

U.S. Department of Labor

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



September 30, 1996

96-20A
ERISA SEC. 3(32)

Mr. Dennis E. Valentine
Brauer, Buescher, Valentine, Goldhammer & Kelman, P.C.
1563 Gaylord Street
Denver, Colorado 80206

Dear Mr. Valentine:

This is in reply to your request for an advisory opinion on behalf of the Denver Fire and Police Health Fund (the "Fund"). You ask whether the Fund is excluded from Title I of the Employee Retirement Income Security Act of 1974 ("ERISA") as a governmental plan within the meaning of ERISA section 3(32).

You represent that the Fund currently covers police officers employed by the Police Department of the City and County of Denver (the "City" or "Denver"), firefighters employed by the Denver Fire Department, and employees of the Fire and Police Pension Association ("FPPA"), which administers fire and police pension funds (but not the Fund). You further represent that the City makes contributions to the Fund, pursuant to a collective bargaining agreement with the Denver Police Protective Association, covering most of the cost of providing benefits from the Fund for active employees of the Denver Police Department. The City also makes contributions, pursuant to a collective bargaining agreement with Denver Fire Fighters Local 858, International Association of Fire Fighters ("IAFF"), for active employees of the Denver Fire Department. FPPA makes contributions to the Fund to provide a significant portion of the cost of coverage for active employees of FPPA.

The Fund was established in 1977 as a non-profit corporation under state law by a group of individual firefighters and police officers, who were employed by the City and appointed for the purpose of establishing the Fund by the Denver Fire Fighters, Local 858 and the Denver Police Protective Association. The Fund provides medical, surgical, dental, vision and hospital care to covered members, who include active employees and retirees. The financial statements for the Fund dated 12/31/92 and 1991 ("financial statements"), which you submitted, indicate that the Fund is exempt from federal and state income taxes.

The Fund is administered by a board of seven trustees appointed as follows: three are appointed jointly by the Denver Fire Fighters, Local 858¹ and the Denver Firefighters Protective Association² from the active or retired

¹ Local 858 is the exclusive bargaining representative of all firefighters and thus is an employee organization within the meaning of ERISA section 3(4).

² The Denver Firefighters Protective Association was found to be an employees' beneficiary association within the meaning of ERISA section 3(4) in Opinion 83-13A (issued March 14, 1983). That Opinion (which is unaffected by the position taken in this Opinion) held that a plan administered by the Denver Firefighters Protective Association, which was governed by a council elected by employees and funded solely with employee contributions, was not a governmental plan. You have represented that the Denver Firefighters Protective Association operates in the same manner as described in that Opinion, except that the benefit amount has increased.

ranks of the Denver Fire Department; three are appointed by the Denver Police Protective Association³ from the active or retired ranks of the Denver Police Department; and one is appointed by whichever of the two Departments has the greater number of plan participants as of July 1 of each year. Any trustee may be removed at any time by the party that appointed that trustee. See Article 3, paragraph 2 of First Restated Agreement and Declaration of Trust Establishing The Denver Fire and Police Health Fund ("Trust Agreement").

Eligible participants include active and retired employees of the Denver Fire Department, the Denver Police Department, FPPA, "and any other municipality, county, fire protection district, or other public entity which is approved as a participating employer by the Trustees." Article I, paragraph 4 of Trust Agreement, defining "employee." You represent that the only public entities approved by the Trustees as participating employers are the Fire and Police Departments and FPPA.⁴

The Fund currently covers about 527 active and 109 retired police officers, 477 active and 179 retired firefighters, and about eight active FPPA employees, together with their dependents. In the case of firefighters who choose to participate in the Fund, the Denver Fire Department is required, pursuant to the collective bargaining agreement in effect for them, to contribute a portion of the cost of their participation.⁵ The Denver Police Department contributes most of the cost of coverage for participating police officers, pursuant to the collective bargaining agreement with the Denver Police Protective Association⁶ (formerly pursuant to ordinance and policy). FPPA contributes all of the cost of individual coverage for its employees and half the cost of family coverage. Each maintains a payroll deduction system for employee contributions to the Fund. Overall, the City and FPPA pay about 83 percent of total contributions to the Fund. Retired employees pay the entire cost of coverage.⁷

³ The Denver Police Protective Association is currently the bargaining agent that negotiated the 1996-98 collective bargaining agreement with the City on behalf of police officers in the bargaining unit. Before it became a bargaining agent, the Denver Police Protective Association was a membership organization of police officers that dealt with the City concerning benefits for police officers. The Denver Police Protective Association is thus an employee organization within the meaning of ERISA section 3(4).

⁴ You represented that the Fund would be willing to redefine the term "employer" in the Fund's documents to make it clear that the only participating employers are the two City departments and FPPA.

