

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210



MAR 28 1988

88-06A

Sec. 3(1), 3(4), 3(16), 3(21)

Mr. Michael D. Foster
Jackson, Kelly, Holt & O'Farrell
1600 Laidley Tower
P.O. Box 553
Charleston, West Virginia 25322

Dear Mr. Foster:

This is in response to your request for an advisory opinion concerning the applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA) to the Kanawha Valley Regional Transportation Authority Sick Fund (the Fund). Specifically, you have inquired whether the Fund constitutes an "employee welfare benefit plan" within the meaning of ERISA section 3(1) and, if so, whether the Kanawha Valley Regional Transportation Authority (the "KVRTA") would be considered a plan sponsor, administrator, or a fiduciary with respect to the Fund.

You advise that the KVRTA is an entity established pursuant to West Virginia Code §8-27-1 to provide urban mass transportation to the residents of Kanawha County, West Virginia. The employees of KVRTA consist of union employees who are members of the Amalgamated Transit Union AFL-CIO-CLC and non-union hourly and salary workers. You represent that the KVRTA has been asked to cooperate in the establishment of the Fund, which would provide modest payments to participating employees who are sick and who have met the eligibility requirements under the terms of the program (e.g., in order to be eligible for benefits, members must have exhausted all sick and personal leave and must not be receiving workers compensation). The Fund would be available to all nonsupervisory employees of KVRTA, not just union or non-union employees.

According to the Rules and Regulations of the Fund, a copy of which accompanied your request, the fund will be governed by a five-member committee, to be selected by participating employees at an annual meeting (Article I). The governing committee will be solely responsible for the rules and regulations of the Fund as well as the disbursement of benefits from the Fund (Articles I and IV). KVRTA's only role in connection with the Fund is to withhold from employees' wages their dues under the program and to submit such dues to the governing

committee of the Fund. KVRTA may also make space available on its premises for meetings of the Fund.

Pursuant to Article II of the Fund's Rules and Regulations, the Fund will be financed by a \$5.00 initiation fee and a \$2.00 per month, per member assessment, which may be subject to increase depending on the number of members sick. The benefit payable under the Fund is \$2.00 multiplied by the number of members. This benefit is payable quarterly and begins only after a member has exhausted all sick and personal leave.

KVRTA contends that the Fund is not an "employee welfare benefit plan" within the meaning of ERISA section 3(1). In this regard, you indicate that the Fund is not established or maintained by an employer or by an employer/employee organization, but rather is a voluntary association of all employees of KVRTA. You also suggest that the program constitutes a "remembrance fund", as defined in 29 CFR §2510.3-1(g), which is excluded from title I coverage. KVRTA further contends that, even if the Fund is determined to be an "employee welfare benefit plan," KVRTA is not the plan administrator, plan sponsor, or a fiduciary with regard to the Fund within the meaning of section 3(21)(A).

Section 3(1) of ERISA defines the term "employee welfare benefit plan" to mean:

... any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, ... or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions). [Emphasis supplied.]

Paragraph (g) of §2510.3-1, to which you refer in your letter, provides:

(g) Remembrance funds. For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include a program under which contributions are made to provide remembrances such as flowers, an obituary notice in a newspaper or a small gift on occasions such as the sickness, hospitalization, death or termination of employment of employees, or members of an employee organization, or members of their families.

First, with regard to the application of §2510.3-1(g), it is the Department's view that, while the amount of benefits payable by the Fund may, depending on the size of the membership, be small,

the specific purpose of the Fund is to provide benefits in the event of sickness, a benefit within the meaning of ERISA section 3(1), rather than a "remembrance" or "small gift" within the meaning of §2510.3-1(g). Accordingly, the Fund does not appear to be a "remembrance fund" within the meaning of §2510.3-1(g).

