

U.S. Department of Labor

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



January 6, 1997

97-02A
ERISA SEC. 3(32), 4(b)(1)

Mr. Russell A. Hollrah
Littler, Mendelson, Fastiff, Tichy & Mathiason
1225 "I" Street, N.W., Suite 1000
Washington, D.C. 20005

RE: California State University, Hayward Foundation
Identification: A00493
Request for Advisory Opinion

Mr. Hollrah:

This responds to your request for an advisory opinion as to the application of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to benefit arrangements that the California State University, Hayward Foundation, Inc. (the "Foundation") desires to make for its employees. Specifically, you inquire whether the Foundation may contract with the California Public Employees' Retirement System (CalPERS) to provide for the participation of its employees as members without affecting the status of CalPERS as a governmental plan under section 3(32) of ERISA.

You represent that the Foundation is a nonprofit public benefit corporation, organized under the Nonprofit Public Benefit Corporation Law of California. The Foundation operates a bookstore and vends food for the benefit of the California State University, Hayward. The Foundation also solicits and manages research grants, gifts and donations; manages the fiscal aspects of certain campus projects and instructional activities; and invests endowment accounts. The Foundation receives no profits and when it terminates, its net assets will be irrevocably dedicated to a charitable purpose selected and approved by the President of California State University, Hayward and the Board of Trustees of the California State University. Presently the Foundation operates on property leased to it by the California State University, Hayward, which it cannot encumber and for which it pays no rent.

You also represent that the Foundation is an "auxiliary organization" under California law¹ and, as such, is an agent² whose obligations, if approved by the Trustees of the California State University, become the obligations of the State of California.³ You further represent that the Chancellor and the President of the University are charged by

¹ Cal. Gov't Code § 89901(a), (b) & (c).

² Cal. Gov't Code § 20009.1(b) provides that public agency includes "[a]ny auxiliary organization operating pursuant to Chapter 7 (commencing with Section 89900) of Part 55 of the Education Code and in conformity with regulations adopted by the Trustees of the California State University" Section 89901 defines the term auxiliary organization to include "[a]ny entity which operates a commercial service for the benefit of a campus of the California state University on a campus or other property of the California State University." See also §89901(d)(1)&(2)

³ Cal. Gov't Code § 89911.

law with ascertaining that the obligations of "auxiliary organizations" conform to policies or regulations established by the Trustees of the California State University.⁴

You also represent that the Foundation is governed by an eleven-member Board of Directors (the "board") comprised of the President of the University and the chief fiscal officer of the University, acting ex officio; three students who serve by virtue of their involvement in student government;⁵ three full-time faculty members who are elected by other faculty members; one person from off-campus who is neither an employee of nor a student at the California State University, Hayward, who is selected by the President; and two University administrators also selected by the President. Thus, a majority of the Board is controlled, either through appointment or employment, by the President of the California State University, Hayward. You also represent that the Board has the power and duty, inter alia, to manage the business of the Foundation consistent with the laws of the State of California, Cal. Gov't Code § 89900 (b) & (c), including the power to appoint and to remove Foundation employees.

CalPERS is a state-run system providing retirement income and death benefits to public employees or their beneficiaries within the State of California.⁶ See Cal. Gov't Code §§ 20001, 20002; see generally id. §§ 20000 - 21763. CalPERS is also charged, under the Public Employees' Medical and Hospital Care Act,⁷ with approving health benefits for state employees.⁸ CalPERS is administered by a board consisting of representatives of the State Personnel Board, the Governor of California, and employee-members of the system. Id. §§ 20100 - 20102.1. Employees of the State of California, of the county superintendent of schools, or of the University of California are required to participate in CalPERS. Id. §§ 20012(a), 20303. Any other political subdivision of California that is defined by statute as a "public agency" may choose either to contract with CalPERS for coverage of its employees or to adopt its own independent retirement plan.⁹

Section 4(b)(1) of ERISA exempts any "governmental plan" from coverage under Title I. Governmental plans are defined in ERISA section 3(32) as any 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 agency or instrumentality of any of the foregoing."

Based on your representations, the Department concludes that the Foundation is an "agency or instrumentality" of the State of California within the meaning of § 3(32) of ERISA, and that Foundation employees may therefore participate in CalPERS without affecting CalPERS status as a "governmental plan." We note that the Foundation's approved obligations become obligations of the State of California, Cal. Gov't Code § 89911; the Foundation's

⁴ Cal. Gov't Code § 89900(b) & (c).

⁵ One student director serves ex officio by virtue of his position as the President of the Associated Student Council, and the two other student Directors are selected by the Associated Student Council.

⁶ For purposes of this opinion, we assume, without examination, that CalPERS, as it is presently operated, constitutes a "governmental plan" under ERISA section 3(32). This opinion should not be taken as constituting a position of the Department of Labor on this issue.

⁷ Cal. Gov't Code §§ 22751-22860.

⁸ Id. § 22774.

⁹ Cal. Gov't Code § 20450. See also supra n.2 (establishing the Foundation as a public agency).

activities are largely controlled by the Trustees of the California State University through the University Chancellor or President, Cal. Gov't Code § 89900;¹⁰ and the Foundation's Bylaws ensure that a significant number of the Foundation's Board of Directors are chosen by the University President who is, in turn, accountable to the Trustees of the California State University.¹¹

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

Sincerely,

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

¹⁰ See Advisory Opinion 94-02A (February 14, 1994) (D.C. Bar is a governmental agency or instrumentality because "the D.C. Bar exists by virtue of rules promulgated by the D.C. Court" and also because the D.C. Bar exercises its authority under the "direction and control of the D.C. Court.").

¹¹ Cal. Gov't Code §§ 66600, 89901; See Advisory Opinion 95-21A (August 25, 1995) (entity was "controlled and supervised by trustees appointed and governed by the elected Commissioners of Franklin County, a political subdivision of the State").