⁵ A Denver firefighter or police officer may choose between health coverage provided under the Fund or by another carrier or entity selected by Denver Fire Fighters Local 858 and the Denver Police Protective Association, respectively. The City pays the amount specified in the collective bargaining agreement to the Fund or other plan selected by individual firefighters or police officers.

⁶ The Denver Police Protective Association was established on March 30, 1908 as a nonprofit corporation whose purpose was to promote fellowship among members of the police department, improve wages, hours, and terms and conditions of employment of police officers, aid widows of members, and encourage social entertainment. Article III of Articles of Incorporation and Article I, Section 2 of Constitution and By-laws. The Denver Police Protective Association is managed by a board of seven trustees, Articles of Incorporation, Article IV, and its voting membership consists of active police officers, Article II, Section 1 of Constitution and By-laws.

⁷ In the case of an active police officer, the City pays \$167.73 for individual coverage and \$479.53 for family coverage, while the police officer's contribution is \$10.77 and \$25.97, respectively. In the case of an active firefighter, the City pays \$178.50 for individual coverage and \$487.36 for family coverage, while the firefighter's contribution is \$7.80 and \$18.14, respectively. FPPA pays the total cost of individual coverage and half the cost of family coverage for active FPPA employees. Retired employees pay the entire cost of coverage under the Fund, and

FPPA is an independent public body, which was created effective January 1, 1980, by the Colorado General Assembly to administer certain fire and police pension plans, including the state fire and police pension plan. Colorado law declares FPPA to be constituted as a public instrumentality (and not an agency of state government, so as not to be subject to administrative direction by any department, commission, board, or agency of the state) and deems its exercise of the powers conferred by the statute to be the performance of an essential public function. Colorado Revised Statutes (Colo. Rev. Stat.) § 31-30-1004(1). The state Pension Reform Committee has oversight responsibility over FPPA, and the monthly meetings of the Board of Directors of FPPA are open to the public. Its employees are treated as governmental employees for purposes of participation in the Public Employees' Retirement Association ("PERA"). Colo. Rev. Stat. § 24-51-101(20) and § 24-51-101(29).

FPPA provides benefits to about 10,000 individuals who are employed by or retired from over 170 Colorado police and fire departments. FPPA administers the state fire and police pension fund,⁸ including investing and managing the fund, disbursing money, setting required contribution levels, and determining the award of disability and survivor benefits. FPPA is also responsible for formulating rules and regulations implementing state law governing the state fire and police pension plan after a public hearing. The salaries of FPPA employees and FPPA's other expenses are paid by the state and the local fire and police plans administered by FPPA.

The board of directors of FPPA, which is responsible for the overall direction of FPPA, is appointed by the governor of the state and confirmed by the state senate. The FPPA board is composed of two members representing Colorado municipal employers; one member representing full-time paid firefighters; one member representing full-time police officers; one member alternately selected from among retired firefighters and retired police officers; one member representing volunteer firefighters; one member from the financial or business community; one member experienced in insurance disability claims and one member experienced in personnel or corporate administration. The board appoints an executive director who is the chief administrative officer. The executive director appoints the staff of FPPA who are responsible for the day-to-day administration of the state fund. Any member of the board may be removed by the governor of the state for cause. Colo. Rev. Stat. § 31-30-1004(2)(e).

ERISA section 4(b)(1) provides that Title I of ERISA does not apply to "governmental plans" as defined in ERISA section 3(32). ERISA section 3(32) defines the term "governmental plan," in pertinent part, as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof" or by any of their "agenc[ies] or instrumentalit[ies]."

The facts and representations contained in your letter and accompanying documents establish that the Denver Fire and Police Departments and FPPA are political subdivisions or agencies or instrumentalities within the meaning of ERISA section 3(32); that the City and FPPA pay about 83 percent of total contributions to the Fund; and that participation in the Funds is limited to current or retired employees (and their dependents) of each of the contributing governmental entities. Consequently, it is the view of the Department of Labor that the Fund was established and is maintained by the City and County of Denver and by FPPA for their respective employees and the Fund constitutes a governmental plan within the meaning of ERISA section 3(32) and thus is not subject to the

the payment mechanism for most retirees is a deduction from their pension payment, which is transmitted to the Fund.

⁸ The pension benefit provided under the state retirement plan for firefighters and police officers is funded partly by contributions by the state and partly by participant contributions made through payroll deduction. The disability and survivor benefit provided under the plan is entirely funded by the state.

provisions of Title I of ERISA pursuant to ERISA section 4(b)(1). It should be noted, however, that to the extent participation in the Fund is extended to include employees or former employees of employers other than the City and County of Denver and FPPA, the Department's position concerning the status of the Fund as a governmental plan may be affected.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Section 10 of that Procedure explains the effect of advisory opinions. This letter relates solely to the application of the provisions of Title I of ERISA and is not determinative of any particular tax treatment under the Internal Revenue Code.

Sincerely,

Susan G. Lahne
Chief, Division of Coverage
Office of Regulations and Interpretations