Second, while the Fund appears to provide a benefit described in ERISA section 3(1), in order to constitute an "employee welfare benefit plan," the Fund, in addition to satisfying other criteria, must be established or maintained by an employer, employee organization, or both. On the basis of the information provided, it is the Department's view that by simply withholding and forwarding employees' dues and making space available for Fund meetings KVRTA would not be establishing or maintaining an employee benefit plan for purposes of title I of ERISA. However, while it does not appear that the Fund would be established or maintained by an employer (i.e., KVRTA), it does appear that the Fund would be established and maintained by an "employee organization", as that term is defined in ERISA section 3(4).

As defined in ERISA section 3(4), the term "employee organization" includes, among other things, "any employees' beneficiary association organized for the purpose, in whole or in part, of establishing [an employee benefit] plan." While the term "employees' beneficiary association" is not defined in title I of ERISA, the Department applies the criteria it developed in construing the same term under the Welfare and Pension Plans Disclosure Act. Under those criteria, a particular organization or association is an "employees' beneficiary association" within the meaning of section 3(4) of ERISA if: 1) membership in the association is conditioned on employment status -- for example, membership is limited to employees of a certain employer or members of one union; 2) the association has a formal organization, with officers, bylaws, or other indications of formality; 3) the association generally does not deal with an employer (as distinguished from organizations described in the first part of the definition of "employee organization", e.g., labor union); and 4) the association is organized for the purpose, in whole or in part, of establishing a welfare or pension plan.

In addition, it is the view of the Department that when employees of the same employer create a welfare fund to supplement sick benefits paid by their employer, the fund (having met the aforementioned criteria) is covered by title I of ERISA as being established by an "employees' beneficiary association", unless exempt from coverage under ERISA section 4(b).

Applying the above criteria, the Department concludes, on the basis of the information provided, that the Fund would constitute an "employees' beneficiary association" and, thus, an "employee organization" described in ERISA section 3(4). Accordingly, the program of benefits provided by the Fund would constitute an "employee welfare benefit plan", established and maintained by an employee organization, subject to the provisions of title I of ERISA.

Third, with regard to whether KVRTA would be the plan administrator of the Fund, we note that the term "administrator" is defined in ERISA section 3(16)(A) to mean (in relevant part) the person specifically so designated by the terms of the instrument under which the plan is operated or, in the case where an administrator is not designated, the plan sponsor. Section 3(16)(B) defines the term "plan sponsor" to mean "(i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan."

Generally, an employer is a plan administrator within the meaning of section 3(16)(A) only to the extent that it is either designated as such under the plan instrument or is the plan sponsor in the absence of a specific designation. An employer would not be considered a plan sponsor under section 3(16)(B) of ERISA if the employer has not established or maintained the plan or, otherwise, does not represent the parties who have established or maintained the plan. In the case of a plan which has been established and maintained by an employees' beneficiary organization, section 3(16)(B) provides that the employee organization is the sponsor of the plan and, consequently, the plan administrator if no other administrator is specifically designated.

Lastly, with regard to whether KVRTA would be a fiduciary with respect to the Fund, ERISA section 3(21)(A), as a general matter, establishes a functional test to determine fiduciary status. Because of the inherently factual nature of such determinations, the Department ordinarily will not rule on the issue. However, the following information may be of assistance to you.

Section 3(21)(A) provides, in relevant part, that a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or control respecting management of the plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys, or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary responsibility in the administration of the plan.

In interpreting section 3(21)(A) as it applies to specific activities in relation to employee benefit plans, the Department has indicated in its ERISA Interpretive Bulletin 29 CFR §2509.75-8 that it will examine the types of functions performed, or transactions undertaken, on behalf of a plan to determine whether such activities are fiduciary in nature and therefore subject to ERISA's fiduciary responsibility provisions. Although persons having certain positions with a plan (for example, plan administrator) will be plan fiduciaries because of the discretionary nature of the duties attendant upon such position, fiduciary status is not limited to persons occupying those positions. Rather, it is the function performed that will determine fiduciary status. Thus, for

example, the employer, or officers or directors of the employer, will be subject to the fiduciary provisions of ERISA to the extent that the employer's functions with regard to the plan are among the types of activities enumerated in ERISA section 3(21)(A).

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,

Robert J. Doyle
Acting Associate Director for Regulations and Interpretations