

U.S. Department of Labor

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



April 3, 1995

95-03A
ERISA SECTION
3(1), 3(4), 3(40)

Ms. Tereese M. Connerton
Connerton, Ray & Simon
1920 L Street, N.W.
Fourth Floor
Washington, D.C. 20036-5004

Dear Ms. Connerton:

This is in response to your request for an advisory opinion on behalf of The American Federation of Government Employees (hereinafter, AFGE) regarding the AFGE Dental Trust Fund (hereinafter, the Fund). Specifically, you ask whether certain proposed changes to the Fund would cause the Fund to be considered an "employee welfare benefit plan" within the meaning of section 3(1) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), but not a "multiple employer welfare arrangement" (hereinafter, MEWA), as defined in section 3(40) of Title I of ERISA.

Your correspondence and the accompanying materials contain the following facts and representations. You represent that AFGE, which is affiliated with the American Federation of Labor and Congress of Industrial Organizations, is a labor organization that represents its members in dealing with their employers concerning working conditions and other employment matters. AFGE's Constitution and Rules, which you have submitted, provide that AFGE's members, through elections, participate in the governance and activities of AFGE. The Constitution and Rules of AFGE further set forth the following qualifications for membership in AFGE:

All employees of the United States Government and any of its instrumentalities of whatever nature, including military personnel of the armed forces, and of the District of Columbia, and all other persons providing their personal services indirectly to the United States Government are eligible for membership in this Federation.

AFGE Constitution and Rules, Art. III, §1(b).

You represent that AFGE is organized, at least in part, to establish and maintain welfare arrangements, such as the Fund, for its members and their dependents. You further represent that the Fund was established by AFGE on December 22, 1971, and operates pursuant to a Trust Agreement that was restated effective June 30, 1987.¹ The Trust is intended to meet the requirements of section 501(c)(9) of the Internal Revenue Code (hereinafter, the Code) and is administered by a board of trustees (hereinafter, the Board) consisting of nine trustees, three of whom are appointed by AFGE's national executive council and six of whom are appointed by any AFGE local unions whose members participate in the Trust. The Trust receives no employer contributions and is funded solely through

¹ You represent that the Fund offers an indemnity-type dental program (hereinafter, Plan 400) and a prepaid closed panel dental program (hereinafter, Plan 500). Plan 400 allows participants and their eligible dependents to select any dentist and reimburses the individual who receives dental services for any services covered. Plan 500 selects a dental provider whose services are available to participants and their eligible dependents without cost or at reduced cost.

contributions made by participating AFGE members. You state that, since its establishment by AFGE, participation in the Fund has grown to approximately 5,300 individuals. At present, eligibility to participate in the Fund is open to all AFGE members and to employees of AFGE.

You represent, in correspondence dated May 18, 1994, that the Board proposes to amend the documents governing the Fund to limit eligibility to participate in the Fund. Specifically, you represent that, pursuant to the proposed amendments, the Fund will be available only to individuals who are AFGE members and employees of the Federal government² (including, specifically, employees of "non-affiliated fund instrumentalities" of the Federal government (hereinafter, NAFIs))³ and to their dependents. The Board proposes through these amendments to prohibit any other members of AFGE and all individuals employed by AFGE from participating in the Fund.⁴

You ask whether the Fund, if it is amended to operate as you describe, would constitute an "employee welfare benefit plan" within the meaning of section 3(1) of ERISA. Also, you ask whether the Fund, if so amended, would be a MEWA within the meaning of section 3(40) of ERISA.

Section 3(1) of Title I of ERISA defines the term "employee welfare benefit plan," in pertinent part, as:

any plan, fund, or program which was . . . established or maintained . . . by an employee organization, . . . 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] accident. . . .⁵

² Except with regard to NAFIs, you make no specific representations about the agencies or instrumentalities of the Federal government employing the individuals who will be eligible to participate in the Fund after its amendment. Because your submission provides no specific information concerning this issue and in view of the diversity of methods used by the Federal government to fulfill its governmental functions, we assume solely for the purposes of this opinion, but without expressing any views thereon, that the employer of all individuals eligible to participate in the Fund after adoption of the proposed amendments, in fact, will be "the Government of the United States" or its "agencies or instrumentalities" as the latter term is used in Title I of ERISA. We base the conclusions expressed in this opinion on this assumption, and different conclusions may be appropriate if it is shown not to be reliable.

³ You represent that, pursuant to Federal statute, NAFIs generate revenues through activities in support of armed forces personnel and that their revenue is accounted for separately from the general revenues of the Federal government, that such NAFIs are Federal government instrumentalities pursuant to Federal statute, and that employees of NAFIs are considered to be Federal government employees for most purposes. See 5 U.S.C. §2105(c).

⁴ You have not presented, and we have not reviewed, any specific documents through which the Board proposes to achieve the amended limits on participation in the Fund that you describe.

⁵ Inasmuch as the proposed Fund amendments you describe would prohibit AFGE employees from participating in the Fund and inasmuch as these employees are the sole current category of participants other than AFGE members, there is no basis for considering any employer of Fund participants to be involved in maintenance of the Fund in its proposed form. We therefore address only that portion of the "employee welfare benefit plan" definition that refers to an "employee organization."

The Fund provides dental benefits, which are a type of medical or health benefit included in section 3(1) of Title I of ERISA. However, in order to be an "employee welfare benefit plan," within the meaning of ERISA section 3(1), the Fund must not only provide benefits described in that section, but must also have been established or maintained by an employee organization within the meaning of section 3(4) of Title I of ERISA.

Section 3(4) of Title I of ERISA defines the term "employee organization," in pertinent part, as:

any labor union or any organization . . . 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. . . .⁶

As specified in section 3(4), the term "employee organization" includes a labor union in which employees participate that deals with employers on behalf of its membership. A labor union's dealings with employers on behalf of its participating members must relate to either an employee benefit plan or to "other matters incidental to employment relationships." Based on your representations and on the documents that you have submitted, it appears that AFGE members participate in AFGE by voting in AFGE elections and that AFGE, as its members' bargaining agent, deals with primarily the Federal government as its members' employer concerning matters incidental to their employment. Accordingly, the Department concludes that AFGE is a "labor union" within the meaning of the "employee organization" definition in section 3(4) of ERISA.⁷ Because the Fund, according to amended provisions under which you propose that it will operate, is established and maintained by an "employee organization" and otherwise meets the definition in ERISA section 3(1), we conclude that the Fund is an "employee welfare benefit plan" within the meaning of ERISA Title I.

With regard to your second question concerning the Fund's proposed amended form, which concerns its status as a MEWA, section 3(40) of ERISA defines the term "multiple employer welfare arrangement" (MEWA), in pertinent part, as follows:

an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in . . . [section 3(1)] to the employees of two or more employers. . . .

Under our assumptions as to the nature of the employment relationships in issue here, participation in the Fund would be limited, in its amended form, to employees of a single employer. Accordingly, based on our understanding of the Fund's proposed operation, as amended, the Fund would not then constitute a MEWA. Nevertheless, as discussed above, the Fund would constitute an "employee welfare benefit plan" within the meaning of ERISA section 3(1).

This letter constitutes an advisory opinion under ERISA Procedure 76-1 and, accordingly, is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

⁶ The term "employees' beneficiary association," which is another type of "employee organization" within the meaning of ERISA section 3(4), does not appear relevant to the facts you present.

⁷ In addition, we note that ERISA Opinion 86-16A characterized AFGE as an "employee organization" within the meaning of ERISA section 3(4).

Sincerely,

ROBERT J. DOYLE
Director of Interpretations and Regulations