the County Board) elected by County residents. See N.C.Gen.Stat. § 153A-34; Moore v. Beaufort County, 936 F.2d 159 (4th Cir. 1991). In 1955, the County Board gained voter approval of, and issued, revenue bonds to finance a public hospital.¹ See Lewis v. Beaufort County, 249 N.C. 628, 107 S.E.2d 77 (N.C. Supr.Ct. 1959).

The County owns both the hospital facility that was constructed through issuance of its revenue bonds and the property on which it is located. In the County's financial statement for the fiscal year ending June 30, 1996, the County lists the hospital among its component units.² Moreover, the County Board monitors hospital profitability and must approve any major disbursements.

BCHA was organized by the County in 1958 as a non-profit, membership corporation under North Carolina's nonprofit corporation law. See N.C.Gen.Stat. §§ 153A-249 and 131E. It operates pursuant to articles of incorporation and bylaws. Its articles of incorporation state that it was instituted, among other related purposes, to "lease, establish, maintain, and operate" hospital and related facilities. Its bylaws provide for its day-to-day operation by a nine-member board of trustees (the BCHA Board) and for those trustees to also serve as BCHA's voting membership. BCHA bylaws provide for the County Board to appoint eight of the nine trustees on the BCHA

¹ In 1988, the County Board again issued revenue bonds to finance that hospital.

² Other entities treated as component units of the County are the Alcoholic Beverage Commission Board and the airport commission.

Board. Each trustee so appointed serves a three-year term but may serve consecutive terms if reappointed. Those eight trustees appoint, based on recommendations from the BCHA medical staff, a ninth trustee from among medical staff members who also serves as BCHA's chief of staff. His or her term as trustee continues as long as he or she is chief of staff. The County's continuing control over the BCHA Board is assured insofar as the County Board must approve any amendment to the bylaws that concerns trustees' selection or tenure.

You describe BCHA as a "public hospital" within the meaning of North Carolina statutes.³ N.C.Gen.Stat. § 159-39(a), in pertinent part, defines a "public hospital" as "any hospital . . . [o]n whose behalf a county . . . has outstanding general obligation or revenue bonds" or one that is "owned by a county . . . and operated by a nonprofit corporation or association, a majority of whose board of directors or trustees are appointed by the governing body of a county." According to statute a "public hospital" like BCHA is subject to certain financial requirements administered by the County. For example, rules and regulations of the County Board govern BCHA's financial transactions and other assets; the County Board may inquire into, and may investigate, BCHA's internal control procedures; and the County Board must approve the contract under which BCHA undergoes a yearly audit. See N.C.Gen.Stat. § 159-39(e) and (f). Finally, each audit of BCHA must be filed with the County, along with BCHA's semiannual reports on investments and deposits, and BCHA must handle deposits and investments according to North Carolina statutes that apply to most governmental entities insofar as § 159-39 incorporates those statutes by reference. See N.C.Gen.Stat. § 159-39 (f) through (j) and §§ 159-30 through 32.

As authorized by North Carolina statute,⁴ the County leased to BCHA the County's real property and hospital facility. The current lease began May 1, 1994, and has a term of five years.⁵ The County receives no consideration in return for the lease, excepting that, pursuant to the lease, BCHA agrees to operate as "Beaufort County Hospital" and to furnish the County with an annual operational statement. The lease further provides that, if BCHA is dissolved or fails to operate hospital facilities in accordance with its lease, it must convey its surplus assets to the County, except for certain assets identified in the lease as third parties' donations to BCHA.⁶ Finally, if BCHA fails to comply with the lease, the County Board may reenter, repossess, and re-let the hospital property.

To assist in hospital operations, BCHA employs individuals and provides for their compensation and benefits. For their pension benefits, BCHA established the Plan as a defined benefit plan in 1965. The Plan covers only BCHA

³ Beginning June 21, 1996, N.C.Gen.Stat. § 131E-7.1 allows a "public hospital" to acquire ownership in all or part of a nonprofit or for-profit managed care company, including a preferred provider organization or HMO. The "governmental plan" status of BCHA's Plan, as discussed below, does not extend to any benefit arrangements that may be established to provide benefits to individuals employed by entities in which BCHA has any ownership rights acquired pursuant to N.C.Gen.Stat. § 131E-7.1.

