U.S. Department of Labor Employee Benefits Security Administration
Washington, D.C. 20210

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2003-17A
ERISA SEC. 3(5)

Ralph L. Hawkins
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2600 Century Square
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Dear Mr. Hawkins:

This responds to your request on behalf of the Hanford Employee Welfare Trust ("HEWT" or "the Trust") for an advisory opinion concerning the applicability of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). Specifically, you ask whether HEWT is a single employee welfare benefit plan maintained by a "group or association of employers" within the meaning of section 3(5) of ERISA.

You have provided the following facts and representations with your request. The Hanford Site ("Site") is located on 560 square miles in the State of Washington. For nearly 40 years, the United States Department of Energy ("DOE") produced plutonium at the Site. The production ended in 1987. Since then the Site has been the subject of an ongoing and extensive environmental cleanup effort. The DOE is responsible for the project and has hired contractors to conduct the operations under its oversight. Although the contractors and their subcontractors are separate companies, they are each bound by their DOE contracts to provide their employees similar employee benefits. They also work in an integrated fashion. The DOE website states that "[w]hile each contractor has specific areas of responsibility within the Hanford clean up program they work together when necessary to ensure that programs, projects, and activities at Hanford are coordinated and accomplished efficiently with emphasis on safety of the workforce and the public and protection of the environment." The prime contractors also participate in a "Site Services Board," a formal association that manages and coordinates the 54 different DOE-mandated site services. The contractors also have a common labor force with many individuals having been employed by more than one of the contractors at the Site. Two labor organizations represent a substantial number, but less than 50%, of the contractors' employees.

Fluor Hanford, Inc. ("Fluor") is the managing contractor for the operations at the Hanford Site under a contract with the DOE. Among other responsibilities, Fluor is charged in its contract with administering the HEWT in order to provide welfare benefits to the employees and retirees (and their dependents) of the contractors and subcontractors at the Site. Fluor established the HEWT in 2000. Subscription to the Trust is available only to the DOE contractors and subcontractors ("the contractors" or "the employers") working at the Site. A board of trustees is the named fiduciary and administrator of the HEWT. Two trustees are appointed by Fluor, and each of the other seven participating employers appoints one trustee. The board of trustees makes decisions by majority vote. Each employer has one vote for each 500 employees or fraction thereof. Based on that formula, Fluor currently exercises nine votes and the other seven employers exercise a total of ten votes.[1] The board has sole authority to control and manage the operation and administration of the Trust such as making eligibility determinations, paying claims, and interpreting the terms of the Trust as well as authority to amend or terminate the Trust. The trustees also choose the program of benefits available through the HEWT within the types approved by DOE, and may select insurance contracts and service providers. The board currently has a service agreement with Fluor for the provision of plan administration services. Fluor also receives compensation from the DOE for maintaining the HEWT. You have represented that although the HEWT board of trustees has the authority to remove Fluor as the primary provider of plan administrative services, such a change would have to be approved by the DOE.

Some contractors are required by their DOE contract to provide benefits to their employees through the HEWT, others may use alternative arrangements with DOE consent. DOE must approve the type and cost of the benefits provided under the Trust using the guidelines in the Federal and DOE Acquisition Regulations, and DOE reimburses the contractors for the cost of providing the benefits to their employees. Each employer's participation in HEWT ends when its contract with DOE terminates, but if there is a successor employer that undertakes the contract, the employees have uninterrupted coverage under the HEWT. Also, withdrawal of any employer does not terminate coverage under the HEWT for any employee who continues in the employment of another subscribing employer.

The types of employee benefits that may be provided under the HEWT include medical dental, vision, life insurance, accidental death and dismemberment, and disability benefits. Each participating employer must subscribe to all of the benefit programs offered by the Trust. Some of the benefits are provided through insurance contracts, and some are self-insured. The HEWT provides that each employer is responsible for paying its portion of any applicable insurance premium or contribution for self-insured benefits. The Trust also provides that no subscribing employer is responsible for the payment of benefits to the employees of another subscribing employer.

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[1] You propose to amend the Trust to provide that under no circumstances will one contractor be authorized to cast a number of votes that equals or exceeds the votes held by other contractors in the aggregate.

The term "employee welfare benefit plan" is defined in section 3(1) of Title I of ERISA to include, among others:

> . . . any plan, fund, or program . . . 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 . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment . . . .

Although the HEWT provides benefits described in ERISA section 3(1), to be an employee welfare benefit plan, the Trust must also, among other criteria, be established or maintained by an employer, an employee organization, or both. There is no indication in your submission that the Trust was established or is maintained by an employee organization within the meaning of section 3(4) of ERISA. Therefore this letter will only address whether the Trust is established or maintained by an "employer" within the meaning of section 3(5) of ERISA.

Section 3(5) of ERISA defines employer as: " . . . any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." The definitional provisions of ERISA thus recognize that a single employee welfare benefit plan might be established or maintained by a cognizable, bona fide group or association of employers, acting in the interests of its employer members to provide benefits for their employees.

A determination whether there is a bona fide employer group or association must be made on the basis of all the facts and circumstances involved. Among the factors considered are the following: how members are solicited; who is entitled to participate and who actually participates in the association; the process by which the association was formed, the purposes for which it was formed, and what, if any, were the preexisting relationships of its members; the powers, rights, and privileges of employer members that exist by reason of their status as employers; and who actually controls and directs the activities and operations of the benefit program. The employers that participate in a benefit program must, either directly or indirectly, exercise control over the program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program.

The Department has expressed the view that where several unrelated employers merely execute identically worded trust agreements or similar documents as a means to fund or provide benefits, in the absence of any genuine organizational relationship between the employers, no employer group or association exists for purposes of ERISA section 3(5). Similarly, where membership in a group or association is open to anyone engaged in a particular trade or profession regardless of their status as employer, and where control of the group or association is not vested solely in employer members, the group or association is not a bona fide group or association of employers for purposes of ERISA section 3(5). See, e.g., Advisory Opinion 95-01 (February 13, 1995) and Advisory Opinion 88-07A (March 28, 1988).

In this case, the group of employers who subscribe to the HEWT are limited to DOE contractors at the Hanford Site and they are not eligible to continue to participate in the HEWT beyond the term of their DOE contract. They have a commonality of interest and genuine organizational relationship beyond the HEWT and the provision of welfare benefits based on the fact that they are all DOE contractors who are engaged in interconnecting operations of waste clean up and security at the same Hanford Site with a history of organized cooperation on workplace related matters at that worksite. Although the DOE exercises oversight over the employers to ensure that benefit costs are contained within the guidelines of the Federal and DOE Acquisition Regulations, the employers, through their representation on the HEWT board of trustees, appear to control and direct the activities and operations of the HEWT.

Based on the information submitted and your representation on how the Trust will be amended, it is the view of the Department that the subscribing employers would, at least in form, constitute a bona fide employer group or association, and the HEWT, therefore, would at least in form constitute a single employee welfare benefit plan for purposes of Title I of ERISA. Whether the subscribing employers exercise control over the benefit program in substance as well as in form is an inherently factual issue on which the Department generally will not rule in an advisory opinion.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions. This letter relates only to the issue that you specifically raised in your request regarding the current status of the HEWT benefit program under Title I of ERISA. We note in particular that you have not asked, and we provide no opinion in this letter, concerning whether the HEWT arrangement is being operated in compliance with the provisions of Title I of ERISA. This letter also does not address any issues arising under any other federal or state laws.

Sincerely,

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