

U.S. Department of Labor

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



September 30, 1996

96-21A
ERISA SEC. 3(32)

Mr. Dennis E. Valentine
Brauer, Buescher, Valentine, Goldhammer & Kelman, P.C.
1563 Gaylord Street
Denver, Colorado 80206

Re: City of Aurora Employees' Health Fund

Dear Mr. Valentine:

This is in reply to your request for an advisory opinion on behalf of the City of Aurora Employees' Health Fund (the "Fund"). You ask whether the Fund is excluded from Title I of the Employee Retirement Income Security Act of 1974 ("ERISA") as a governmental plan within the meaning of ERISA section 3(32).

You represent that the Fund was established in 1978 by a group of individuals employed by the City as a means of providing health insurance benefits for active and retired City employees and their dependents.¹ The Fund is administered by a board of trustees, of whom two are appointed by the City manager, two are appointed by each of two employee organizations (Local 1290 of the International Association of Fire Fighters, which represents Aurora firefighters and the Aurora Police Association, which represents Aurora police officers), and one is elected by certain other City employees (career service employees, excluding firefighters, police officers, elected officials, and employees appointed by the City Council or City manager)² See Agreement and Declaration of Trust Establishing The City of Aurora, Colorado Employees' Health Fund.

The Fund currently covers about 823 active and 118 retired employees of the City of Aurora ("City" or "Aurora"), including firefighters and police officers employed by the fire and police departments of the City and certain elected officials of the City, together with their dependents.³ The Fund also covers 22 employees of the E-470 Public Highway Authority ("E-470 Authority") and three employees of the Aurora Employees' Retirement Board ("Retirement Board"). The City and the Retirement Board contribute the entire cost of individual coverage (\$152) and \$356 of the total premium of \$378 for family coverage for active employees. The E-470 Authority pays the total cost of coverage for its employees. Retired employees pay the entire cost of coverage.

¹ The individuals who comprised the first board of trustees were appointed as follows: one by the Aurora Police Association, one by Local 1290, International Association of Fire Fighters, one by the American Federation of State, County, and Municipal Employees, and two by the City manager.

² This election procedure replaces the appointment of one trustee by the American Federation of State, County, and Municipal Employees (AFSCME), which until this year represented certain City employees who participated in the Fund under an informal arrangement with the City.

³ City employees may select coverage under the Fund or two other providers of coverage.

You represent the following with respect to the three employers⁴ participating in the Fund:

1. The City of Aurora is a political subdivision of the State of Colorado.
2. The E-470 Authority is designated by State law as a political subdivision of the State. The E-470 Authority was created as of January 13, 1988, by three Colorado counties⁵ by their executing an Establishing Contract for the E-470 Public Highway Authority ("Establishing Contract") pursuant to the State Public Highway Authority Law. Colorado Revised Statutes (Colo. Rev. Stat.), Title 43, Article 4, part 5. This law authorizes the establishment of regional authorities to finance, build, and operate transportation improvements involving more than one municipality or county. Colo. Rev. Stat. § 43-4-503. The E-470 Authority is governed by a board of directors. Each participating county or municipality has the right to appoint (or remove at any time) one director to the board, who must be an elected official of the legislative or governing body of such county or municipality. The E-470 Authority is empowered to issue bonds, establish fees and tolls without supervision or regulation, and, with certain limitations, exercise the power of eminent domain. The Establishing Contract will remain in effect until January 1, 2028, unless earlier terminated by unanimous agreement of all member counties or municipalities or by a vote of at least two-thirds of all directors.⁶
3. The Retirement Board manages the City of Aurora General Employees' Retirement Plan (Retirement Plan). The Retirement Board was established by the City Council of Aurora pursuant to City Ordinance and has the authority to determine eligibility for membership and benefits, administer the Retirement Plan, and supervise the investment of funds. The Retirement Plan covers all City employees except police officers, firefighters, temporary employees and certain individuals appointed by the City Council, and is funded by contributions from the City and participants. Aurora City Ordinance, Articles III and X.

The Retirement Board's seven voting trustees are elected or appointed in the following manner: three are elected by City employees from among plan participants; three are appointed by the City Council from among City residents; and the seventh is appointed by the six other voting trustees. In addition, the City manager, director of human resources and director of finance are nonvoting members of the Retirement Board by virtue of their office. All members of the Retirement Board serve without compensation, except for reimbursement of expenses. The Retirement Board appoints a plan administrator as chief staff officer and may appoint support staff.⁷ Salaries of the Retirement Board's employees are paid from the Retirement Plan. Because the Retirement Plan is considered to be a

⁴ Section 1.08 of the Restated Rules and Regulations of the City of Aurora, Colorado Employees' Health Fund defines the term "employer" to mean the City of Aurora and any employers which are approved by the board of trustees pursuant to guidelines established by the board of trustees. The written guidelines provide that participating employers must have a close and direct relationship with the City. The only entities approved for participation with the City are the E-470 Authority and the Retirement Board.

⁵ You represent that the cities of Aurora, Brighton, Thornton, and Commerce City and the town of Parker, all political subdivisions of the State, have since joined as parties to the Establishing Contract.

⁶ The board meets at least monthly, after providing advance notice of such meetings to the clerk of each member county or municipality. Two committees established by the board consist of individuals elected by the member counties or municipalities.

⁷ Employees of the Retirement Board participate in the same life insurance and dental programs as do City employees, and certain of their benefits, holidays, sick and vacation leave are similar to those of City employees.

component unit of the City, information on the Retirement Plan's annual audit is included in the City of Aurora's Annual Financial Report.

ERISA section 4(b)(1) provides that Title I of ERISA does not apply to "governmental plans" as defined in ERISA section 3(32). ERISA section 3(32) defines the term "governmental plan," in pertinent part, as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof" or by any of their "agenc[ies] or instrumentalit[ies]."

The facts and representations contained in your letter and accompanying documents establish that the City of Aurora is a political subdivision of the State of Colorado and that the E-470 Authority and the Retirement Board are political subdivisions or agencies or instrumentalities within the meaning of ERISA section 3(32); that such governmental entities contribute most of the cost of coverage under the Fund; that the City manager appoints two of the five trustees of the Fund; and that participation in the Fund is limited to current or retired employees (and their dependents) of each of the contributing governmental entities. Consequently, it is the view of the Department of Labor that the Fund was established and is maintained by the City of Aurora, the E-470 Authority, and the Retirement Board for their respective employees and the Fund constitutes a governmental plan within the meaning of ERISA section 3(32) and thus is not subject to the provisions of Title I of ERISA pursuant to ERISA section 4(b)(1). It should be noted, however, that to the extent participation in the Fund is extended to include employees or former employees of employers other than the City of Aurora, the E-470 Authority, and the Retirement Board, the Department's position concerning the status of the Fund as a governmental plan may be affected.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Section 10 of that Procedure explains the effect of advisory opinions. This letter relates solely to the application of the provisions of Title I of ERISA and is not determinative of any particular tax treatment under the Internal Revenue Code.

Sincerely,

Susan G. Lahne
Chief, Division of Coverage
Office of Regulations and Interpretations