

U.S. Department of Labor

Office of Pension and Welfare Benefit Programs
Washington, D.C. 20210



MAY 6 1985

85-19A
Sec. 408(c)(2)

Paul D. Myrick, Esquire
Darby & Myrick, P.C.
200 St. Anthony Street
P.O. Box 2565
Mobile, Alabama 36652

Re: Identification Number F-2993A

Dear Mr. Myrick:

This is in response to your letter of October 17, 1984, and subsequent telephone conversation of October 30, 1984, with Mr. E. F. Williams of this office, on behalf of the A.F. of L. - A.G.C. Building Trades Pension and Welfare Plans (the Plans) regarding the application of the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and section 302 of the Labor-Management Relations Act of 1947 (LMRA). You request an opinion as to whether a plan trustee, who is a full-time employee of an association of employers that is a plan sponsor, may receive compensation from the Plans for services performed as a trustee.

You represent that Mr. Jack Terry, a trustee of the Plans, is a full-time employee of the Associated General Contractors of America, Inc. (AGC). The AGC is an association of employers that sponsors the Plans. Mr. Terry is not an employee of either a contributing employer or a participating union. In addition, none of the employees of AGC participate in the Plans.

Section 406(a)(1)(C) and (D) of ERISA prohibits a fiduciary with respect to a plan from causing the plan to engage in a transaction, if he or she knows or should know that the transaction constitutes a direct or indirect furnishing of goods, services or facilities between a plan and a party in interest; or transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. Section 3(14) of ERISA defines the term "party in interest" to include a fiduciary with respect to a plan.

Further, section 406(b)(1) of ERISA prohibits a fiduciary with respect to a plan from dealing with the assets of the plan in his or her own interest or for his or her own account.

Section 408(b)(2) of ERISA provides an exemption from the prohibited transactions provisions of section 406(a) of ERISA for any contract or reasonable arrangement with a party in interest for office space, or legal, accounting or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor. However, section 408(c)(2) of ERISA contains limitations with respect to the payment to a fiduciary of such compensation. Specifically, section 408(c)(2) of ERISA provides that nothing in section 406 shall be construed to prohibit any fiduciary from receiving any reasonable compensation for services rendered, or for reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers whose employees are participants in the plan, or from an employee organization whose members are participants in the plan, shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred.

Section 3(5) of ERISA defines the term "employer" to mean any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

The regulation implementing section 408(c)(2) of ERISA, 29 CFR section 2550.408c-2, further provides, in paragraph (b)(2), that the term "reasonable compensation" does not include any compensation to a fiduciary who is already receiving full-time pay from an employer or association of employers (any of whose employees are participants in the plan) or from an employee organization (any of whose members are participants in the plan), except for the reimbursement of direct expenses properly and actually incurred and not otherwise reimbursed.

Since you state that the trustee is a full-time employee of the AGC, we assume for purposes of this ruling that he is paid full-time in that capacity.

It is the Department's opinion that a fiduciary who receives full-time pay from an employer association acting on behalf of a group of employers as a sponsor of an employee benefit plan, where employees of the contributing employers are participants in the plan, would be precluded under section 408(c)(2) from receiving compensation from a plan for his services as trustee. The legislative history of section 408(c)(2) indicates that Congress' intention was to prevent double payment,¹ where, as here, the sponsoring association, which is supported solely by the contributing employers, pays the trustee full-time pay. H. Rpt. 93-1280, 93d Cong., 2d Sess. at 312. This concern is reflected by the exclusion in 29 CFR 2550.408c-2(b)(2) of payment of

¹ See Donovan v. Daugherty, 550 F. Supp. 390, 405 (S.D. Ala. 1982) (the underlying purpose of the exemption was to prevent double payment to the trustee from the plan and from a participating union or employer).

compensation to a fiduciary who is already receiving full-time pay from "an employer or association of employers (any of whose employees are participants in the plan)." Since the predominant concern of Congress in promulgating ERISA section 408(c)(2) was that of prohibiting double payment, the wording of the exclusion under the regulation indicates that the material inside the parenthesis refers to the term "employers" in the phrase "association of employers" and not to the term "association".

Finally, we wish to note that we make no comments concerning issues arising under section 302 of the LMRA, since the Department of Justice rather than the Department of Labor has jurisdiction regarding that provision.

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

Sincerely,

Elliot I. Daniel

Acting Assistant Administrator for Regulations and Interpretations