U.S. Department of Labor

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

MAY 18 1993

93-15A
Section 406(b)(2)

Mr. Randall G. Simpson
Jermain, Dunnagan & Owens
3000 A Street, Suite 300
Anchorage, Alaska 99503

Dear Mr. Simpson:

This is in response to your request for an advisory opinion concerning the application of the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 (ERISA) to the termination and transfer of excess funds of the Alaska Laborers-Employers Legal Services Fund (the Legal Services Fund) to the Alaska Laborers & Construction Industry Health & Security Fund (the Health & Security Fund).

You represent that the Legal Services Fund and the Health & Security Fund are jointly administered, labor-management trust funds established under collective bargaining agreements and the Labor Management Relations Act, 29 U.S.C. § 186(c)(5). The Health & Security Fund was established on September 30, 1953, and has been operating continuously as a medical, vision and dental health and welfare plan with life, accidental death and disability benefits. The Legal Services Fund was established on January 15, 1975 and has been providing legal services for eligible participants from that date.

According to your representations, the eligibility rules for participants in both the Legal Services Fund and the Health & Security Fund have always been and remain identical. If hours of covered employment qualify a participant for benefits under one plan, the participant will qualify under the other plan so long as the covered employee is working under a collective bargaining agreement requiring contributions to both funds.

You also represent that since establishment of the Legal Services Fund in 1975, those individuals comprising the Board of Trustees of the Legal Services Fund are the same persons who comprise the Board of Trustees of the Health & Security Fund. Neither the Legal Services Fund nor the Health & Security Fund has been a service provider to the other plan and each has operated under separate administration, eligibility and plan documents.

The Board of Trustees of the Legal Services Fund has determined to terminate that Fund. This termination would be accomplished by (1) amending the Legal Services Fund documents to permit the Trustees to carry out the termination; (2) paying, to the extent possible, all remaining unclaimed legal benefits and expenses until all participants have run out their eligibility; and (3) transferring the remaining funds from the Legal Services Fund to the Health & Security Fund.

The Trustees of the Legal Services Fund would condition the transfer of the assets to the Health & Security Fund on an indemnification agreement whereby the Health & Security Fund would agree to indemnify and hold the Legal Services Fund and its Trustees harmless for any costs or damages, including attorney's fees, which could be assessed against the Legal Services Fund as a result of the termination and transfer of assets. The Health & Security Fund would agree to pay all valid claims for any remaining unclaimed legal aid benefits which may continue to become due or may be asserted by eligible participants.

You have requested an advisory opinion with regard to the following questions:

1. Are the Legal Services Fund and the Health & Security Fund or the Trustees of either parties-in-interest as defined in section 3(14) of ERISA with respect to each other and the other fund?

2. Is the contemplated transfer of assets from the Legal Services Fund to the Health & Security Fund, after termination of the Legal Services Fund, a transaction prohibited under section 406(a) of ERISA?

3. Would the involvement of the Trustees/fiduciaries of the Legal Services Fund in a transfer of assets to the Health & Security Fund result in an action which is prohibited under section 406(b)(2) of ERISA?

4. Is the termination of the Legal Services Fund and transfer of excess assets a transaction which is in violation of section 403(c)(1) and 404 of ERISA?

5. Is the indemnification agreement to be entered into by the Legal Services Fund and the Health & Security Fund an exculpatory provision proscribed by section 410(a) of ERISA?

Section 5.04 of ERISA Procedure 76-1 (41 Fed. Reg. 36281, 36282, August 27, 1976) provides that the Department of Labor (the Department) ordinarily will not issue advisory opinions on the form or effect in operation of a plan, fund or program or a particular provision or provisions thereof subject to Title I of ERISA. Accordingly, the Department makes the following determinations based on the assumptions that the Legal Services Fund will be properly terminated and all claims paid or properly forfeited so that there are no longer any participants or beneficiaries of the Legal Services Fund.[1]

With regard to your first question, the Department has addressed the issue of whether related plans are parties in interest with respect to one another in Prohibited Transaction Exemption 76-1 (41 Fed. Reg. 12740, 12744, March 26, 1976). As explained in the preamble to that exemption, two or more plans are not parties in interest with respect to each other merely because they are maintained by the same plan sponsor or have trustees or fiduciaries who are common to the plans. A plan may be a party in interest with respect to another plan, however, if it has a relationship to that plan as defined in section 3(14) of ERISA. For example, a plan may be a party in interest with respect to another plan under section 3(14)(B) of ERISA if it provides services to such other plan.[2]

Based on your representations that neither Fund has been a service provider to the other Fund, and assuming that there is no other relationship between the Funds to cause them to be parties in interest to each other, it is the view of the Department that neither the Legal Services Fund nor the Health & Security Fund is a party in interest with

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[1] For purposes of this opinion we also assume that no contributions to the Legal Services Fund were derived from participant contributions, whether after-tax contributions or pre-tax salary reductions.

