

U.S. Department of Labor

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



95-07A
ERISA SECTION 3(33), 4(b)(2)

Mr. Gair Petrie
Paine, Hamblen, Coffin, Brooke & Miller
Suite 1200, Washington Trust Financial Center
717 West Sprague Avenue
Spokane, Washington 99204-0464

Dear Mr. Petrie:

This is in reply to your correspondence on behalf of Providence Services (hereinafter, Services), which is an institution of St. Ignatius Province of the Sisters of Providence. Your correspondence concerns applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to the Providence Services Pension Plan (hereinafter, the Plan).¹ Specifically, you request an advisory opinion from the Department of Labor concluding that the Plan is a church plan or plans within the meaning of section 3(33) of Title I of ERISA.

Your correspondence and the accompanying documents contain the following facts and representations. The Sisters of Providence (hereinafter, the Order) is a religious congregation of women established according to the tenets of the Roman Catholic Church (hereinafter, the Church). The Order's members in the United States are subdivided into three provinces based on their geographic locations; all members of each province are also members of the Order.

Your request is specifically concerned with the Order's St. Ignatius Province (hereinafter, the Province). The Province is governed by a provincial council (hereinafter, the Province's governing body) that consists of five provincial councillors led by one among them who is a provincial superior, all of whom are members of both the Order and the Province.

The main activities of the Province in furtherance of its mission within the Church are caring for the sick and providing for education in a religious school environment. The Province has been organized as a nonprofit corporation and has, in turn, established various medical care and educational institutions. Currently, two unincorporated divisions (i.e., Administration and Mt. St. Joseph's Convent (hereinafter, the Convent), which serves ill or retired sisters) and ten separately incorporated nonprofit institutions are among the Province's institutions in Montana and Washington.²

You state that the Province's nonprofit corporations, with one exception, were incorporated prior to 1992. In 1992, the Province generally restructured and, in some cases, also renamed its institutions, adding one newly incorporated nonprofit institution.

¹ Before 1992, the Plan was known as the Sisters of Providence, St. Ignatius Province Retirement Plan.

² You also mention two other Province institutions, namely, the College of Great Falls and the Dominican Network, which controls four nonprofit corporations and one for-profit corporation. You further indicate that those seven employers have no employees participating in the Plan that is the subject of your request for an opinion.

Before 1992, the Province exercised its supervisory authority over four of its nonprofit institutions in Montana through the Sisters of Charity of Providence in Montana (hereinafter, the Sisters in Montana).³ Further, before 1992, the Province exercised its supervisory authority over Administration and St. Joseph Care Center through the Sisters of Charity of Providence in Eastern Washington (hereinafter, the Sisters in Eastern Washington). Also, before 1992, the Province exercised its supervisory authority directly over two other of its nonprofit institutions: Sacred Heart Medical Center (hereinafter, Hospital A) and St. Mary Medical Center. Finally, from 1991 until the restructuring that occurred in 1992 (described below), the Province supervised Caritas Services through Hospital A.

As part of the restructuring of the Province's nonprofit corporations in 1992, the Province organized Services as a Washington, nonprofit membership corporation to assume the Province's supervisory responsibilities over its nonprofit corporations.⁴ The Province controls Services because the members of the Province's governing body serve as the sole corporate members of Services and because, as the sole corporate members of Services, the Province's governing body appoints and may remove certain officials of Services (i.e., the members of its board of directors (hereinafter, the Services Board), its president, and its chief executive officer).

Through Services, the Province now supervises six nonprofit corporations (i.e., five medical care facilities and a center for family and child care (hereinafter, the Centers)). Hospital A in Spokane and St. Mary Medical Center in Walla Walla are the Province's Centers in Washington; Columbus Hospital Corporation and St. Thomas Child and Family Center in Great Falls, St. Joseph Hospital Corporation in Polson, and St. Patrick Hospital Corporation (hereinafter, Hospital B) in Missoula are the Province's Centers in Montana.

Your submission indicates that the Centers are subordinate to the Province through Services because Services, which is supervised by the Province (as described above), is the sole corporate member of each of the Centers. Further, as the sole corporate member of each of the Centers, Services controls the Centers in all the following ways: it must approve any amendment or repeal of each Center's bylaws and articles of incorporation; it fixes the number of directors on each Center's board of directors; it must approve a slate of directors for election to each of those boards; it may remove, with or without cause, any directors on a Center's board of directors; and it appoints and may remove, with or without cause, a chief executive officer for each Center.

