

U.S. Department of Labor

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



SEP 21 1989

ERISA OPINION 89-26A
Sec. 3(1), 3(4), 3(5)

Mr. H. James Gorman, Jr.
Coopers & Lybrand
One Post Office Square
Boston, Massachusetts 02109

Dear Mr. Gorman:

This is in reply to your letter of January 3, 1989, requesting an advisory opinion regarding coverage provisions of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the Connecticut Association of Residential Facilities (CARF) Employees' Benefit Trust (the Trust) is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA.

You advise that the Trust was established by CARF to provide group life insurance, disability income insurance, hospital, surgical, medical, and major medical benefits as well as other health care benefits for individuals employed by agency members of CARF. CARF membership, as provided in Article III of its bylaws, consists of agencies operating residential facilities and other interested organizations and persons. Membership is divided into three categories as follows:

1. Agency Membership is open to any corporation or public agency which is operating a community-based residential facility. Public agency members must be represented by those presently directly operating a community-based residential facility. Agency members shall have one vote.
2. Associate Membership is available to those agencies not involved in community-based residential facilities who are interested in community residential programs. Associate members have no voting privileges.
3. Individual Membership is available to those individuals who wish to show support for the Association. Individual members have no voting privileges.

Only agency members of CARF are "Eligible Employers" within the meaning of Article I, paragraph 5, of the Trust Agreement. An "Eligible Employer" becomes a "Participating

Employer" within the meaning of the Trust Agreement when the Trust's advisory board accepts its application in writing. Article II, paragraph 1, of the Trust Agreement provides:

There shall be a corporate entity appointed by the Grantor [CARF], which shall serve as Trustee and Named Fiduciary of this Fund on behalf of the Employees and the Dependents of Employees who shall become Participants in the Plan or Plans which shall be adopted hereunder by the Advisory Board.

In order to facilitate the purposes hereof, Grantor shall appoint three or more natural persons, to act in its behalf, as an Advisory Board. Such persons may allocate specific administrative responsibilities, obligations and duties among themselves and may adopt such rules governing their conduct, including action by less than unanimous vote, as they shall determine. Any vacancy occasioned by a resignation, removal, or death or a Member of the Advisory Board shall be promptly filled by the appointment of a successor Member by Grantor.

Additionally, Article II, paragraph 2, of the Trust Agreement provides as follows:

A Trustee may be removed by Grantor, with or without cause, and at any time. A Trustee may be removed by the Advisory Board, with or without cause, and at any time. However, such removal by the Advisory Board shall require the written vote of a two-thirds majority of the Members of such Advisory Board.

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, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, 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).

Although the Trust provides health benefits as well as other benefits which are among those benefits identified in section 3(1), in order to be an employee welfare benefit plan, the trust must also, among other criteria, be established or maintained by an employer, an employee organization, or both.

The terms "employee organization" and "employer" are defined respectively by ERISA sections 3(4) and 3(5) as:

(4) The term "employee organization" means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

(5) The term "employer" means 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.

There is no indication in your submission that CARF, which established and maintains the Trust, is an employee organization within the meaning of section 3(4) of ERISA. CARF does not exist "... for the purpose, in whole or in part, of dealing with employers...." Furthermore, in several opinion letters the Department of Labor (the Department) has identified criteria for purposes of determining what constitutes an "employees' beneficiary association" as that term is used in section 3(4). One criterion is that membership in such an association must be conditioned on employment status -- for example, where membership is limited to employees of a certain employer or members of one union. However, membership in CARF is not conditioned on one's employment status but rather is open to both agencies and individuals without regard to employment status.

With regard to the issue of whether CARF is an "employer" within the meaning of section 3(5) of ERISA, the definitional provisions of ERISA recognize that a single employee welfare benefit plan might be established or maintained by a group or association of employers, within the meaning of section 3(5), acting in the interests of its employer members to provide benefits to their employees. On the other hand, where several unrelated employers merely execute similar documents or otherwise participate in an arrangement as a means to fund benefits, in the absence of any genuine organizational relationship among the employers, no employer association and, consequently, no employee welfare benefit plan can be recognized.

A determination of whether a group or association of employers is a bona fide employer group or association must be made on the basis of all the facts and circumstances involved. Among the factors considered are the following: how members are solicited; who is entitled to participate and who actually participates in the association; the process by which the association was formed, the purposes for which it was formed, and what, if any, were the preexisting relationships of its members; the powers, rights, and privileges of employer members that exist

by reason of their status as employers; and who actually controls and directs the activities and operations of the benefit program. In addition, it is the Department's view that the employers that participate in a benefit program must, either directly or indirectly, exercise control over that program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program.

Although the Trust limits participation to employers who are agency members of CARF and CARF agency members have voting rights with regard to CARF, it appears that agency membership in CARF is not conditioned on employer status. For this reason, and because a determination concerning whether CARF is a bona fide employer association would be inherently factual in nature, the Department is unable to assure you, at this time, that the Trust is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA.

Assuming the Trust does not constitute an employee welfare benefit plan under ERISA's coverage provisions, each private-sector employer providing welfare benefits for its employees through the Trust may have established its own separate employee welfare benefit plan covered by title I of ERISA. This letter does not, however, address any of the issues surrounding the ERISA duties or obligations of the CARF Trust or any of its agents with respect to any ERISA-covered employee welfare benefit plan of any individual employer. Also, each employer that is an "agency or instrumentality" of any state government (or political subdivision thereof) providing welfare benefits for its employees through the Trust may have a separate "governmental plan" within the meaning of section 3(32) of ERISA. Governmental plans are excluded from coverage by title I of ERISA, in accordance with section 4(b)(1) of ERISA. The Department determines an employer's "agency or instrumentality" of government status for purposes of section 3(32) of ERISA on a case-by-case basis.

We further note that, regardless of whether the Trust itself constitutes an employee welfare benefit plan covered under title I of ERISA, it appears the Trust is a "multiple employer welfare arrangement" (MEWA) within the meaning of section 3(40) of ERISA, as amended by the Act of January 14, 1983 (Pub. L. 97-473). Section 514(b)(6) of ERISA, as amended, provides, in part, that in the case of a MEWA which is a fully insured employee welfare benefit plan, and notwithstanding any other provision of section 514, state law which regulates insurance may apply to the extent that such law provides standards, requiring the maintenance of specified levels of reserves and levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to pay benefits when due. Section 514(b)(6) further provides that in the case of any other employee welfare benefit plan which is a MEWA, state insurance law may apply to the extent not inconsistent with title I of ERISA.

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,

Robert J. Doyle
Director of Regulations and Interpretations