



June 10, 2005

Jared N. Kawashima
Ning, Lilly & Jones
707 Richards Street, Suite 700
Honolulu, HI 96813

2005-15A
ERISA SEC.
3(1)

Dear Mr. Kawashima:

This is in reply to your request for an advisory opinion regarding the applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the Painting Industry of Hawaii Labor Management Cooperation Trust Fund (Fund) is an “employee welfare benefit plan” within the meaning of section 3(1) of Title I of ERISA.

You represent that the Fund was jointly established by the International Brotherhood of Painters and Allied Trades, Union Local 1791, AFL-CIO (Union) and the Painting and Decorating Contractors Association of Hawaii (Association) as of February 13, 1998, pursuant to the Trust Agreement of Painting Industry of Hawaii Labor Management Cooperation Trust Fund (Trust Agreement). You further represent that the Fund is designed to conform to the requirements of section 302(c)(9) of the Labor Management Relations Act of 1947 (LMRA), as amended.¹ You represent the Fund was not established for the purpose of providing, nor does it provide, any benefit described in sections 3(1) of ERISA. Although references to ERISA are made in various places in the Trust Agreement, you represent that the Fund has never operated as if it were an ERISA-covered plan and no communications to employees have described the Fund as an ERISA covered plan. In addition, you advise that no provision in the Trust Agreement has been interpreted by the Board of Trustees as authorizing the Fund to provide any benefits described in section 3(1) of ERISA. You further advise that the Trust Agreement will be amended to delete all references to ERISA.²

The activities and affairs of the Fund are administered by a joint board of trustees (Board), who are empowered to control and manage the operation and administration of the Fund. You represent that the Board currently has a total of six trustees; three Union appointed trustees and three trustees appointed by the Association. You also represent that the number of trustees on the Board may be changed from time to time by the Board, so long as the positions open to Association trustees and Union trustees

¹ 29 U.S.C. § 186(c)(9).

² In addition, the Trust Agreement references a document, the “Painting Industry of Hawaii Labor-Management Cooperation Plan (Plan),” which you represent never existed. You advise that the Trust Agreement will be amended in the future to delete all references to the Plan.

remain equal in number. The Fund is funded by employer contributions at a rate set in applicable bargaining agreements.

The Fund's purposes as stated in the Trust Agreement are as follows:

To study and explore ways and means of promoting fair competition in the area painting industry;

To provide Employers and their employees with opportunities to study and explore new and innovative approaches to achieving organizational effectiveness and recovering work traditionally performed by Employers and their employees;

To assist Employers and their employees in solving problems of mutual concern not susceptible to resolution within the collective bargaining process;

To improve communication between representatives of labor and management;

To enhance the involvement of employees in making decisions that affect their working lives;

To expand and improve working relationships between Employers and their employees;

To investigate and implement programs designed to protect the integrity of the painting industry of Hawaii and the welfare of the consumer;

To avoid disputes between labor and management before they arise, and to assist in promptly and fairly resolving disputes when they do arise;

To promote the use of safe, efficient, high quality construction services in development, maintenance and rehabilitation of industrial and commercial facilities;

To seek to maintain a productive dialogue with users of painting services;

To foster the development of craft skills and high quality training in the painting industry;

To foster improvements in occupational safety and health and other working conditions in the painting industry;

To engage in activities to support or oppose legislation in ways to advance the purposes of the painting industry in Hawaii;

To advance and promote the Painting Industry through activities and programs including but not limited to advertising and contributing to charitable/non-profit programs and activities; and

To engage in any other, lawful activities incidental or related to the accomplishment of these purposes.

Section 3(1) of Title I of ERISA defines the term "employee welfare benefit plan" to include:

[A]ny 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).

Based on the information and representations you provided, it does not appear that the Fund provides any benefit included in section 3(1)(A) or section 3(1)(B) of ERISA. It is the Department's position that section 3(1)(B) of ERISA does not incorporate as a covered benefit every arrangement described in section 302(c) of LMRA. Rather, the Department clarified the definition of an "employee welfare benefit plan," in 29 C.F.R. § 2510.3-1(a)(3), with regard to benefits described in section 302(c) of LMRA, by stating:

Section 302(c) of the LMRA lists exceptions to the restrictions contained in subsections (a) and (b) of that section on payments and loans made by an employer to individuals and groups representing employees of the employer. Of these exceptions, only those contained in paragraphs (5), (6), (7) and (8) describe benefits provided through employee benefit plans. Moreover, only paragraph (6) describes benefits not described in section 3(1)(A) of the Act. The benefits described in section 302(c)(6) of the LMRA but not in section 3(1)(A) of the Act are "... holiday, severance or similar benefits." Thus, the effect of section 3(1)(B) of the Act is to include within

the definition of “welfare plan” those plans which provide holiday and severance benefits, and benefits which are similar (for example, benefits which are in substance severance benefits, although not so characterized).

Although this regulation was adopted prior to the amendment of section 302(c) of LMRA that added subsection 302(c)(9), the principle it articulates remains fully applicable. Only those arrangements described in section 302(c) of LMRA that provide benefits to participants or their beneficiaries would constitute employee welfare benefit plans. Further, there is no indication in the submission that the Fund is an employee pension benefit plan within the meaning of section 3(2) of Title I of ERISA.

Accordingly, based on the information and representations you provided, it is the position of the Department that the Fund is not an employee benefit plan covered under Title I of ERISA. The absence of any explicit limitation in the Trust Agreement that would prevent the Fund from providing welfare or pension benefits to participants or beneficiaries precludes us from assuring you that the Fund will not be an employee benefit plan if, as is apparently permitted under the above noted grant of broad authority in the Trust Agreement, it is operated so as to provide a welfare or pension benefit within the meaning of Title I of ERISA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

John J. Canary
Chief, Division of Coverage, Reporting and Disclosure
Office of Regulations and Interpretations