⁴ See, e.g., N.C.Gen.Stat. § 131E-7(d).

⁵ Either party may terminate the lease with one year's written notice.

⁶ Property excepted from the conveyance requirement includes purchases made with funds that BCHA obtained from charitable foundations or charitable corporations. The lease further provides that property BCHA purchases with funds donated by charitable foundations or corporations, even if acquired by the County, must be delivered to another nonprofit corporation, under conditions specified in the lease.

employees.⁷ BCHA acts as Plan administrator, and an independent financial institution acts as trustee; however, the Plan is listed in notes to the County's financial statements among the liabilities of the County.

You ask for an advisory opinion in order to clarify the Plan's ERISA responsibilities. You propose, if we find that the Plan is a "governmental plan," to inform participants and beneficiaries about the Plan's exclusion from ERISA Title I coverage, disclaiming contrary statements in the Plan document. Second, it appears, based on notes in the County's financial statements, that the Plan soon may be terminated and replaced by a defined contribution plan for BCHA employees.⁸ Our opinion concerning exclusion from ERISA Title I coverage applies only to the Plan itself and not to any successor plan for BCHA employees.

Your request raises Title I issues only with respect to ERISA § 4(b)(1), which excludes from Title I coverage any "governmental plan" defined in ERISA § 3(32). Section 3(32), in pertinent part, defines the term "governmental plan" to include any "plan established or maintained for its employees by . . . any agency or instrumentality" of State government, including an "agency or instrumentality" of a "political subdivision" of "the government of any State."⁹

The phrase "agency or instrumentality" is not defined in ERISA, and no regulations issued pursuant to ERISA interpret that phrase. Accordingly, whether an entity is an "agency or instrumentality" of government, depends on the facts and circumstances of the relationship between government and the entity whose benefit arrangement's status as a "governmental plan" is in issue.

Your submission evidences that, under North Carolina statutes, BCHA is a "public hospital." As such, BCHA was organized by the County's elected government officials, and it is used by the County as an integral part of its system of medical services for residents. The County appoints all but one member of the BCHA Board, which controls BCHA operations on a day-to-day basis, and controls the BCHA Board through rules for the trustees' appointment and tenure. The County provides ongoing financial support of hospital operations through tax revenue bonds, budget appropriations, and acceptance of financial liabilities in connection with the Plan. The County reported the hospital's finances as a component unit of its 1996 financial statement, and the County has the right, if BCHA dissolves or violates its lease on hospital property, to BCHA's surplus assets, excepting funds that BCHA receives through donations. Accordingly, we conclude that BCHA is an "agency or instrumentality" of the County.

Based on your representations and on information submitted on behalf of BCHA with respect to its relationship with the County and its status under North Carolina statutes, we conclude that BCHA is a government "agency or instrumentality" within the meaning of ERISA § 3(32). Accordingly, the Plan, which was established and is maintained by BCHA for its employees, is a "governmental plan" described in ERISA § 3(32) and is excluded by ERISA § 4(b)(1) from Title I coverage.

⁷ The Plan indicates at § 1.17 that employees of employers that "affiliate" with BCHA may participate in the Plan; however, you represent that BCHA has no "affiliated" employers. The view expressed in this opinion concerning the Plan's "governmental plan" status does not apply if employees of "affiliated" employers begin to participate in the Plan.

⁸ Pursuant to Title IV of ERISA, the Pension Benefit Guaranty Corporation (PBGC) supervises termination of most ERISA-covered defined benefit plans. In that regard, an opinion of the Department as to the "governmental plan" status of a plan does not constitute a ruling as to that plan's status under any other Title, including Title IV. See also *Hightower v. Texas Hospital Association*, 65 F.3d 443 (5th Cir. 1995).

⁹ We assume that the County is a "political subdivision" of North Carolina within the meaning of ERISA § 3(32).

This letter expresses no conclusion as to any particular tax treatment of the Plan under the Internal Revenue Code, as administered by the Internal Revenue Service, or any particular treatment under Title IV of ERISA, as administered by the PBGC.

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

Sincerely,

John J. Canary
Chief, Division of Coverage, Reporting and Disclosure
Office of Regulations and Interpretations