



February 23, 2005

Mr. William Lindsay
Local 25 IBEW
370 Vanderbilt Motor Parkway
P.O. Box 18033
Hauppauge, NY 11788-8833

Dear Mr. Lindsay:

This is in response to your letter requesting guidance under the Employee Retirement Income Security Act (ERISA). In particular, you ask whether contributions made by several current and prospective service providers to the IBEW Local 25 Health and Benefit Fund (the Fund) to your political campaign involve breaches of the fiduciary responsibility provisions of ERISA.

You represent that you serve as a trustee of the Fund. You also serve as Business Manager of IBEW Local 25. You further represent that in your personal capacity you were elected to the Suffolk County Legislature (Legislature) in March 2001. In November 2001 you sought reelection to the Legislature.

You state that the trustees of the Fund (Trustees) were recently in the process of interviewing several third-party administrators (TPAs) to handle claims processing for the Fund. At some point a subcommittee of the Trustees narrowed the selection down to two potential TPAs. You state that you did not serve on the subcommittee involved in narrowing the selection, nor did you have any say in the selection of the two finalist TPAs.

You represent that a political campaign committee called "Lindsay for Legislature" (the Campaign) assists you in your campaigns for election and reelection to the Legislature. The Campaign is duly registered with the Internal Revenue Service, the New York State Board of Elections, and Suffolk County to assist in your campaigns. You represent that the Campaign solicits contributions from a list of contributors, which has been compiled over several years. In an effort to assist in your bid for reelection, the Campaign sent letters requesting over 600 potential donors to participate in a golf fundraiser held in June 2001.

You represent that the Campaign sent letters to the two potential TPAs requesting their participation in the golf fundraiser. Representatives of both candidate service providers attended the golf fundraiser. The two potential service providers donated a total of \$280 to the Campaign. Ultimately, you represent, the full amount of the donations was returned.

You also state that you recused yourself from voting on the final selection of the TPA at a subsequent meeting of the Trustees. You state that you neither participated in the discussion of the TPA's selection nor voted on the issue.

In addition, you represent that prior to your election to the Legislature in March 2001, a cocktail party was held in an effort to raise funds for your campaign. You state that you did not personally prepare the list of invitees nor did you personally send the letters of invitation. In attendance at the cocktail party were several service providers to the Fund, including Fund counsel. Apparently, a number of Fund service providers made donations to the Campaign as a result of the cocktail party. You further represent that ultimately the contributions made by these service providers were returned at your direction.

You request the Department of Labor's (the Department) views as to whether the above facts indicate that you, or any Fund service provider, violated his or her fiduciary duties with respect to the Fund.

The Department may, when it is deemed appropriate and in the best interest of the sound administration of ERISA, issue information letters calling attention to established principles under ERISA, even though an advisory opinion was requested. ERISA Procedure 76-1, section 5, 41 Fed. Reg. 36281 (Aug. 27, 1976). Accordingly, we have determined that it is appropriate to respond to your inquiry in the form of an information letter, the effect of which is described in section 11 of ERISA Procedure 76-1.

Under section 3(21)(A) of ERISA, a person is a fiduciary to the extent that he exercises any discretionary authority or control respecting the management of a plan or the disposition of its assets, or to the extent that he exercises discretionary authority or control with respect to the administration of a plan. The Department has previously stated that some positions, including the position of plan trustee, by their very nature require persons to perform one of the functions described in section 3(21)(A).¹

Section 406(a)(1)(D) prohibits a plan fiduciary from causing the plan to engage in a transaction if he knows or should know that such transaction constitutes a direct or indirect transfer to, or use by or for the benefit of, a party in interest of any assets of the plan. The Department has previously stated that a violation of section 406(a)(1)(D) may occur if a transaction is part of an arrangement, agreement, or understanding designed to benefit parties in interest.²

Section 406(b)(1) prohibits a fiduciary from dealing with the assets of a plan in his own interest or for his own account. Section 406(b)(2) prohibits a fiduciary from acting, in his individual or any other capacity, in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants and beneficiaries. Section 406(b)(3) prohibits a fiduciary from receiving any consideration for his own personal account from any party dealing with the plan in connection with a transaction involving the assets of the plan.

¹ 29 CFR § 2509.75-8, Q-D-3

² See, e.g., Advisory Opinion 85-36A, October 23, 1985

Section 3(14) defines the term “party in interest” to include plan fiduciaries as well as plan service providers.

The Department has stated that when a fiduciary uses the authority, control, or responsibility which makes him or her a fiduciary to cause a plan to enter into a transaction involving the provision of services when the fiduciary has an interest in the transaction which may affect the exercise of his or her best judgment as a fiduciary, a transaction described in section 406(b) would occur.³ However, the Department has explained in regulations that a fiduciary may avoid engaging in an act described in section 406(b)(1) by removing him or herself from all consideration whether or not to hire or retain a certain service provider and by not otherwise exercising, with respect to the proposed transaction, any of the authority, control, or responsibility which makes him or her a fiduciary.⁴ Thus, a fiduciary may avoid engaging in an act described in section 406(b)(1) or (b)(2), absent any arrangement, agreement, or understanding with respect to the selection and compensation of any service provider, by removing him or herself from all consideration by the plan concerning such service and by not otherwise exercising, with respect to the proposed transaction, any of the authority, control, or responsibility which makes him or her a fiduciary.

Further, section 404(a)(1)(A) of ERISA requires plan fiduciaries to conduct their affairs with respect to the plan solely in the interest of plan participants and beneficiaries, and for the exclusive purpose of providing benefits to plan participants and beneficiaries and defraying the reasonable expenses of administering the plan. Section 404(a)(1)(B) requires plan fiduciaries to discharge their duties with respect to the plan with the care, skill, prudence, and diligence then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. Section 403(c)(1) provides that the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

We believe that a fiduciary’s duty to act prudently and solely in the interests of the plan and its participants and beneficiaries does not end with respect to a particular plan decision because a fiduciary may have recused himself from that decision and avoided prohibited

³ 29 CFR § 2550.408b-2(e). It also should be noted that the receipt or agreement to receive or solicitation of money or a thing of value by a plan trustee with intent to be influenced with respect to any of his or her actions, decisions, or other duties relating to a plan or the payment, offer, or promise to pay money or provide a thing of value by any person, whether direct or indirect, with the intent of influencing an action or decision relating to a plan may constitute a crime under Title 18 U.S.C. 1954. The Department expresses no views concerning the application of Title 18 to the facts described in this letter.

⁴ 29 CFR §2550.408b-2(e)(2); *see also*, Advisory Opinion 99-09A (May 21, 1999); Advisory Opinion 91-37A (October 16, 1991)

transactions. In this regard, if a fiduciary has material information, including information regarding potential service providers, that would be necessary in order for other plan fiduciaries to make an appropriate and prudent decision, we believe the fiduciary's duties under section 404 of ERISA would require informing the deciding fiduciaries of that information.

I hope this information has been helpful to you.

Sincerely,

Louis J. Campagna
Chief, Division of Fiduciary Interpretations
Office of Regulations and Interpretations