

U.S. Department of Labor

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



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

OPINION 81-52A
SECTION 403(c)(1), 404(a)(1)(A)

JUN 15 1981

Ms. Vivienne W. Nearing
Stroock & Stroock & Lavan
61 Broadway
New York, New York 10006

Dear Ms. Nearing:

This is in response to your letter of June 6, 1980, requesting an advisory opinion that payment by the Trustees of the _____ Fund (the Fund) of a death benefit to the widow of _____, the Fund Manager, would, absent a legal obligation to pay such a benefit, not, per se, violate the exclusive purpose of standard of section 403(c)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), the fiduciary responsibility standards of section 404(a)(1) of ERISA, or the prohibited transaction provisions of section 406 of ERISA and section 4975 of the Internal Revenue Code of 1954 (the Code).

You represent that the Fund exists to provide benefits under two plans - _____ a collectively bargained multiemployer defined benefit pension plan, which covers _____ and _____, a collectively bargained multiemployer defined benefit pension plan, which covers _____ other than those covered by _____. As of December 31, 1978, approximately 2,000 employers contributed to the Fund. Approximately 10,000 active participants, 2,134 pensioners and beneficiaries, and 643 former employees entitled to deferred vested pensions were covered under _____. Employer contributions for the Fund year ending December 31, 1978 totaled \$4,068,925. The value of the Fund's assets as of that date was \$36,206,939.

You set forth facts and representations intended to show that _____ was a loyal, dedicated, and valuable employee of the Fund during the nearly twenty-two years he served as Fund Manager.

Although the Fund did not enter into any agreement with requiring it to pay a death benefit to his widow, you state that the Trustees wish to pay such a benefit in recognition of his services to the Fund. The amount of the benefit has not been determined, but would be less than annualized 1979 salary. You cite a federal court and several tax court decisions which hold that

payments by business organizations of death benefits to the widows of key employees, in the absence of a legal obligation to pay such benefits, are deductible under the Code as ordinary and necessary business expenses, if made with appropriate business intent and in furtherance of the organization's business activities. You represent that the Trustees have determined that payment of a death benefit to _____ widow would provide significant incentive to other employees and contribute to improving their morale.

Part 4 of Subtitle B of Title I of ERISA establishes standards of conduct applicable to fiduciaries of employee benefit plans. Section 403(c)(1) requires, in part, that the assets of a plan be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and of defraying reasonable expenses of administering the plan. Section 404(a)(1)(A) requires a fiduciary to discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan. Therefore, because the payment proposed to be made to _____ would not be made to her as a participant or beneficiary of the plan, the payment would violate the requirements of sections 403(c)(1) and 404(a)(1)(A) of ERISA unless it constitutes a reasonable expense of administering the plans.

Whether a particular expense is a reasonable administrative expense under sections 403(c)(1) and 404(a)(1)(A) is, in most instances, a factual question, with respect to which the Department of Labor (the Department) ordinarily will not opine. See section 5 of ERISA Procedure 76-1 (41 FR 36281, August 27, 1976). However, the Department has determined that the issues you raise may be resolved as a matter of law and are the proper subject of an advisory opinion.

It is the opinion of the Department that the payment by the Trustees of the Fund of a death benefit to the Fund Manager's widow would constitute a violation of the exclusive purpose standards of sections 403(c)(1) and 404(a)(1)(A) of ERISA. As you indicate in your letter, the Fund did not enter into any agreement, either written or oral, with _____ to provide for the payment of a death benefit to his widow in the event of his death. Therefore, the expectation of such a benefit was not part of his compensation for his services to the plan, and in such circumstances, we do not believe it would be accurate to characterize the actual payment of such a benefit as compensation for services performed. In addition, since the effect of the payment of a gratuitous death benefit on the morale of other employees of the Fund, and the incentive it may provide them, are speculative, we also believe that the proposed payment would not be a reasonable expense of administration of the plan if made for such purposes.

You should be aware that in a case involving facts similar to those described in your letter, the United States District Court for the District of Puerto Rico held, in a case instituted by the Department, that the payment from plan assets of a gratuitous death benefit to the widow of a former plan trustee constituted a prohibited transaction. Marshall v. Cuevas, 238 Pens. Rep. (BNA) D-6 (D.P.R. 1979).

We note that ERISA does not contemplate, and the Department has no authority to adopt, a de minimis rule with respect to the exclusive purpose standards of sections 403(c)(1) and 404(a)(1)(A) of ERISA.

Because we have concluded that the payment of the death benefit, under the circumstances described in your request, is proscribed by sections 403(c)(1) and 404(a)(1)(A) of ERISA, we find it unnecessary to render an opinion on the additional issues you raise, such as whether payment of the benefit would violate other fiduciary responsibility standards of section 404(a)(1) of ERISA or whether payment of the benefit is a prohibited transaction under sections 406 of ERISA and 4975 of the Code.

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.

Sincerely,

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