U.S. Department of Labor Office of Pension and Welfare Benefit Programs
Washington, D.C. 20210

NOV 27 1985 85-40A

William E. Cox, Esquire
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Suite 1010
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Washington, D.C. 20036

Re: Operating Engineers Pension Trust Fund (the Pension Plan) and the Operating Engineers Welfare Trust Fund of Washington, D.C. (the Welfare Plan)
Identification Number: F-3003A

Dear Mr. Cox:

This is in response to your letter of November 7, 1984 requesting an advisory opinion regarding the application of sections 206 and 406 of the Employee Retirement Income Security Act of 1974 (ERISA) to a certain arrangement involving the transfer of funds by the Pension Plan to the Welfare Plan.

You represent that the Pension and Welfare Plans are multiemployer plans that were established pursuant to section 302(c)(5) of the Labor Management Relations Act of 1947 and are maintained by Local 77 of the International Union of Operating Engineers and various contributing employers and employer organizations in the Washington, D.C. area. The same persons serve as trustees of the Pension and Welfare Plans. The same third party contract administrator administers the Pension and Welfare Plans.

Effective January 1, 1984, due to rising costs of health care services, the trustees amended the Welfare Plan to require retirees to pay $150 per quarter to maintain their eligibility for benefits under the Welfare Plan. Previously, there was no fee for such coverage. The trustees have proposed that an arrangement be established pursuant to which a Pension Plan retiree who also participates in the Welfare Plan would be afforded the option of authorizing the Pension Plan to deduct from his or her monthly pension check an amount equal to the amount required to be paid to the Welfare Plan. The Pension Plan would then transfer monthly to the Welfare Plan an amount representing the total amount of deductions for all retirees who participate in the program. The arrangement would be entirely voluntary on the part of the retiree; it would be authorized by the retiree in writing in advance and would be revocable at any time at the sole discretion of the retiree.

Neither the trustees nor the Welfare Plan would have any enforceable rights against the retiree or the Pension Plan as a result of the arrangement. You assert that the Welfare Plan would file a written acknowledgement with the trustees of the Pension Plan (who are the Pension Plan's plan administrator) which would satisfy the requirements of the anti-alienation of benefits provision of section 401(a)(13) of the Internal Revenue Code (the Code) and the regulations thereunder, 26 CFR 1.401(a)-13(e)(2).[1] Neither plan has heretofore provided services to the other plan and neither plan is an employer of any employees covered by the other plan. Further, no retiree involved in the arrangement is currently employed by an employer contributing to the plan. You state that each plan would bear its portion of the cost of administering this arrangement.

You request an advisory opinion that: (1) the provision of services by the Pension Plan to the Welfare Plan under the described arrangement would not constitute a prohibited transaction under ERISA sections 406(a)(1)(C) and 406(b)(2); (2) that the transfer of funds under the described arrangement by the Pension Plan to the Welfare Plan would not constitute a prohibited transaction under ERISA section 406(a)(1)(D) and 406(b)(2); and (3) that the arrangement would not violate ERISA section 206. We note also that the described arrangement raises issues under ERISA sections 402, 403 and 404.

Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) the authority to issue rulings under section 4975 of the Code has been transferred, with certain exceptions, to the Secretary of Labor. Therefore, the references in this letter to specific sections of ERISA refer also to corresponding sections of the Code. However, the authority to issue rulings under ERISA section 206 was transferred to the Secretary of the Treasury under the Reorganization Plan. Accordingly, this advisory opinion will not address the question of whether the proposed arrangement would violate the restrictions of ERISA section 206.

ERISA section 402(b)(4) requires that every employee benefit plan specify the basis on which payments are made to and from the plan. ERISA 403(c)(1) provides, in relevant part, that the

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[1] Under section 401(a)(13) of the Code, a trust will not be considered qualified for tax purposes unless the plan of which the trust is a part provides that benefits under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process. Treasury Regulation Section 1.401(a)(13)(e)(1) provides that, under certain conditions, a participant or beneficiary may direct the plan to pay all, or any portion, of a plan benefit payment to a third party, without such event constituting an "assignment or alienation." One of the conditions is that the third party must file a written acknowledgement with the plan administrator. Treasury Regulation Section 1.401(a)-13(e)(2) sets forth the specifics of this acknowledgement requirement for third party arrangements.

assets of an employee benefit plan shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan. ERISA section 404(a)(1)(A) requires a plan fiduciary to discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries of the plan and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan. ERISA section 404(a)(1)(D) further requires the fiduciary to act in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of Title I of ERISA.

