

U.S. Department of Labor

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



Reply to the Attention of:
Dan O'Neil
(202) 523-8368

OPINION NO. 82-42A
Sec. 3(21)(A)(i) * (iii)

AUG 16 1982

James G. Johnson, Esq.
Fred T. Ashley, Esq.
Hill, Farrer and Burrill
Thirty-Fourth Floor - Union Bank Square
445 South Figueroa Street
Los Angeles, California 90071

James G. Varga, Esq.
Margolis, McTernan, Scope, Sacks & Epstein
3600 Wilshire Boulevard, Suite 2200
Los Angeles, California 90010

Re: Warehousemen's Health & Welfare Trust Fund
Identification Number: F-2231G

Gentlemen:

This is in response to your letter of December 18, 1981, and prior correspondence, in which you request an exemption for Mr. Melvin Lennard, an impartial arbitrator, "from the definition of 'fiduciary'" contained in section 3(21)(A) of the Employee Retirement Income Security Act of 1974 (ERISA). Mr. Lennard has been selected to settle a dispute between management and union trustees of the Warehousemen's Health & Welfare Trust Fund (the Plan).

The dispute pertains to a proposal that the Plan seek a contribution from the International Longshoremen's & Warehousemen's Union, Local 26 (Local 26) toward the amount paid by the Plan in settlement of a sex discrimination claim filed against the Plan and Local 26. The management trustees voted in favor of this proposal, and the union trustees voted against it. The management and the union trustees have agreed on the appointment of Arbitrator Lennard to render a final and binding determination on the issues in dispute pursuant to the Plan's declaration of trust and section 302(c) of the Labor Management Relations Act, 29 USC §187(c). The issues to be arbitrated are: (1) whether the Plan should request pro rata contribution from Local 26 and (2) if local 26 should decline to contribute, what action the Plan should undertake.

Section 408(a) of ERISA grants the Department of Labor (the Department) the authority to grant administrative exemptions from the prohibited transactions provisions set forth in sections 406 and 407(a) of ERISA. Under Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), the Department's authority to issue exemptions from the prohibited transactions provisions was extended to section 4975(c)(1) of the Internal Revenue Code of 1954, which is parallel to section 406 of ERISA. However, the question of whether and to what extent an arbitrator is to be deemed a fiduciary of an employee benefit plan is not appropriately disposed of in an administrative proceeding for exemption from the prohibitions of sections 406 and 407(a) of ERISA.

Nevertheless, since we believe that the representations in your letter are sufficiently detailed to enable us to render an advisory opinion with respect to the circumstances you describe, we have undertaken to treat your letter as a request for an advisory opinion on the question of whether an arbitrator would be a fiduciary under the circumstances described in your letter.

Section 3(21)(A) of ERISA provides, in relevant part, that a person is a fiduciary with respect to a plan to the extent (i) he or she exercises any discretionary authority or control respecting management of the plan or exercises any authority or control respecting management or disposition of its assets, (ii) he or she renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he or she has any discretionary authority or discretionary responsibility in the administration of the plan. The term "fiduciary" includes any person designated under section 405(c)(1)(B) of ERISA (relating to designation of certain fiduciary responsibilities to persons other than named fiduciaries).

The Department has taken the position in several cases that an arbitrator would be a plan fiduciary if he or she performs any of the functions described in section 3(21)(A) of ERISA. In the instant case, Mr. Lennard must decide whether the Plan should seek reimbursement from Local 26 and what further action the Plan should undertake if Local 26 declines to contribute toward the settlement. It is the opinion of the Department that, by deciding the questions presented to him involving the Plan's claim for reimbursement, Mr. Lennard would be acting as a fiduciary under section 3(21)(A)(i) and (iii) of ERISA because he would be exercising discretionary authority or discretionary responsibility in the management and administration of the Plan.

Accordingly, based solely on your representations, we conclude that, in his role as arbitrator in deciding how the Plan is to proceed, Mr. Lennard is a fiduciary within the meaning of section 3(21)(A) of ERISA.

We note that the Department's advisory opinion does not deal with the propriety under sections 404 and 406 of ERISA of the trustees' earlier decision to settle the sex discrimination claim, or their actions on the issue of whether to seek contribution from the union.

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

Sincerely,

Alan D. Lebowitz
Assistant Administrator for Fiduciary Standards
Pension and Welfare Benefit Programs