

**U.S. Department of Labor**

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



February 12, 1997

97-05A  
ERISA SEC. 3(32)

Scott M. Lepak, Esq.  
Barna, Guzy & Steffen, Ltd.  
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Minneapolis, MN 55433-5894

Dear Mr. Lepak:

This is in reply to your request for an advisory opinion regarding the applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to the Sheriff's Youth Programs of Minnesota 403(b) Annuity Program (the Plan), which is a tax-sheltered annuity program that is tax-qualified under section 403(b) of the Internal Revenue Code (the Code). Specifically, you ask whether the Plan is a governmental plan within the meaning of ERISA section 3(32) and, therefore, is excluded from coverage under Title I by section 4(b) of ERISA. You also ask, in the alternative, whether the Plan operates within the "safe harbor" criteria of Department of Labor regulation 29 C.F.R. § 2510.3-2(f), which describes certain tax-sheltered annuity programs that do not constitute ERISA-covered plans.

You represent that the Sheriff's Youth Programs of Minnesota ("SYPOM") sponsors the Plan for its employees. According to your representations, the Plan provides for both employer and employee contributions, both of which are invested in annuity contracts issued by Northwestern Mutual Life Insurance Company. The Plan covers only employees of SYPOM.

Section 4(b)(1) of ERISA excludes governmental plans from coverage under Title I of ERISA. Section 3(32) of ERISA defines the term "governmental plan" to include "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 agency or instrumentality of any of the foregoing."

According to the information provided, the Plan was established and is maintained by SYPOM. It can be considered a "governmental plan," therefore, only if SYPOM is an agency or instrumentality of the Government of the United States or the government of a State, or a political subdivision thereof, within the meaning of section 3(32). The terms "agency" and "instrumentality" are not defined in ERISA; nor are there any regulations under ERISA that interpret those terms. The specific facts and circumstances of the relationship between a government and a particular employer must be examined to determine whether the employer is an "agency" or "instrumentality" of government for purposes of section 3(32).

Your submission contains the following additional facts and representations. SYPOM is a private, non-profit corporation organized under the Minnesota Non-Profit Corporation Act. See Minnesota Statutes, Chapter 317A. SYPOM's bylaws currently provide, effective as of 1996, that "voting membership" in SYPOM is open only to sheriffs, an office that, you have advised, is filled through public elections. To be a voting member in SYPOM, a duly-elected sheriff must pay an annual membership fee.<sup>1</sup> You have advised that a sheriff's decision whether to

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<sup>1</sup> In the past, anyone applying for membership who paid the annual membership fee could become a voting member.

become a voting member in SYPOM is entirely voluntary and unrelated to the duties imposed upon sheriffs under Minnesota law.

SYPOM, according to its bylaws, is controlled by a Board of Trustees (the SYPOM Board) consisting of 30 trustees, each elected by the voting members of SYPOM for a term of three years. At least 12 of the trustees must be sheriffs.<sup>2</sup> SYPOM's day-to-day operations are the responsibility of its executive director, who is appointed by the SYPOM Board for an indefinite term. The executive director is subject to ongoing oversight by SYPOM's executive committee, which is composed of members appointed by the SYPOM Board. A majority of the executive committee's members are sheriffs.

SYPOM provides treatment and care for youth whom the court system in Minnesota have deemed to be in need of protection. It undertakes to provide these services solely by contracting with county social service agencies that are responsible to the Minnesota courts. The contracts determine both the fees that SYPOM will receive and the duties and responsibilities that SYPOM will undertake.<sup>3</sup>

SYPOM is not directly funded through taxes or government bonds; over 95% of the revenues that SYPOM receives for operations, including salaries and benefits, come from payments by county social service agencies pursuant to contracts. You also represent that SYPOM's employees are considered private, rather than governmental, employees under various federal and state laws dealing with employment matters, including the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and workers compensation laws.

Based upon our review of the facts, representations, and documents that you provided, it is the view of the Department that SYPOM is not a governmental "agency or instrumentality." Rather than operating under the control of any governmental entity, it appears that SYPOM functions as an independent contractor to the county social service agencies for which it performs services. Further, although the voting members of SYPOM are all elected officials of the State of Minnesota, it appears that their participation in SYPOM is purely voluntary and not related to their responsibilities as public officials. We conclude that the Plan is not a governmental plan within the meaning of ERISA section 3(32) because it was established and is maintained by SYPOM, rather than any governmental entity. Accordingly, unless a provision other than the governmental plan exclusion in ERISA section 4(b)(1) excludes the Plan from coverage under Title I of ERISA, the Plan must comply with all applicable requirements of that Title.

In correspondence with this office, you suggested that the Plan may meet the requirements of 29 C.F.R. § 2510.3-2(f), which identifies certain tax-sheltered annuities that do not constitute employee pension benefit plans. The regulation describes arrangements with respect to which the employer's involvement is so limited that it does not, in the Department's view, constitute the establishment or maintenance of the program by the employer.<sup>4</sup> However, we

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<sup>2</sup> You advise that the corporation's by-laws are currently being amended to gradually reduce the number of trustees from 30 to 15. It is not clear from the amendments, however, how many of those remaining 15 trustees must be sheriffs.

<sup>3</sup> One of the sample contracts you submitted specifically identified SYPOM as an "independent contractor" and stated that employees of SYPOM are not employees of the county that has contracted with SYPOM for its services.

<sup>4</sup> The term "employee pension benefit plan" is defined in section 3(2) of Title I of ERISA to include "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or an employee organization, or by both . . . ."

note that you have represented that SYPOM makes employer contributions to the annuity program on behalf of its employees. On that basis, we have determined that the annuity program does not meet the criterion set forth in regulation section 2510.3-2(f)(3). Accordingly, we are unable to conclude that the Plan operates within the criteria established by the "safe harbor."

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