We note that the Department has previously expressed its views with respect to ERISA sections 402(b)(4), 403(c)(1), 404(a)(1)(A) and 404(a)(1)(D) as those sections apply to an arrangement similar to the one described in your request. In 29 CFR 2509.78-1 (I.B. 78-1), the Department stated that a payment by a multiple employer vacation plan of all or any portion of benefits to which a plan participant or beneficiary is entitled to a party other than the participant or beneficiary will comply with ERISA sections 402(b)(4), 403(c)(1), 404(a)(1)(A) and 404(a)(1)(D) if the arrangement pursuant to which payments are made does not constitute a prohibited transaction under ERISA section 406 and: (1) the governing plan documents expressly state that benefits payable under the plan to a participant or beneficiary may be paid, at the direction of the participant or beneficiary, to a third party rather than to the participant or beneficiary; (2) the participant or beneficiary directs in writing that the plan trustees shall pay a named third party all or a specified portion of the sum of money which would otherwise be payable under the plan to him or her; and (3) a payment is made to a third party only when or after the money would otherwise be payable to the plan participant or beneficiary. In I.B. 78-1 the Department further stated that in the case of a multiple employer plan as defined in Prohibited Transaction Exemption 76-1, Part C, Section III, (PTE 76-1, 41 FR 12740, March 26, 1976), if the arrangement to make payments to a third party is a prohibited transaction under ERISA section 406, the arrangement will comply with ERISA sections 402(b)(4), 403(c)(1), 404(a)(1)(A) and 404(a)(1)(D) if the conditions of PTE 76-1 and Prohibited Transaction Exemption 77-10 (PTE 77-10, 42 FR 33918, July 1, 1977) and the above three paragraphs of I.B. 78-1 are met.

ERISA section 406(a)(1)(C) prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction which the fiduciary knows or should know constitutes a direct or indirect furnishing of goods, services or facilities between the plan and a party in interest. ERISA section 406(a)(1)(D) prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction which the fiduciary knows or should know constitutes the transfer to, or use by or for the benefit of, a party in interest of any assets of the plan. ERISA section 406(b)(2) states that a fiduciary with respect to a plan shall not in his individual or 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.

The term "party in interest" is defined in ERISA section 3(14). The trustees, as fiduciaries within the meaning of ERISA section 3(21), would be parties in interest with respect to the Pension Plan and the Welfare Plan under ERISA section 3(14)(A). To the extent that the Pension Plan provides services to the Welfare Plan under the arrangement, the Pension Plan would become a party in interest with respect to the Welfare Plan under ERISA section 3(14)(B). Thus, in the absence of a statutory or administrative exemption, the provision of services by the Pension Plan to the Welfare Plan under the described arrangement would constitute a prohibited transaction under ERISA section 406(a)(1)(C) and 406(b)(2).

However, PTE 76-1 and PTE 77-10 exempt from the prohibitions of section 406(a) and 406(b)(2), respectively, the provision of administrative services by a multiple employer plan (as defined in PTE 76-1, Part C, Section III) to another multiple employer plan if: (1) the plan receives reasonable compensation for the provision of the services; (2) the arrangement allows any multiple employer plan which is a party to the transaction to terminate the relationship on reasonably short notice under the circumstances; and (3) the plan complies with certain recordkeeping requirements. We note that sections I(a) of PTE 76-1 and I(b) of PTE 77-10 state, in relevant part, that, solely for the purposes of the exemptions, "reasonable compensation" need not include a profit which would ordinarily have been received in an arm's length transaction, but must be sufficient to reimburse the plan for its costs.

The provision of services by the Pension Plan to the Welfare Plan under the arrangement you describe would be exempt from the prohibitions of ERISA section 406(a) and 406(b)(2) if the conditions of PTE 76-1 and PTE 77-10 are met. In this connection, we note that the arrangement you describe would not satisfy all of the conditions of PTE 76-1 or 77-10 if the Pension Plan is not fully reimbursed by the Welfare Plan for the costs incurred by the Pension Plan in providing services to the Welfare Plan. We also note that whether specific conditions of a class exemption are met in each case involve questions which are inherently factual in nature. Section 5.01 of ERISA Advisory Opinion Procedure 76-1 (ERISA Proc. 76-1, 41 FR 36281, August 27, 1976) states that the Department generally will not issue opinions on such questions.

In I.B. 78-1, the Department also discussed whether the arrangement described therein would involve prohibited transactions under sections 406(a)(1)(D) and 406(b)(2). The Department concluded in I.B. 78-1 that the mere payment of money to which a participant or beneficiary is entitled, at the direction of the participant or beneficiary, to a third party who is a party in interest would not be prohibited under section 406(a)(1)(D). Further, the Department concluded that if a trustee or other fiduciary of a plan, in addition to his duties with respect to the plan, serves in a decisionmaking capacity with another party, the mere fact that the fiduciary effects payment to

such party of money to which a participant is entitled, at the direction of the participant and in accordance with specific provisions of governing plan documents and instruments, does not amount to a prohibited transaction under section 406(b)(2).

Your letter states that the funds to be transferred from the Pension Plan to the Welfare Plan will consist of money which would otherwise be payable by the Pension Plan to its participants and beneficiaries. You further state that each transfer of funds will be made at the written direction, and at the sole discretion, of the Pension Plan participants and beneficiaries. Based on your representations, it does not appear that the transfer of funds by the Pension Plan to the Welfare Plan under the described arrangement would, in and of itself, constitute a violation of ERISA section 406(a)(1)(D). In addition, it does not appear that there would be an adversity of interests involved in the transfer of funds by the Pension Plan to the Welfare Plan at the written direction of the Pension Plan participants and beneficiaries as contemplated by section 406(b)(2) of ERISA.

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. We note that questions arising under section 206 of ERISA should be directed to the Internal Revenue Service.

Sincerely,

Elliot I. Daniel
Assistant Administrator for Regulations and Interpretations