



OPINION NO. 84-42A
Sec. 3(1)

NOV 1 1984

Mr. Thomas F. Phalen, Jr.
Kircher and Phalen
Suite 2312 Kroger Building
Cincinnati, Ohio 45202-1159

Dear Mr. Phalen:

This is in reply to your correspondence of January 17 and February 2, 1984, requesting an advisory opinion concerning applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Your correspondence describes a proposed Continuing Unemployment Proficiency and Training Fund (CUPT or "B" Fund) to be added to the IBEW Local No. 212 (the Union) Supplemental Unemployment Benefit Trust Fund (the "A" Fund). The sole purpose of the CUPT or "B" Fund is to supplement wages and benefits which are substandard according to the generally applicable collective bargaining agreement but which it will be permissible for otherwise unemployed Union members to accept if hired at designated job sites during periods of generally high unemployment. Specifically, in view of its purpose, you question whether the CUPT or "B" Fund may provide benefits included in the definition of an employee welfare benefit plan in section 3(1) of ERISA.

Your correspondence contains the following facts and representations. The Union's Labor Management Committee and the Cincinnati Chapter of the National Electrical Contractors Association (NECA) propose to amend their collective bargaining agreement (Inside Agreement) and the Agreement and Declaration of Trust for the "A" Fund to permit the trustees to establish a separate CUPT or "B" Fund in times of high unemployment only. In connection with the establishment of the CUPT or "B" Fund, jobs at certain construction projects will be bid by participating employers who are parties to the Inside Agreement using substandard wage and benefit criteria and on an "open shop" basis. Union members will be employed for the duration of the designated project at lower wages and less benefits with the understanding that they will receive payments from the CUPT or "B" Fund as a supplement.

You state that the Labor Management Committee initially intends to give priority for participation in the CUPT or "B" Fund to those unemployed Union members no longer receiving unemployment benefits. Thereafter others would be considered. You add that, for an individual to continue participation in the CUPT or "B" Fund, the participant must also be eligible for participation in the "A" Fund; however, since it is anticipated that participants in the CUPT or "B" Fund would not be eligible for state unemployment compensation, it is expected that a Union member, when hired in a job designated for participants in the CUPT or "B" Fund merely must be available for work on the same basis as members entitled to supplemental unemployment benefits from the "A" Fund.

You indicate that initially the CUPT or "B" Fund would utilize interest and earnings from the "A" Fund and that no additional contributions would be necessary at the present time. The CUPT or "B" Fund will function only so long as high unemployment lasts or the financial condition of the "A" Fund remains unaffected. At termination of the CUPT or "B" Fund, its assets will revert to the

"A" Fund.

The following clause, in pertinent part, will be added to both the Inside Agreement as part of section 5.13 and the trust agreement as section 1.3:

Upon determination by the Trustees that a severe unemployment condition exists, and provided further that the existing Fund, then to be designated as the "A" Fund, is in sound financial condition, the Trustees may in their absolute discretion and in accordance with the plan established by the Trustees, establish a separate pooled "B" Fund by such combination of interest from the existing "A" Fund, and/or other contributions as designated by the Labor Management Committee under the provisions of the collective bargaining agreement, to be disbursed as supplemental benefits to participating unemployed members accepting employment on such designated projects; provided however, that at any time the Trustees determine in their absolute discretion that the severe unemployment condition has ceased to exist, and/or that the sound financial condition of either plan is being effected, they may discontinue the "B" plan and distribute the remaining assets to the "A" plan

Section 3(1) of ERISA and Department of Labor regulations thereunder (29 C.F.R. §2510.3-1) enumerate the specific purposes for which a plan must be established or maintained to be treated as an employee welfare benefit plan under ERISA. Among these purposes are the provision of apprenticeship or other training programs and benefits in the event of unemployment. While you have contended that the CUPT or "B" Fund might provide training benefits under section 3(1), such training must involve a program or arrangement for the enhancement or expansion of skill. The mere continuation or resumption of employment in one's customary trade or business to avoid some theoretical atrophy of employment related skills does not constitute training under section 3(1). Therefore, the CUPT or "B" Fund does not provide training benefits under section 3(1).

Whether a particular plan provides a benefit in the event of unemployment will turn on the facts and circumstances of each case. The Department generally would analyze each plan based on its place on a continuum which considers the relationship between the benefits provided and the actual status of unemployment. Thus, at one end of the continuum would be plans which would not be viewed as providing benefits in the event of unemployment if they assist an individual who receives his regular wage for full-time employment in his customary job under a collective bargaining agreement. Other plans which fall in that general end of the continuum would also not be treated as providing unemployment benefits. Cf., Mobile Mechanical Contractors Association v. Carlough, 456 F. Supp. 310 (S.D. Ala 1978), aff'd in relevant part, 644 F.2d 481 (5th Cir. 1981) (construing the term "unemployment benefit" under section 302(c) of the LMRA rather than under section 3(1) of ERISA). At the other end of the continuum would be plans which provide benefits during a period that an individual is not employed. Plans which fall toward this end of the continuum would be considered to be providing unemployment benefits. See, e.g., the discussion of the guaranteed annual income benefit in ERISA Opinion 79-55A (copy enclosed).

In the present case, it appears that the CUPT or "B" Fund does not provide benefits in the event of unemployment under section 3(1). The participants in this plan would presumably be working on a full-time basis in their customary trade or craft under their collective bargaining agreement.

We note that we are expressing no opinion with respect to the applicability of other laws to the above arrangement, particularly section 302(c) of the Labor-Management Relations Act.

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

of advisory opinions.

Sincerely,

Elliot I. Daniel
Acting Assistant Administrator
Office of Regulations and Interpretations

Enclosure