

**U.S. Department of Labor**

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



Reply to the Attention of:

OPINION NO. 83-13A  
Sec. 3(32), 3(1), 3(4)

MAR 14 1983

Mr. Joseph M. Goldhammer  
Brauer, Simons & Buescher, P.C.  
1563 Gaylord Street  
Denver, Colorado 80206

Dear Mr. Goldhammer:

This is in reply to your letters of August 12, and August 27, 1981, requesting an advisory opinion concerning applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to a retirement and death benefit arrangement (the Plan) for members of the Denver Fire Fighters Protective Association (the Association). Specifically, you request the Department to confirm your belief that the Plan is not a governmental plan but is, instead, an employee benefit plan covered by ERISA title I.

The representations you have made to the Department for the purposes of this advisory opinion are as follows. Active membership in the Association is voluntary and is limited to current or retired employees of the Fire Department of the City and County of Denver, Colorado (the Denver Fire Department). Membership in the Association, however, is not a condition of employment with the Denver Fire Department. The objects of the Association stated in Article I of its constitution include, in pertinent part, "...to render financial aid and relief to [its members] and to their beneficiaries." Benefits provided by the Association consist of lump sum death and retirement benefits for eligible members. The maximum benefit amounts available to members are \$2,000 and \$2,500, respectively. The amount paid is based on the occurrence of death or the length of membership at date of retirement. Neither benefit amounts nor eligibility for benefits is based on financial need. The Association also sponsors activities and recreational programs for its membership and purchases recreational equipment.

The members' monthly dues, interest on investments, and profits from the yearly fire fighters' benefit dance are the major sources of the Association's revenues. By agreement with the Denver Fire Department, dues for the Association can be deducted from its employees' paychecks and forwarded to the Association at the employee's request. The amounts of dues are set by a council elected by the Association's membership. This elected council also governs all operations of the Association, in accordance with Association bylaws and constitution, except for those matters such documents reserve to the membership at large. You mention that the only relationship between the Denver Fire Department or any other governmental entity and the benefits the Association provides its members is the payroll deduction dues checkoff system made available to its employees by the Denver Fire Department. For that reason you believe that the

Association's program of benefits may not be a governmental plan. However, you also believe that the Association's employee membership may not be engaged in commerce or any activity affecting commerce, and, you are concerned that the Association may not meet the definition of an "employee organization" in ERISA section 3(4) resulting in ERISA title I requirements not being applied to the Plan.

ERISA section 4(a) provides that ERISA title I applies to employee benefit plans established or maintained by any employer engaged in commerce or in any industry or activity affecting commerce, or by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce, or by both, except for, *inter alia*, plans specifically exempt under ERISA section 4(b). Among the exceptions in ERISA section 4(b) is section 4(b)(1) which excludes governmental plans from ERISA title I coverage.

ERISA section 3(11) defines the term "commerce" as "... trade, traffic, commerce, transportation, or communication between any State and any other place outside thereof." The term "industry or activity affecting commerce" is defined in ERISA section 3(12) as "... any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry affecting commerce within the meaning of the Labor Management Relations Act, 1947, or the Railway Labor Act." The term "industry or activity affecting commerce" has been given a liberal interpretation by the courts. As noted in prior opinions of the Department under ERISA (for example, in ERISA Opinion 79-62A, copy enclosed), the phrase "industry or activity affecting commerce" is broadly defined. It would include the activities of fire fighters such as those who are members of the Association. Thus, the only remaining element of ERISA section 4(a) to be established in your factual situation is whether the Association's program of benefits is an employee benefit plan within the meaning of ERISA section 3(3).

Under ERISA section 3(3), an employee benefit plan is an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan. The term "employee pension benefit plan" is defined in ERISA section 3(2) which, in pertinent part, provides that the term includes any plan, fund, or program established or maintained by an employee organization (within the meaning of ERISA section 3(4)) and which provides retirement income to employees. The term "employee welfare benefit plan" is defined in ERISA section 3(1) which, in pertinent part, provides that it includes any plan, fund, or program established or maintained by an employee organization (within the meaning of ERISA section 3(4) and which provides death benefits to participants or beneficiaries. Because the Plan provides both retirement benefits and death benefits to eligible members (all of whom were or are employees) or to their beneficiaries, the Plan is both an employee welfare benefit plan and an employee pension benefit plan if established or maintained by an employee organization within the meaning of ERISA section 3(4), unless otherwise excluded from ERISA title I coverage.

Section 3(4) of ERISA defines the term "employee organization" as "... any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental

to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan." The term "employees' beneficiary association" as used in section 3(4) is not defined in ERISA. The Department has developed certain criteria to be used in construing the term "employees' beneficiary association." Those criteria are:

1. Membership in an employees' beneficiary association is conditioned on employment status -- for example, membership might be limited to employees of a certain employer or members of one union;
2. An employees' beneficiary association has a formal organization, with officers, bylaws, or other indications of formality;
3. As distinguished from organizations described in the first part of the definition of "employee organization," an employees' beneficiary association does not deal with any employer;
4. An employees' beneficiary association which is an "employee organization" within the meaning of the statute is organized for the purpose, in whole or in part, of establishing a welfare or pension plan.

Based on your representations and on the Association's constitution and bylaws, it appears that the Association meets these criteria for the following reasons: (1) membership in the Association is limited to certain current and retired fire fighters of the City and County of Denver who are or have been employees of the Denver Fire Department; (2) the Association has a formal organization with elected officers, a constitution, and bylaws; (3) the Association does not deal with any employer with respect to benefits or other matters; and (4) according to its constitution, the Association is organized in part to provide a program of death benefits and retirement benefits. Accordingly, the Department is of the opinion that the Association is an employees' beneficiary association and, therefore, an "employee organization" within the meaning of ERISA section 3(4). On the other hand, if the Association exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan or other matters, the Association would be an "employee organization" within the meaning of ERISA section 3(4) because it would meet the requirements of the first part of that section which describes employee organizations other than employees' beneficiary associations. Thus, the program of death and retirement benefits it maintains is an "employee benefit plan" within the meaning of ERISA title I.

As noted above, ERISA section 4(b)(1) provides that ERISA title I requirements do not apply to an employee benefit plan which is a governmental plan within the meaning of ERISA section 3(32). Section 3(32) 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. The Association itself is not a governmental entity described in ERISA section 3(32), and your submission indicates that neither the Denver Fire Department nor any other governmental entity has or exercises any control over the Plan or Plan funds nor are any funds for the Plan's operation

contributed by such entities. Under these circumstances, we are of the view that the program of benefits provided by the Association is not a governmental plan within the meaning of ERISA section 3(32).

Accordingly, because the Plan is both an employee welfare benefit plan and an employee pension benefit plan covered by ERISA title I, the Plan must meet all applicable ERISA title I requirements, unless excluded from ERISA title I by regulation or statutory exclusion other than ERISA section 4(b)(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,

Jeffrey N. Clayton  
Administrator  
Pension and Welfare Benefit Programs

Enclosures