

U.S. Department of Labor

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



Reply to the Attention of:
Daniel Brown
(202) 523-8971

OPINION 81-66A
Sec. 3(14)

AUG 10 1981

Mr. Richard A. Naegele
Wickens, Herzer & Panza Co., L.P.A.
1144 West Erie Avenue
Lorain, Ohio 44052

RE: Lakeland Community Hospital, Inc. Employees' Amended and Restated
Pension Plan (the Plan)
Identification Number F-1651

Dear Mr. Naegele:

This is in response to your letter of May 16, 1980, originally directed to the Internal Revenue Service, and subsequent letter dated November 6, 1980, regarding a ruling concerning the application of Part 4 of Title I of the Employee Retirement Income Security Act of 1974 (the Act) and section 4975 of the Internal Revenue Code of 1954 (the Code) to a proposed loan by the Plan to the Lakeland Medical Center, Inc. (the Medical Center). Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), the authority of the Secretary of the Treasury to issue rulings of the type requested has been transferred, with certain exceptions not here relevant, to the Secretary of Labor. Accordingly, this letter is issued solely by the Department of Labor and all references to specific sections of the Act contained in this letter shall also refer to corresponding sections of the Code.

You represent that the Plan is a defined benefit pension plan sponsored by the Lakeland Community Hospital, Inc. (the Hospital). Under the provisions of the Plan, a Joint Board of Administration serves as plan administrator and named fiduciary. At present, the sole member of the Joint Board of Administration is the Hospital's Employee Relations Administrator.

The Medical Center is a non-profit corporation organized under Ohio law. You further represent that under Ohio law, a non-profit corporation cannot issue stock evidencing an ownership interest in such a corporation.

The Medical Center is governed by a Board of Trustees currently composed of fifteen trustees. Five trustees serve by virtue of their positions as officers of the Hospital. In addition, two trustees of the Hospital also serve as trustees of the Medical Center. The remaining eight trustees are not directly affiliated with the Hospital or the Plan. The Medical Center's primary assets consist of land and a professional office building which you indicate have a current market value of approximately \$1,750,000. You state that the Medical Center's primary purpose is to attract physicians to the Lorain, Ohio area, and to the Hospital in particular.

The Plan proposes to loan \$500,000 to the Medical Center which will be used to retire a portion of an outstanding construction loan on the office building. The loan will be secured by a second mortgage on the building and property and will bear an interest rate of one point over the prime rate charged by Lorain National Bank for the first three years of the loan and adjusted annually to the prime rate at Lorain National Bank thereafter. You indicate that this interest rate is equal to or greater than the prevailing rate that a bank would charge for a similar loan.

Based on these facts and representations, you have requested rulings with respect to the following:

- 1) that the Medical Center is not a party in interest with respect to the Plan under section 3(14) of the Act; and
- 2) that the proposed loan by the Plan to the Medical Center will not constitute a prohibited transaction under section 406 of the Act.

With regard to your first request, a party in interest with respect to a plan is defined by section 3(14) of the Act as, among others, a corporation 50% or more of which is owned by a fiduciary, an employer any of whose employees are covered by the plan, or an employee, officer, director (or an individual having powers or responsibilities similar to those officers or directors), or a 10 percent or more shareholder directly or indirectly, of such an employer. On the basis of the information submitted, it is the opinion of the Department that the Medical Center is not a party in interest with respect to the Plan.

With regard to your second request, you should be aware that, although the Medical Center is not a party in interest with respect to the Plan, a loan by the Plan to the Medical Center may, under certain circumstances, be a prohibited transaction under section 406 of the Act. Specifically, where there are facts present to indicate that a loan from a plan to a third party was actually a use or transfer of funds for the benefit of a party in interest, such a loan would be prohibited under section 406(a)(1)(D) of the Act. Such a conclusion would necessarily depend upon the nature of the relationship between the party in interest and the third party receiving the loan.

Similarly, depending upon the degree (if any) of the fiduciary's interest in the transaction, the fiduciary may be deemed to be dealing with plan assets in its own interest or account, a transaction prohibited under section 406(b)(1) of the Act. Under those circumstances, the fiduciary could also be viewed as acting on behalf of a party whose interests are adverse to those

of the plan, a transaction prohibited under section 406(b)(2) of the Act. Because of the inherently factual nature of these questions, however, the Department will not issue an advisory opinion with respect to whether the proposed transaction is prohibited by section 406(a)(1)(D), (b)(1) or (b)(2) of the Act.

The Department has not considered whether the proposed investment decision complies with the general fiduciary duties of section 404 of the Act, including prudence and diversification of investments, and is not hereby rendering an advisory opinion with respect to the issues raised by that section. We wish to note, however, that although a rate of return on a particular investment may seem favorable when compared to the return the plan has realized on other investments, for purposes of the prudence rule and Act section 404(a) in general, the appropriate standard by which an investment decision should be made is the rate of return which a plan can realize on an investment of comparable risk. See 29 CFR §2550.404a-1.

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,

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