[2] A plan may also be a party in interest to another plan:

(a) Under section 3(14)(H) of ERISA, if it holds, directly or indirectly 10 percent or more of the shares of a person described, with respect to the other plan, in subparagraph (B), (C), (D), (E), or (G) of section 3(14) of ERISA, or

(b) Under section 3(14)(I) of ERISA, if it is a 10 percent or more (in capital or profits) partner or joint venturer of a person described, with respect to the other plan, in subparagraphs (B), (C), (D), (E), or (G) of section 3(14) of ERISA.

respect to the other. We note, however, that individuals who serve as trustees for both Funds are parties in interest with respect to both Funds (see section 3(14)(A) of ERISA).

Concerning your second question, section 406(a) of ERISA provides, in part, that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he or she knows or should know that the transaction constitutes a direct or indirect (1) lending of money or other extension of credit between the plan and a party in interest, or (2) a transfer to, or use by or for the benefit of, a party in interest, of any asset of the plan. The transaction between the Legal Services Fund and the Health & Security Fund is not a transaction between an employee benefit plan and a party in interest with respect thereto. Therefore, it is the Department's view that, based upon your representations, the transaction is not prohibited by section 406(a) of ERISA.

With respect to your third question, section 406(b)(2) of ERISA provides that a fiduciary with respect to a plan shall not in his or her individual or in 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. If the Legal Services Fund has been properly terminated and all claims have either been paid or properly forfeited so that there are no longer any participants or beneficiaries of the Legal Services Trust, the proposed subsequent transfer of excess funds by the trustees of that trust would not violate section 406(b)(2) because, at that time, the Legal Services Trust will no longer exist, and therefore, no transaction will be occurring on behalf of that plan. If neither further claims nor participants or beneficiaries of the Legal Services Trust Fund exist, the trustees of the Health and Security Fund would not be representing interests adverse to that Fund and, thereby, violating section 406(b)(2) by receiving the transferred monies.

Concerning your fourth question, the Department will not ordinarily issue advisory opinions regarding sections 403(c)(1) or 404(a)(1) of ERISA. See section 5.02(n) and (o) of ERISA Procedure 76-1. We note, however, that section 403(c)(1) of ERISA provides, in part, that except as provided in section 403(d), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan. In addition, section 404(a)(1) of ERISA provides, in part, that subject to sections 403(c) and (d), a fiduciary shall discharge his or her 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 their beneficiaries. In addition, section 404(a)(1)(D) of ERISA requires that plan fiduciaries discharge their duties in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of Titles I and IV of ERISA.

Section 403(d)(2) provides that the assets of a welfare plan which terminates shall be distributed in accordance with the plan document, except as otherwise provided in regulations of the Secretary. To date, the Department has not issued regulations under section 403(d)(2). Accordingly, a transfer other than a distribution in accordance with the terms of the Legal Services Fund documents, as contemplated under section 403(d)(2), may contravene sections 403(c)(1) and 404(a) of ERISA.

With regard to your fifth question, section 410(a) of ERISA provides generally that any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation or duty under Part 4 of Title I of ERISA shall be void as against public policy. Section 410(a) has been augmented by an interpretive bulletin, ERISA IB 75-4, 29 C.F.R. 2509.75-4, which provides, in pertinent part, that the Department interprets this section to permit indemnification agreements which do not relieve a fiduciary of responsibility or liability under Part 4 of Title I of ERISA. If the indemnification agreement contemplated in this case purports to reimburse the Legal Services Fund for any sums which it may have to pay as a result of this transaction, but does not relieve the trustees of any liability for their breach of fiduciary responsibility, we are of the opinion that such agreement is not prohibited by section 410(a) of ERISA.

This letter is an advisory opinion under ERISA Procedure 76-1. Section 10 of the Procedure describes the effect of an advisory opinion.

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations