

U.S. Department of Labor

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



Reply to the Attention of:
Neil Grossman
(202) 523-6915

OPINION 81-45A
3(21), 406(b)(2)

MAY 5 1981

Karen Hawley Henry, Esq.
Littler, Mendelson, Fastiff & Tichy
The Hartford Building, 20th Floor
650 California Street
San Francisco, California 94108

Dear Ms. Henry:

This is in reply to your letter of February 13, 1979, requesting an advisory opinion concerning the application of the prohibited transaction provisions of section 406 of the Employee Retirement Income Security Act of 1974 (ERISA) to certain transactions described in your letter involving Affiliated Hospitals of San Francisco (Affiliated) and the plan it sponsors.

Following is a summary of the facts and representations contained in your submission: Affiliated is the bargaining agent for nine member hospitals in the San Francisco Bay Area. In its capacity as bargaining agent, Affiliated negotiates with labor organizations on the subject of health and welfare benefits. Affiliated presently sponsors a health benefit plan (the Plan) for employees of its nine member hospitals. The Plan is wholly funded through insurance contracts with Blue Cross of Northern California (Blue Cross), a non-profit organization. Contributions to the Plan are made in the form of premium payments to Blue Cross by each member hospital.

As sponsor of the Plan, Affiliated performs the following functions: determines the level of benefits, pays monthly premiums, and selects the carrier (funding media or claims administrator) for the Plan. All other functions are performed by Blue Cross.

One of the current officers of Affiliated is also on the Board of Directors of Blue Cross. Neither Affiliated nor any member hospital is represented, as such, on the Board of Directors of Blue Cross. However, individuals who are on the Board of Directors of Affiliated may sit as individuals on the Board of Directors of Blue Cross from time to time, or act in some other capacity for or on behalf of Blue Cross.

You state your opinion that a member of the Board of Directors of Affiliated is a "fiduciary," as defined in section 3(21) of ERISA with regard to decisions of that Board which directly pertain to the Plan.

You have requested opinions with respect to the following issues.

- 1) Whether an officer or member of the Board of Directors of Affiliated, who is also on the Board of Directors of Blue Cross, is prohibited by section 406(b)(2) of ERISA from participating in Affiliated's selection of the funding media or claims administrator of the Plan;
- 2) If the answer to issue No. 1 is in the affirmative, whether that prohibited transaction would be cured if the particular officer or Board member of Affiliated appoints or designates a third party, who may be a subordinate of such Affiliated officer or Board member, but who is not on the Board of Directors of Blue Cross, to represent the particular hospital on Affiliated's Board of Directors for purposes of determining the funding media or claims administrator of the Plan; and
- 3) Whether an officer or member of the Board of Directors of Affiliated, who is also a member of the Board of Directors of Blue Cross, is prohibited by section 406(b)(2) of ERISA from participating in decisions of the Board of Directors of Blue Cross which directly or indirectly affect the Plan.

Section 3(21) of ERISA provides, in part, that a person is a fiduciary with respect to a plan to the extent that he exercises any discretionary authority or discretionary control respecting the management of such plan or exercises any authority or control respecting the management of its assets, or to the extent that he has any discretionary authority or responsibility in the administration of such plan. Therefore, consistent with your opinion noted above, any officer or director of Affiliated whose responsibilities or activities with respect to the Plan meet that description is a fiduciary with respect to the Plan.

Section 406(b)(2) of ERISA provides that:

A fiduciary with respect to a plan shall not in his 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.

As a general matter, the Department of Labor (the Department) believes that neither the situation in which a fiduciary of the Plan who is also a director of Blue Cross participates in a decision regarding the selection of the funding media or claims administrator of the Plan, nor the situation in which the same such individual participates in decisions of the Board of Directors of Blue Cross which directly or indirectly affect the Plan, would constitute a per se violation of section 406(b)(2). This position is based on the assumption that the transactions concerning which the Department's opinion are sought are those in which the interests of Blue Cross, as a non-profit

organization, and those of the Plan (or its participants and beneficiaries) are not necessarily adverse. Circumstances may arise, however, where the interests of Blue Cross are adverse to the interests of the Plan. In such cases, it would appear that abstention from participation in such matters may be necessary in order to avoid violation of section 406(b)(2). In this regard, your alternative proposal -- the designation of a third party to represent the member hospital on Affiliated's Board of Directors -- might provide a means to alleviate potential 406(b)(2) violations that arise because a fiduciary of the Plan, who also serves as a director of Blue Cross, participates in the selection of the funding media or claims administrator of the Plan. However, whether that procedure would eliminate the potential 406(b)(2) violations in a given instance is an inherently factual question. Section 5.01 of ERISA Procedure 76-1, 41 FR 36281, (August 27, 1976), provides that the Department generally will not issue opinions on such questions.

You request that your letter be considered an application for an exemption if the Department should render an adverse opinion regarding any issue raised herein. If you conclude that an exemption is warranted with respect to any transaction discussed herein, an application for an exemption should be submitted to the Department in conformance with the procedures set forth in ERISA Procedure 75-1, 40 FR 18471 (April 28, 1975), as amended, 42 FR 57183 (November 1, 1977). No assurance can be given, however, that such an application would be granted.

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

Sincerely,

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