In addition, the Province through Hospital A, which (as discussed above) is supervised by the Province through Services, supervises two nursing homes (hereinafter, the Nursing Homes). Those Nursing Homes, which are St. Joseph Care Center and St. Brendan's Continuing Care Center, are located in Spokane, Washington.⁵ Your

³ The entities supervised by the Province through the Sisters in Montana were, in 1991, Columbus Hospital Corporation, St. Patrick Hospital Corporation, St. Thomas Child and Family Center, and St. Joseph Hospital.

Since the Province's restructuring of its institutions in 1992, the Sisters in Montana neither employs any individuals nor supervises any institutions of the Province. Nevertheless, the board of directors of the Sisters of Montana remains under the control of the Province's governing body.

⁴ Through Services, the Province now also supervises the College of Great Falls and the Dominican Network (mentioned in footnote 2 above).

⁵ As part of the Province's 1992 restructuring of its nonprofit corporations, the Sisters in Eastern Washington (described above) was renamed St. Joseph Care Center. Further, on May 3, 1991, Hospital A acquired Caritas Services which, at that time, operated St. Brendan's Nursing Home (now St. Brendan's Continuing Care Center). In June 1994, St. Joseph Care Center changed its name to "St. Joseph, a Washington nonprofit corporation" and now operates St. Joseph Care Center and St. Brendan's Continuing Care Center. Caritas now operates outpatient

representations indicate that the Nursing Homes are subordinate to the Province through Hospital A because Hospital A is the sole corporate member of each of the Nursing Homes.⁶ Further, you represent that, as the sole corporate member of each of the Nursing Homes, Hospital A controls the Nursing Homes, on behalf of the Province, because it must approve a slate of directors for election to each Nursing Home's board of directors, and it appoints the chief executive officer for each of the Nursing Homes. However, you also represent that the Province retains the right to amend or repeal the bylaws and articles of incorporation for either of the Nursing Homes, and the Province fixes the number of directors on each Nursing Home's board of directors.

You also identify two institutions involved with the Province's provision of medical care. They are Whitman Community Hospital (hereinafter, Whitman Hospital) in Colfax, Washington, and Mednet in Missoula, Montana.

Whitman Hospital is a medical facility that the Province managed and operated from 1965 through 1988, pursuant to an agreement between the Province and Whitman County Hospital Association. In 1988, the Province donated Whitman Hospital to Whitman County, Washington, and a public hospital district, which you indicate is an agency of the State of Washington, now operates Whitman Hospital.⁷

Mednet offers long distance communications services to customers in Missoula, Montana, and supplies communications equipment and services to that area's medical providers. Mednet is a for-profit partnership that includes an institution of the Province as a partner.⁸ The 50 percent partner in Mednet since 1991 has been Hospital B, which is among the consumers of Mednet's equipment and services and (as discussed above) is controlled by the Province through Services.

The Order and its Province, Convent, Services, the Centers, and the Nursing Homes are listed in the The Official Catholic Directory (P.J. Kenedy & Sons, 1992) (hereinafter, the Directory).⁹ Accordingly, the group tax exemption letter issued to the United States Catholic Conference by the Internal Revenue Service (hereinafter, IRS) pursuant to section 501(c)(3) of the Internal Revenue Code (hereinafter, the Code) appears to include the Nursing Homes, the Centers, Services, the Order, the Province, and the Convent, which (as noted above) is one of two unincorporated

radiology for Hospital A and has no employees. Although your representations indicate that the articles of incorporation and bylaws for St. Brendan's Continuing Care Center are substantially the same as those for St. Joseph's Care Center, your submission included no bylaws or articles of incorporation for St. Brendan's Continuing Care Center. Accordingly, the views expressed in this opinion are contingent on bylaws and articles of incorporation for St. Brendan's Continuing Care Center being as you represent them. If those documents are other than as represented in your correspondence, we may wish to reconsider this opinion.

⁶ Our assumptions concerning the control exercised by the Province over St. Brendan's while St. Brendan's was operated by Caritas Services are based solely on your representation that the Province through Hospital A controlled Caritas Services in the same manner as the Province through Hospital A controls St. Joseph Care Center.

⁷ You have not requested, and this advisory opinion is not intended to express, any views concerning applicability of the "governmental plan" definition in section 3(32) of Title I of ERISA to any benefit arrangements for employees of Whitman Hospital.

⁸ Prior to 1991, a wholly-owned, for-profit subsidiary of the Sisters in Montana was a 50 percent owner and managing partner of Mednet.

⁹ The Directory listing in the case of St. Brendan's Continuing Care Center is for St. Brendan's Nursing Home, which (as explained above) is a name formerly used by that Care Center.

divisions of the Province. We further assume for purposes of this opinion that Administration, which is the Province's other unincorporated division, shares in the Province's tax exempt status.

