



Reply to the Attention of:

OPINION NO. 84-01A and 84-02A

Sec. 406(A)
406(b)(2)
410(a)
3(14)

JAN 4 1984

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Re: Palm Beach County Carpenters Vacation Trust Fund
Palm Beach County Carpenters Pension-Annuity Trust Fund
Identification Numbers: F-2165A and F-2273A

Gentlemen:

This is in response to your letters of October 31, 1981 and January 27, 1982, requesting various advisory opinions concerning the fiduciary responsibilities provisions of the Employee Retirement Income Security Act of 1974 (ERISA) as they apply to the subject employee benefit plans (respectively, the Vacation Trust Fund and the Pension-Annuity Trust Fund).

You represent that the Vacation Trust Fund and the Pension-Annuity Trust Fund are jointly administered, labor-management trust funds established under collective bargaining agreements and the Labor Management Relations Act, 29 U.S.C. §186 (c)(5). The Pension- Annuity Trust Fund was established on April 1, 1969, operating initially only as a pension plan and since April 1, 1973 to the present as both a pension plan and an annuity plan. The Vacation Trust Fund was established on April 1, 1973, and from then until March 31, 1975, contributions were received on behalf of participants. Since March 31, 1975, the Vacation Trust Fund has received no contributions from participating employers, and no benefits have been provided by that fund since June 1, 1975. However, its assets have continued to grow due to interest earnings and unclaimed vacation benefits. As of March 31, 1981, the Vacation Trust Fund had total assets of \$219,654 and the Pension-Annuity Trust Fund had assets of approximately \$11,995,102.

Since April 1, 1973, those individuals comprising the board of trustees of the Vacation Trust Fund have been, and still are, the same persons who comprise the board of trustees of the Pension-Annuity Trust Fund. During the two years from April 1, 1973 to March 31, 1975, the same approximately 2500 individuals were participants in both funds. Due to a normal turnover in participants, the present participants in the Pension-Annuity Trust Fund are not identical to the participants in the Vacation Trust Fund as of March 31, 1975.

The board of trustees of the Vacation Trust Fund has determined to terminate that fund. This would be accomplished by (A) amending the fund documents in two respects to permit the trustees to carry out the termination; (B) paying, to the extent possible, all remaining unclaimed vacation benefits and expenses; (C) making a \$25 payment to all 2500 Vacation Trust Fund participants (as of March 31, 1975), either as a payment to the annuity portion of the Pension-Annuity Trust Fund if the individual is still a participant thereof, or directly to the individual if no longer a participant in the Pension-Annuity Trust Fund; and (D) transferring the remaining funds from the Vacation Trust Fund to the annuity portion of the Pension-Annuity Trust Fund.

Additionally, the Vacation Trust Fund has considered having the transfer of the remaining assets to the annuity portion of the Pension-Annuity Trust Fund made subject to an indemnification agreement whereby the Pension-Annuity Trust Fund would agree to indemnify and hold the Vacation Trust Fund harmless for any costs or damages, including attorney's fees, which could be assessed against the Vacation Trust Fund as a result of the transfer. In addition, the Pension-Annuity Trust Fund would agree to pay all valid claims for unclaimed vacation benefits.

You request advisory opinions with regard to the following questions:

- 1) Are the Vacation Trust Fund, the Pension-Annuity Trust Fund or the trustees of either, parties in interest, as defined in section 3(14) of ERISA, with respect to the other fund?
- 2) Is the contemplated transfer of assets from the Vacation Trust Fund to the Pension-Annuity Trust Fund a transaction prohibited under section 406(a) of ERISA?
- 3) Would the involvement of the trustees/fiduciaries of the Vacation Trust Fund and the Pension-Annuity Trust Fund result in actions which are prohibited by section 406(b)(2) of ERISA?
- 4) Is the indemnification agreement to be considered by the Vacation Trust Fund and the Pension-Annuity Trust Fund an exculpatory provision proscribed by section 410(a) of ERISA?

The Department is making no determination concerning the validity of the amendments made to the trust agreement in order to terminate the plan and transfer the monies. In issuing advisory opinions under ERISA, the Department generally neither interprets the provisions of individual plans nor interprets any law other than ERISA which may be applicable to a transaction. The Department makes the following determinations based on the assumptions that the Vacation Trust Fund 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 Vacation Trust.

With regard to your first question, the explanatory material accompanying Prohibited Transaction Exemption 76-1 (41 FR 12740, 12744, March 26, 1976) states, in pertinent part, that two or more multiple employer plans are not parties in interest with respect to each other merely because they are maintained by the same plan sponsors. While the presence of trustees or fiduciaries who are common to two or more multiple employer plans does not make such plans parties in interest, a multiple employer plan may be a party in interest with respect to another multiple employer plan under section 3(14) of ERISA if, for example, it provides services to such other multiple employer plan.

In response to an inquiry from us you have represented that neither plan has ever been a service provider to the other although the Pension-Annuity Trust Fund paid for services rendered by third parties to the Vacation Trust Fund and was subsequently reimbursed by the Vacation Trust Fund. Therefore, based on your representations that neither plan has been a service provider to the other plan 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 Pension-Annuity Trust Fund nor the Vacation Trust Fund 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 pertinent 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 Vacation Trust Fund and the Pension-Annuity Trust Fund is not a transaction between an employee benefit plan and a party in interest with respect thereto, the transaction is not one 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 Vacation Trust Fund 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 Vacation Trust, the proposed subsequent transfer of excess funds from the Vacation Trust by the trustees of that trust would not violate section 406(b)(2) because, at that time, the Vacation Trust 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 Vacation Trust Fund exist, the trustees of the Pension-Annuity Trust Fund would not be representing interests adverse to that Fund and, thereby, violating section 406(b)(2) by receiving the transferred monies.

With regard 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 interpretive bulletin 29 CFR §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 Vacation Trust Fund 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.

This letter is an advisory opinion under ERISA Procedure 76-1 (41 FR 36281, August 27, 1976). Section 10 describes the effect of advisory opinions. This advisory opinion relates only to sections 3(14), 406 and 410 of ERISA and not to any other sections. For instance, the Department is expressing no opinion in regard to whether the transaction contemplated satisfies the general fiduciary responsibility provisions of section 404(a) of ERISA.

Sincerely,

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