U.S. Department of Labor

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

November 28, 1994

94-39A
ERISA SECTION 403(c)(1)

Mr. Henry M. Helgen III
McGrann Shea Franzen Carnival
Straughn & Lamb
2200 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2041

Dear Mr. Helgen:

This is in response to your letter requesting an advisory opinion regarding a proposed distribution of plan assets to contributing employers upon the termination of a multiemployer plan. You ask whether such a distribution would constitute a prohibited inurement of plan assets to employers under section 403(c)(1) of the Employee Retirement Income Security Act of 1974 (ERISA).

You represent that the Minneapolis Association of Building Owners and Managers sponsors a multiemployer pension plan (the Plan) pursuant to a collective bargaining agreement between various building owners and managers and the Service Employees Union, Local No. 26, AFL-CIO. The Plan provides retirement and disability benefits to covered employees.[1] The Plan authorizes the currently contributing employers to terminate the Plan and also states that any assets remaining after payment of all liabilities of the Plan will be distributed to the employers who are contributing to the Plan upon termination. The Plan also provides that, upon termination of the Plan, all employees currently covered under the Plan will become fully vested in all accrued benefits. You state that the six employers currently contributing to the Plan (the Employers) intend each to withdraw from the Plan and, after payment of all accrued benefits and other liabilities, to take a pro rata share of the residual assets, provided that it is permissible to do so under ERISA. The Employers anticipate that the Plan will hold assets, after paying all liabilities, of approximately $300,000.00.

Section 403(c)(1) of ERISA requires, in part and subject to certain exceptions, that 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 and beneficiaries and defraying reasonable expenses of administering the plan. Unless an exception to this "exclusive purpose" rule permits the contemplated distribution, such a distribution would constitute a prohibited inurement to the Employers.

None of the statutory exceptions to section 403(c)(1) pertain to a distribution of residual plan assets to employers upon the termination of a multiemployer plan. The exceptions describe other limited circumstances in which assets may be distributed to employers. Two of the exceptions referenced in section 403(c)(1) relate solely to single-employer plans.[2] The remaining exceptions, although applicable to multiemployer plans, describe specific

[1] We assume, for purposes of this advisory opinion and in accordance with your representations, that the Plan is a defined benefit pension plan that is established and maintained by an employer or an employee organization, or both.

[2] See section 403(c)(2)(A)(i) (permitting return of mistaken contributions or payments made by an employer to a plan (other than a multiemployer plan) if return is made within one year after contribution or payment); section

circumstances that do not include reversions of pension plan assets to employers following the termination of a multiemployer pension plan.[3] Because none of the exceptions set forth in section 403(c) are applicable to the contemplated distribution, it is the Department of Labor's (the Department) view that a distribution in the circumstances described would constitute a prohibited inurement of plan assets to the Employers.

In addition, the Department notes that section 404(a)(1)(D) of ERISA requires that plan fiduciaries discharge their duties in accordance with the documents and instruments governing the plan only insofar as such documents and instruments are consistent with the provisions of Titles I and IV of ERISA. Although a reversion of plan assets to the Employers may be permitted by the plan terms, such a reversion would not be consistent with Title I of ERISA.[4] As noted above, section 403(c)(1) permits plan assets to be used only to provide benefits and to pay reasonable administrative expenses of the Plan.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (41 Fed. Reg. 36281, Aug. 27, 1976). Section 10 of the Procedure describes the effect of advisory opinions.

Sincerely,

ROBERT J. DOYLE
Director of Regulations and Interpretations

403(c)(1) (referring, in part, to section 4044(d), which conditionally permits return of residual assets of a single-employer plan to an employer).

[3] See section 403(c)(2)(A)(ii) (permitting return of a mistaken contribution or payment made by an employer to a multiemployer plan within six months after the plan administrator determines it was a mistake); section 403(c)(2)(B) (permitting return of contributions conditioned on initial qualification of a plan under section 401 or 403(a) of the Internal Revenue Code of 1986 (the Code)); section 403(c)(2)(C) (permitting return of contributions conditioned upon the deductibility of the contribution under section 404 of the Code); section 403(c)(3) (permitting return of withdrawal liability overpayments).

Section 403(d)(1), in addition, provides for an allocation of assets (including distribution to employers of residual assets) upon termination of a pension plan to which section 4021 does not apply at the time of termination and to which Part 4 of Title I does apply. Section 4021 applies to employee pension benefit plans established or maintained by a employer, an employee organization, or both. Because we assume for purposes of this advisory opinion (see footnote 1, above) that section 4021 applies to the Plan, section 403(d) does not provide an exception to 403(c)(1) that would permit a distribution to the Employers of residual assets upon termination of the Plan.

[4] The views expressed herein relate solely to application of the provisions of Title I of ERISA.