The Province, Convent, Services, the Centers, the Nursing Homes, Whitman Hospital, and Mednet have employees. Their eligible employees participate in the Plan, which is a defined benefit pension plan that was established by the Province in participants are employed by Whitman Hospital and 10 are employed by Mednet.

The Plan is administered by a Trust Committee (hereinafter, the Committee). The members of the Committee consist of the chief executive officer of Services, whose appointment is controlled by the Province, and the chief executive officer or the administrator of each employer whose employees participate in the Plan. It also appears that, in addition to controlling the appointment of its own chief executive or administrator, the Province, either directly or (as described above) through Services or Hospital A, controls the appointments of the chief executive officer and administrator of each of the following institutions whose employees participate in the Plan: Convent, Services, the Centers, and the Nursing Homes. It further appears that the chief executives or administrators whose appointments the Province controls constitute a majority of members of the Committee. You also represent that the Committee's sole purpose is administration of the Plan.

Your submission includes a copy of the private letter ruling that IRS issued to the Plan on July 20, 1993, concluding that the Plan is a church plan within the meaning of section 414(e) of the Code and has been a church plan since September 2, 1974.¹⁰ Further, it appears from your submission of a settlement dated June 16, 1992, between the Plan and the Pension Benefit Guaranty Corporation that the Plan has made no election under section 410(d) of the Code to be covered by Title II of ERISA.¹¹

Your request for an advisory opinion regarding "church plan" status involves application of the provisions of sections 4(b)(2) and 3(33) of Title I of ERISA to the facts presented. Section 4(b)(2) of ERISA excludes from coverage under Title I of ERISA any plan that is a church plan as defined in section 3(33) of ERISA. The term "church plan" is defined in section 3(33) of ERISA, in pertinent part, as:

a plan established and maintained (to the extent required in clause (ii) of subparagraph (B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1986.

(B) The term "church plan" does not include a plan --

(i) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513 of the Internal Revenue Code of 1986), or

¹⁰ We note that IRS also issued a favorable private letter ruling on May 2, 1991, concerning the Plan's "church plan" status. The earlier IRS letter was based on the Province's institutions prior to 1991 and on the committee's structure prior to 1991. The 1991 private letter ruling issued by IRS did not describe Services, Caritas Services, or the four Centers in Montana; however, it did describe the Sisters in Eastern Washington and the Sisters in Montana.

¹¹ Section 4(b)(2) of ERISA excludes from Title I coverage church plans as defined in section 3(33) of Title of ERISA, excepting only those plans that have made the Code section 410(d) election.

(ii) if less than substantially all of the individuals included in the plan are individuals described in subparagraph (A) or in clause (ii) of subparagraph (C) (or their beneficiaries).

(C) For purposes of this paragraph --

(i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

(ii) The term employee of a church or a convention or association of churches includes --

(II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of the Internal Revenue Code of 1986 and which is controlled by or associated with a church or a convention or association of churches; . . .

(iii) A church or a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1986 shall be deemed the employer of any individual included as an employee under clause (ii).

(iv) An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.

It appears that the Order and the Order's Province are integral parts of the Church by virtue of the health care and religious education ministries they perform. Furthermore, the Order and the Province are exempt from tax pursuant to section 501(c)(3) of the Code, are controlled by the Church, and are "associated with" the Church within the meaning of section 3(33)(C)(iv) of Title I of ERISA because the Order and Province clearly share common religious bonds and convictions with the Church.

Based on your representations, we also conclude that the Church through the Order and the Province controls Administration, Convent, Services, the Centers, and the Nursing Homes. First, the Church controls Administration and Convent through the Province because, as unincorporated divisions of the Province, they are directly supervised by the Province's governing body. Second, the Church through the Province controls Services, which is a civil law corporation, because the members of the Province's governing body serve as the sole corporate members of Services, appoint and may remove the directors on the Services Board, and appoint the president and the chief executive officer of Services. Third, the Church through the Province and Services controls the Centers, which are civil law corporations, because Services, which (as described above) is controlled by the Province, serves as the sole corporate member of each Center and, thus Services controls the Centers in all of the following ways: by approving any amendment or repeal of each Center's bylaws and articles of incorporation; by fixing the number of directors on each Center's board of directors; by approving a slate of directors for election to each of those boards; by removing any directors on each Center's board of directors, with or without cause; and by appointing and removing, with or without cause, the chief executive officer of each Center. Finally, the Church through the Province and Hospital A controls the Nursing Homes, which are civil law corporations. The Nursing Homes are controlled through Hospital A, which (as described above) is controlled by the Province through Services, because, as the sole corporate member of each Nursing Home, it controls each Nursing Home in all the following ways: by approving a slate of directors for election to each Nursing Home's board of directors and appointing the chief executive officer for each of the

Nursing Homes. Also, the Nursing Homes are controlled through the Province because it retains the right to amend or repeal the bylaws and articles of incorporation for either of the Nursing Homes, and the Province fixes the number of directors on each Nursing Home's board of directors.

