

**U.S. Department of Labor**

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



MAY 8 1989

89-08A  
Sec. 408

Mr. Joseph H. Kaplan  
Kaplan, Sicking & Bloom, P.A.  
1951 Northwest 17<sup>th</sup> Avenue  
P.O. Drawer 520337  
Miami, Florida 33152

Re: Identification Number F-3897A

Dear Mr. Kaplan:

This is in response to your letter of May 27, 1988, in which you request, on behalf of the South Florida Carpenters' Joint Apprenticeship and Training Trust Fund (the Fund), an advisory opinion under sections 408(b)(2) and 408(c)(2) of the Employee Retirement Income Security Act of 1974 (ERISA).

You represent that the Fund was established by the South Florida Carpenters' District Council, AFL-CIO, and various employers of carpenters and associations of employers of carpenters for the purpose of training and educating apprentice and journeyman carpenters.

In July 1965, the Trustees of the Fund employed Wallace S. Bray as Director of apprenticeship training. Mr. Bray has served in that position continuously to date performing full-time duties, including assisting in the training and educating of apprentice and journeyman carpenters. The Fund has no other full-time employees. Mr. Bray's salary and benefits are determined by the Trustees of the Fund. Since October 1, 1984, Mr. Bray has had an annual salary of \$34,112 and benefits consisting of contributions by the Trustees of \$44 per week to the South Florida Carpenters' Health & Welfare Trust Fund and \$26 per week to the South Florida Pension Trust Fund for health and hospitalization benefits and pension benefits, respectively.

The United Brotherhood of Carpenters and Joiners of America, AFL-CIO (UBC), the parent organization of the South Florida Carpenters' District Council, has maintained the UBC Pension Fund since January 1967 for employees of carpenter labor organizations which are affiliated with the UBC. Since January 16, 1984, the Trustees of the Fund have desired to make pension contributions to the UBC Pension Plan on Mr. Bray's behalf retroactive to 1967. You further indicate that the Fund could not make such contributions because it is not a carpenter union.

Therefore, the South Florida Carpenters' District Council tried to contribute on Mr. Bray's behalf but was denied on June 15, 1987 because Mr. Bray is not an employee of the District Council.

Mr. Bray has expressed the desire to retire since 1985. In consideration of Mr. Bray's upcoming retirement and as additional compensation for his long years of service to the Fund, the Trustees of the Fund, on December 12, 1987, voted to buy Mr. Bray a retirement benefit with a lump sum value not to exceed \$127,597. On March 28, 1988, the Trustees of the Fund rescinded their action taken on December 12, 1987 and voted to provide Mr. Bray with the pension benefit he would have been entitled to had the Fund contributed to the UBC Pension Plan since its inception in 1967, approximately \$127,597, provided this benefit is not a prohibited transaction under ERISA.

You request an advisory opinion that the payment of \$127,597 to purchase a retirement pension for Mr. Bray, the sole full-time employee of the Fund, constitutes "compensation" and "compensation for services rendered" for purposes of sections 408(b)(2) and 408(c)(2) of ERISA, respectively.

Section 3(14)(A) of ERISA defines the term party in interest with respect to an employee benefit plan to include an employee of such employee benefit plan. In addition, a person providing services to a plan is a party in interest with respect to such plan under section 3(14)(B) of ERISA. Therefore, Mr. Bray is a party in interest with respect to the Fund.<sup>1</sup>

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.

Subject to the limitations of section 408(d), section 408(b)(2) of ERISA exempts from the prohibitions of section 406(a) contracting or making reasonable arrangements 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.

Section 408(c)(2) of ERISA provides, in part, that nothing in section 406 shall be construed to prohibit any fiduciary from receiving reasonable compensation for services rendered in the performance of his duties with the plan.

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<sup>1</sup> In addition, Mr. Bray may be a fiduciary of the Fund by reason of his duties as Director of apprenticeship training. See section 3(21) of ERISA. A fiduciary of a plan is also a party in interest under section 3(14)(A) of ERISA.

The regulation implementing section 408(b)(2) of ERISA, 29 CFR 2550.408b-2, refers to regulation section 2550.408c-2 for a determination relating to what constitutes "reasonable compensation" for the provision of services described in section 408(b)(2). Regulation section 29 CFR 2550.408c-2(b)(1) provides that whether compensation is "reasonable" for the purposes of sections 408(b)(2) and 408(c)(2) of ERISA depends on the particular facts and circumstances of each case.

Section 5.01 of ERISA Advisory Opinion Procedure 76-1 (ERISA Proc. 76-1; 41 FR 36281, August 27, 1976) states that the Department generally will not issue opinions on factual questions. However, the Department believes that, in this instance, the issue you raise is the proper subject of an advisory opinion.

Mr. Bray has provided services to the Fund for approximately 23 years for which he has received a salary as determined by the Trustees of the Fund and benefits consisting of contributions to a health and welfare plan and a pension plan. According to the facts provided, no other compensation agreement, written or oral, was entered into between the Fund and Mr. Bray. On March 28, 1988, the Trustees determined to purchase an additional pension benefit for Mr. Bray as recognition for his previous years of service to the Fund. Therefore, such a benefit was not part of Mr. Bray's expectation of compensation for his services to the Fund for the approximately 23 years prior to March 28, 1988. Accordingly, it is the opinion of the Department that the purchase of a \$127,597 retirement benefit for Mr. Bray would not constitute "compensation" for purposes of section 408(b)(2) of ERISA, nor "reasonable compensation for services rendered" for purposes of section 408(c)(2) of ERISA.

In this regard, you have not asked us to address any issues under sections 403(c)(1) and 404(a)(1)(A) of ERISA. Section 403(c)(1) requires, in part, that the assets of a plan be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan. Section 404(a)(1)(A) requires a fiduciary to discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan. In Advisory Opinion 81-52A (June 15, 1981, copy enclosed), the Department concluded that payment of a gratuitous death benefit by plan trustees to the widow of a plan fiduciary would constitute a violation of the exclusive purpose standards of sections 403(c)(1) and 404(a)(1)(A) of ERISA since such payment could not be characterized as either compensation for services performed or as a reasonable expense of administration of the plan.

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 relating to the affect of advisory opinions.

Sincerely,

Robert J. Doyle  
Director of Regulations and Interpretations

Enclosure