

U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216



Reply to the Attention of:
Pension and Welfare Benefit Programs

OPINION NO. 82-9A
Sec. 3(1), 403

FEB 1 1982

Ms. Marsha J. Murphy
Jolley, Moran, Walsh, Hager & Gordon
1300 Traders Bank Building
1125 Grand Avenue
Kansas City, Missouri 64106

Dear Ms. Murphy:

This is in reply to your letter of August 31, 1981, requesting an advisory opinion regarding applicability of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the Bricklayer's Union No. 4 Health and Welfare Fund (the Fund) is an employee welfare benefit plan under ERISA and, if so, how to properly terminate the Fund.

You advise that on February 12, 1971, the Fund was executed under a trust agreement between Bricklayer's Union No. 4 (the Union) and certain Kansas City employing contractors. Under the terms of the trust agreement, the Fund was to be jointly administered by three trustees selected by the Union and three trustees selected by employers participating in the Fund. The contractors agreed to contribute in accordance with collective bargaining agreements to the Fund. The Fund was to use the contributions to acquire group insurance to provide participating union members with accident, life, hospital, medical and surgical benefits. Between 1972 and 1974 collective bargaining agreements called for contributions to be made instead to the Kansas City Bricklayer's Employees' Welfare Fund so that by March 1974, no employers were contributing to the Fund. However, some individual Union members requested the Fund continue and permit them to continue their benefit coverage by paying the group insurance premiums themselves. As of your submission only 12 individuals were still contributing to the Fund and the Fund's trustees have decided the Fund is not worth the time and effort required for administration. Consequently the trustees voted to terminate the Fund and are considering how to handle approximately \$14,541 remaining in Fund assets.

Section 3(1) of ERISA defines the term "employee welfare benefit plan" to include:

... any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, 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, death ... or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

The Fund was established both by employers and by an employee organization. We assume, for purposes of this letter, (1) that the Fund continues to be operated in accordance with the trust agreement, a copy of which you submitted with your request, and (2) that, accordingly, the Fund continues to be administered by trustees appointed by, and subject to removal and replacement by, the Union and at least those employers who are signatories to the trust agreement. It is the opinion of the Department that, under those circumstances, the Union and at least those employers retain substantial control over the operations of the Fund and that, therefore, the Fund continues to be "maintained", for purposes of section 3(1) of ERISA, by those entities.

In your letter you present the position that the Fund is a program described in Department of Labor regulation 29 C.F.R. §2510.3-1(j). In regulation section 2510.3-1, the Department identified certain programs which would not constitute employee welfare benefit plans. Specifically, regulation section 2510.3-1(j) provides:

(j) Certain group or group-type insurance programs.

For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include a group or group-type insurance program offered by an insurer to employees or members of an employee organization, under which

- (1) no contributions are made by an employer or employee organization;
- (2) participation in the program is completely voluntary for employees or members;
- (3) the sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; and
- (4) the employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues checkoffs.

Regulation section 2510.3-1(j) describes certain insurance arrangements in which the involvement of the employer or employee organization is sufficiently minimal that it does not constitute establishment or maintenance of the arrangements for purposes of section 3(1) of ERISA. However, the functions of the Union and employers with respect to the Fund are not

limited to those described in paragraph (3) of the regulation; moreover, as we have concluded above, those functions do constitute maintenance of the Fund for purposes of section 3(1).

On the basis of the foregoing, the Department concludes that the Fund is an employee welfare benefit plan covered by title I of ERISA.

The above constitutes an advisory opinion under ERISA Procedure 76-1 (issued August 27, 1976, copy enclosed). Accordingly it is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

With respect to your questions on terminating the Fund we hope the following information will be of assistance. We note that the termination clause of the Declaration of Trust provides:

In the event that the obligation of the Employers to make employer payments shall terminate, or upon any liquidation of the Trust Fund for any reason, the Trustees shall continue to apply the Trust Fund to the purposes specified above and none other, and upon disbursement of the entire Trust Fund this Trust shall terminate.

In Article III, the Declaration of Trust provides that the Trustees will provide group life insurance, accident and health insurance, and insurance for medical, surgical and hospital benefits for employees and the spouses and children of employees. Article V of the Declaration provides, in part, that neither the Union nor any member thereof, nor any employee shall receive any payment from or on account of the Fund except in the form of benefits described in Article III and provided by insurance.

Section 403(c)(1) of ERISA provides in relevant part that, except as provided in subsection (d) of section 403 and certain other provisions not here relevant, the assets of a plan shall not inure to the benefit of an employer. Section 403(d)(2) of ERISA provides that the assets of a welfare plan which terminates shall be distributed in accordance with the terms of the plan, except as otherwise provided in regulations of the Secretary of Labor. To date, there are no regulations under section 403(d)(2).

Accordingly, a welfare plan's assets should be disbursed, in connection with its termination, in a manner that is consistent with the plan provisions dealing with termination and the stated purposes of the plan.

Sincerely,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs

Enclosure