In addition, Administration, Convent, Services, the Centers, and the Nursing Homes are "associated with" the Church, within the meaning of section 3(33)(C)(iv) because of factors that assure that they adhere to the tenets and teachings of the Church and thus evidence that they share common religious bonds and convictions with the Church. Those factors include the Church's control of Administration, Convent, Services, the Centers, and the Nursing Homes through the Province (as discussed above); Directory listings applicable to the Province, Convent, Services, the Centers, and the Nursing Homes; and participation by members of the Province as the corporate members of Services. Also, because of the applicable Directory listings and the corresponding group exemption that IRS granted to the Church, it appears that Convent, Administration, Services, the Centers, the Nursing Homes are exempt from tax within the meaning of section 501(c)(3) of the Code.

Accordingly, it is the view of the Department that individuals whose employment is with the Province, Convent, Services, the Centers, or the Nursing Homes are employees of organizations that are civil law corporations exempt from tax pursuant to section 501(c)(3) of the Code and that are controlled by, or associated with, the Church within the meaning of section 3(33)(C)(ii)(II) of Title I of ERISA.¹² In accordance with section 3(33)(C)(iii) of Title I of ERISA, the Church is deemed the employer of these individuals for purposes of the church plan definition in section 3(33); and the Church, as employer, is deemed to have established and to maintain the Plan that is the subject of this opinion.

In addition to the above reason for concluding that the Plan meets the church plan definition in section 3(33), the Plan may be considered a church plan by operation of section 3(33)(C)(i) of Title I of ERISA because the Committee's administration of the Plan further assures that the Church is deemed to maintain the Plan. The principal purpose or function of the Committee is administration of the Plan for the provision of employee retirement benefits. It appears that the Committee is controlled by the Church through the Province because the Committee is controlled by a majority of its members (i.e., the chief executive officers or administrators of Services, Convent, the Centers, and the Nursing Homes), whose appointments are controlled by the Province directly or through nonprofit corporations that Services or Hospital A controls on behalf of the Province (as described above). Furthermore, because the Church's control of the Committee through the Province assures that the Committee adheres to the tenets and teachings of the Church, it evidences that the Committee shares common religious bonds and convictions with the Church. Consequently, the Committee is "associated with" the Church within the meaning of section 3(33)(C)(iv) of Title I of ERISA.

Finally, we considered issues raised by the inclusion of 104 employees of Whitman Hospital and 10 employees of Mednet in the Plan. It appears that participation in the Plan by those 114 individuals, compared with approximately 5,200 individuals you indicate are Plan participants, does not exclude the Plan from the section 3(33) "church plan" definition by operation of sections 3(33)(B)(i) or (ii) of Title I of ERISA.

For the above reasons and based on your representations, it is the Department's opinion that the Plan constitutes a church plan or plans within the meaning of section 3(33)(A) of Title I of ERISA by operation of ERISA section 3(33)(C)(iii). In addition, ERISA section 3(33)(C)(i) appears to describe the Plan. Because church plans described in section 3(33) of Title I of ERISA are excluded from the requirements of Title I of ERISA pursuant to section 4(b)(2) thereof, the Plan is not required to comply with the provisions of Title I of ERISA as administered by the Department.

¹² The status of individuals whose employment is with Whitman Hospital and Mednet is discussed below.

As noted above, it appears that the Plan has not made any election pursuant to Code section 410(d) in favor of ERISA coverage. Nevertheless, we believe that sharing the Department's views concerning the effect of such election may assist you. It is the Department's understanding that an election pursuant to Code section 410(d), as referenced in ERISA section 4(b)(2), is available for purposes of Title I of ERISA only to a pension benefit arrangement. Further, it is the Department's view that an election under Code section 410(d) will be effective to render a pension benefit arrangement subject to Title I of ERISA only if it is made by a pension benefit arrangement that is both a "church plan," as defined in Code section 414(e) and section 3(33) of Title I of ERISA, and an "employee pension benefit plan" within the meaning of section 3(2) of Title I of ERISA. A pension benefit arrangement, such as the Plan discussed herein, will constitute an employee pension benefit plan within the meaning of ERISA section 3(2) only if all elements of that definition are met. In this context, it should be noted that not all employer groups or associations meet the definition of an "employer" in ERISA section 3(5). See, for example, ERISA Advisory Opinion 83-21A.

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.

This letter relates solely to application of the provisions of Title I of ERISA and, therefore, is not determinative of any particular tax treatment under the Code.

Sincerely,

ROBERT J. DOYLE
Director of Regulations and Interpretations