

U.S. Department of Labor

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



Reply to the Attention of:

OPINION 81-14A
3(32), 4(b)(1)

JAN 23 1981

Mr. Courts Oulahan
702 Longfellow Building
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Oulahan:

This is in response to your letter of January 25, 1980, and the letter of Mr. Mark Dray, dated November 11, 1977, on behalf of the Transit Employees of Virginia Disability and Retirement Allowance Plan (the Plan). Specifically, your request concerns the applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to the Plan. You request an opinion that the Plan is a governmental plan within the meaning of ERISA section 3(32) and, thus, is excluded from ERISA title I coverage by ERISA section 4(b)(1).

In the above referenced letters and the accompanying submissions, you state that the Old Dominion Transit Management Company (Old Dominion) and Tidewater Transportation District Commission (Tidewater) are maintaining the Plan for their employees. The relevant history of these organizations is as follows. At one time, mass transit for the cities of Norfolk and Richmond was provided by the Virginia Transit Corporation (Virginia Transit), a private corporation which established a retirement plan through collective bargaining. In 1973, Virginia Transit sold its assets in Norfolk and Richmond to the cities of Norfolk and Richmond.

In 1973 the City of Richmond (Richmond) purchased the Richmond area transit assets of Virginia Transit through a city owned subsidiary, the Greater Richmond Transit Company (Richmond Transit). Subsequently, Richmond Transit entered into a management contract with ATE Management and Service Company (ATE) whereby ATE agreed to provide transit management services through Old Dominion, a wholly owned subsidiary. According to the contract between Richmond Transit and ATE, Old Dominion is the employer of the transit employees and maintains the Plan, but it has no tangible assets other than a payroll account and accounts for the receipt of funds received under the Urban Mass Transportation Act. Richmond Transit maintains substantial control over the transit operations by means of financial, operating, and administrative constraints, and remains the owner of all the capital assets of the Richmond area transit system. All revenues remain the absolute property of Richmond, and all purchases and expenses must be approved by Richmond. Further, Richmond has agreed to indemnify Old

Dominion for all costs, obligations, and for nearly all tort liabilities. Old Dominion has succeeded Virginia Transit as a party to the Plan. Upon termination of the management contract, Richmond may purchase the stock of Old Dominion for the cost of its organization.

In 1973 the City of Norfolk (Norfolk) purchased the Norfolk area transit assets of Virginia Transit and operated the transit system through a management contract with ATE. ATE provided its services through Transit Management Company (Transit Management), a wholly owned subsidiary that served as the employer of the transit employees and maintained the Plan. The only tangible assets of Transit Management, however, were a payroll account and accounts for the receipt of funds received under the Urban Mass Transportation Act. Further, Transit Management was reimbursed for operating expenses and indemnified for nearly all liability by Norfolk. On April 1, 1977, all assets of the Norfolk transit system and all the stock of Transit Management were purchased by Tidewater, a commission established by Virginia state statute. Tidewater established a new management contract with ATE. Pursuant to the contract, Tidewater negotiates with the unions on its own behalf. Further, Tidewater has the authority to issue bonds and to pay the principal and interest of its bonded indebtedness by such taxes as may be authorized by the Virginia General Assembly.

Section 4(b)(1) of ERISA exempts governmental plans from coverage under title I.

Section 3(32) of ERISA, in relevant part, defines the term "governmental plan" to mean:

... a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing

With respect to the Richmond public transportation system, the above referenced letters and the accompanying submissions indicate that since 1973 Richmond Transit has owned the capital assets of the system, has exercised substantial control over the operations and expenditures of the system, and has borne responsibility for the system's operating expenses, including contributions to the Plan. As a company owned by Richmond, moreover, Richmond Transit is an agency or instrumentality of a political subdivision of a state.

In the case of the Norfolk public transportation system between 1973 and April 1, 1977, Norfolk owned the capital assets of the system, exercised substantial control over the operation and expenditures of the system, and bore responsibility for operating expenses, including contributions to the Plan. Since April 1, 1977, Transit Management, the employer of the Norfolk system employees covered under the Plan, has been a wholly owned subsidiary of Tidewater and responsibility for contributions to the Plan is borne by Tidewater or municipalities for which Tidewater provides public transportation. Tidewater and Transit Management are agencies or instrumentalities of a state.

In light of these circumstances, we think that at all times since the enactment of ERISA, the Plan has been maintained by bodies which have been either political subdivisions of a state or agencies or instrumentalities of a state or a political subdivision of a state for individuals who are, directly or in effect, employees of these bodies. In our view, therefore, the Plan has been and is a governmental plan within the meaning of section 3(32) of ERISA. Because the Plan is a governmental plan, it is excluded by section 4(b)(1) of ERISA from title I of ERISA.

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,

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs