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IN THE COURT OF APPEALS FOR THE STATE OF
WASHINGTON
DIVISION I

Jack M. Navlet, et al, individually
and on behalf of a class of others
similarly situated,

Plaintiffs,

v.

The Port of Seattle,

Defendant.

Court of Appeals
No. 56766-7

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DIVISION I
JAN 10 2008

OPENING BRIEF OF APPELLANTS

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I. ASSIGNMENT OF ERROR

The trial court erred by granting Summary Judgment in favor of the Port of Seattle (“the Port”), and holding that the Port has no statutory or contractual obligation to provide Retired Employee Benefits (i.e. retiree medical coverage at Port expense) to Plaintiffs, who earned such coverage by their years of employment for the Port.

II. ISSUES FOR REVIEW

1. Is the Port’s obligation to provide retiree medical benefits to be determined under the Employee Retirement Income Security Act (“ERISA”), or under Washington State Law?
2. Does it violate Washington State Law for the Port to deny Plaintiffs retiree medical benefits, after Plaintiffs have completed the years of service required to qualify for the benefit?

III. STATEMENT OF THE CASE

Plaintiffs are a group of warehousemen with long tenures of service as employees of the Port of Seattle, during which time their compensation included contributions by the Port of Seattle to the I.L.W.U. Local 9 Welfare Plan. (CP 4-7) Among the benefits paid for by the Port’s contributions, and provided through the Welfare Plan, were “Retired Employee Benefits,” which consisted of retiree medical benefits, at either no cost, or at a nominal cost of up to \$20.35 per person

per month, to retirees who had met certain length of service and age or disability requirements. (CP 347)

The Welfare Plan was jointly sponsored by Local 9 and the Port of Seattle. (CP 406-07) In the past, various employers had contributed to the Welfare Plan. But for several years continuing through March 30, 2003, all contributions to the Welfare Plan were by the Port of Seattle, with the sole exception that Local 9 contributed on behalf of its Business Manager. (CP 288, ¶¶ 5-6) The Port of Seattle appointed all management trustees to the Welfare Plan's joint union-management board of trustees. (CP 407)

As discussed below, because virtually all employer contributions to the Welfare Fund were made by the Port of Seattle, by a date well before March 30, 2003, the Welfare Plan had become a "governmental plan," and was therefore no longer subject to ERISA, but was instead subject to Washington State law.

The Retired Employee Benefit was extremely valuable. Under it, persons who had retired under the Warehousemen's Pension Fund and had the requisite age (or disability status) and years of service, were entitled to medical coverage for themselves and their spouses at either no charge, or a charge of \$20.35 per person, depending upon their age, length of service, and whether they were disabled. (CP 347-48)

As of April 30, 2003, the Port of Seattle ceased providing coverage through the Welfare Fund for its active employees, as well as its former employees who were receiving Retired Employee Benefits (the Port retirees). (CP 311, ¶¶ 6-7); 319-23) This event occurred in the context of the Port ceasing all employment of persons in the bargaining unit for which contributions to the Welfare Plan had been required. (CP 18)

In connection with its cessation of contributions, the Port of Seattle contacted the Port retirees, and advised them that they would no longer receive retiree medical insurance at substantially no cost. (CP 323-28) The Port retirees could obtain continued medical coverage through the Port, but only if they paid the full premium for such coverage, which ranged from \$798.07 to \$964.33 for a retiree and spouse who were not yet covered by Medicare. (CP 328) In percentage terms, this was an increase of up to 4800%.

Many former Port employees have satisfied the length of service requirements to receive Retiree medical benefits, but have not yet reached the age required to for retirement under the Pension Fund. (CP 292-94; 347) These employees will also be denied retiree medical benefits, unless the Court confirms that the Port is required to provide them with such coverage.

Plaintiffs' filed a Motion for Partial Summary Judgment to establish that they are entitled to receive retiree medical insurance coverage equal to the coverage in effect for persons who were receiving Retired Employee Benefits under the Welfare Plan immediately prior to April 30, 2003, and on substantially the same terms as were in place at that time. (CP 415-16) Plaintiffs requested that the Port be directed to immediately provide coverage on those terms to Plaintiffs who have already achieved the ages and Pension status required by the Welfare Plan, and that the Port be required to provide that coverage, on the same terms, to the remaining Plaintiffs when they achieved the age or disability status required under the Welfare Plan. (*Id.*)

In addition, Plaintiffs also requested that the Port be required to reimburse retirees who paid the full premium for coverage since April, and that the Port be required to pay the medical expenses (less applicable deductibles, co-pays, and premium contributions, if any) incurred by retirees whose insurance lapsed because they did not pay the premiums required to continue coverage. (*Id.*)

Defendant filed a Motion for Summary Judgment, asking that Plaintiffs' action be dismissed in its entirety. (CP 36)

The motions were fully briefed, and oral arguments were presented on October 8, 2004. (RP 1-39) **Ten months later**, on August 5, 2005,

the trial court issued an Order granting the Port's Motion for Summary Judgment, and dismissing the action. (CP 478-80) The trial court's Order simply recited the pleadings in the case, and contained six lines of analysis. The trial court's complete analysis was as follows:

Based on the foregoing, the court determines that the Plaintiff's (sic) have no statutory basis for their claims to medical benefits. Nor do the unambiguous terms of the Summary Plan Description, or union contracts at issue in this case give rise to a contractual claim to the benefits sought by the plaintiffs (sic). The fact that plaintiffs (sic) may have become vested in their benefits does not change the nature and duration of the benefits, which are set forth and limited in the Summary Plan Description. (*Id.*)

This appeal followed.

IV. ARGUMENT

A. The Welfare Plan Is a Governmental Plan, and Is Therefore Subject to Washington State Law, rather than ERISA

The threshold issue in this case is whether the Welfare Plan is a "governmental plan." If a plan is governmental plan under Title I of ERISA, 29 USC §§1001 – 1145, ERISA §§1 – 515, the plan is exempt from suit by a participant under ERISA, and federal courts lack jurisdiction to hear claims against the plan. As a result, governmental plans are governed by state law.

The ERISA Title 1 definition of governmental plan, in relevant part, provides that it is "any plan established or maintained" by "the

government of any State or political subdivision thereof.” 29 USC §1002(32).

The Port is a “governmental entity.” *Moreno Property Co. v. Port of Seattle*, 88 Wash.2d 822, 828-29 (1977) Under settled federal law, the fact that as of March 31, 2003 (and some years prior to that date) the active participants in the Welfare Plan were, with only one exception, employees of the Port, (CP 288, ¶¶ 5-7) makes the Plan a governmental plan under ERISA.

The decision in *Feinstein v. Lewis*, 477 F. Supp. 1256 (SD NY 1979) reflects that a plan with precisely the structure of the Welfare Plan – a plan jointly administered by union and employer trustees – is a governmental plan if the employees covered by the plan are employed by governmental entities. In *Feinstein*, management representatives from several cities on Long Island and the Teamsters Union jointly administered welfare plans for police employees.

The court rejected the assertion by *Feinstein* plaintiffs that a plan established pursuant to collective bargaining, and administered by a joint union-management board of trustees, was neither established nor maintained by a governmental entity. 477 F. Supp. at 1260. It found that agreeing to establish a plan by means of collective bargaining

constituted “establishing” a plan; in addition, participating on the joint union-management board of trustees constituted “maintaining” a plan.

In the court’s words:

I do not believe that Congress intended the words "established" and "maintained" to be so narrowly construed. The mere fact that a town or school district sets up a benefit plan for its employees as a consequence of negotiations and collective bargaining rather than because of some unilateral action or decision simply does not lead to the conclusion that the plan was not "established" by the town or school district. Although they did so in conjunction with the Union, [footnote omitted] the towns and school districts involved herein did nevertheless "establish" the Plans. Moreover, there can be no doubt that the Plans are "maintained" by the towns and school districts for their employees. Although the Plans are jointly administered by the Union and the employers through the boards of trustees, they are exclusively funded and hence "maintained" by the employers.

See also, *ERISA Opinion Letter 86-22A* (Sept. 9, 1986)¹ (Plan established by City of Palm Beach pursuant to collective bargaining, and jointly administered by trustees selected by City and Union, is “established or maintained” by governmental entity. Although Plan documents contemplate participation by other entities, no other entities participate in the Plan.)

The Department of Labor has repeatedly stated that a plan established pursuant to collective bargaining and jointly administered by

¹ Provided as Appendix A to this brief

union and employer trustees is a governmental plan if the participants are public employees. In the words of *ERISA Opinion Letter 79-83A* (1979):²

[T]he term “governmental plan,” as defined in section 3(32) of ERISA, is not so narrow as to include only plans established by the unilateral action of employers which are governmental entities, or to exclude collectively bargained plans and plans jointly administered by trustees appointed by governmental entities and by labor unions from the “governmental plan” definition if these plans are funded by and cover only employees of governmental entities.

That a single union employee participates in the Welfare Plan does not defeat its status as a governmental plan. The Department of Labor has repeatedly held that participation by a *de minimis* number of union employees will not defeat the character of a plan as a governmental plan. *Triplett v. United Behavioral Health Systems, Inc.*, 1999 U.S. Dist. LEXIS 4108 (E.D. Pa. 1999), citing *U.S. Dept. of Labor Op. Letter 95-27A*, at 3-4.³ More recently, the Department of Labor has addressed the precise issue presented here. *ERISA Op. Letter 2000-04A*⁴ states that a plan covering city employees remained a governmental plan, even though the plan included full time employees of the labor union representing the participating public employees.

² Appendix B

³ Appendix C

⁴ Appendix D

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² Appendix B

³ Appendix C

⁴ Appendix D

That the Welfare Plan at one time included private employers does not alter the fact that it is currently a governmental plan. In *Rose v. The Long Island Railroad Pension Plan*, 828 F.2d 910, 920 (2d Cir. 1987), the Second Circuit held that a pension plan that was created by a private employer became a governmental plan when the entity sponsoring the Plan was later taken over by a public entity.⁶ *Cf. Hawkeye National Life Ins. Co. v. AVIS Industrial Corp.*, 122 F. 3d 490, 497 (8th Cir. 1997) (Plan that originated as a multi-employer plan became a single employer plan at termination because all other employers had previously ceased contributions)

Nor can recitations in Plan documents that the Plan is governed by ERISA alter its character as a governmental plan. *Krystyniak v. Lake Zurich Community Unit District No. 95*, 783 F. Supp. 354, (ND Ill. 1991) held that a plan covering almost exclusively public employees was a governmental plan, even though the Plan document purported to name a fiduciary “for the purposes of [ERISA].” The *Krystyniak* decision relied upon *Feinstein* for the proposition that such recitations,

⁶ As of 1986, the LIRR Pension Plan doubtless continued to provide benefits to former employees who retired before the Metropolitan Transit Authority took over the Pennsylvania Railroad’s operations. Therefore, the decision forecloses any argument by the Port that the possibility that if the Welfare Plan provided Retired Employee Benefits to persons retired from the private employers that no longer contributed to the Plan, it would not be a governmental plan.

and even reporting to the Department of Labor as an ERISA plan, could not prevent a plan covering governmental employees from being a “governmental plan,” and thus subject to state law, rather than ERISA.

The policy reasons for the governmental plan exemption from ERISA support the conclusion that the claims here are properly analyzed under Washington State law, rather than ERISA. The discussion by the Second Circuit in *Rose v. LIRR Pension Plan*, 828 F.2d at 914, lists as the first reason the governmental plan exemption was included in ERISA that public plans were generally more generous than private plans with respect to their vesting provisions. Of course, the very reason that the Port would dispute the Welfare Plan’s status as a governmental plan is to avoid the protections against loss of retirement-type benefits that are well-established in Washington State law. As discussed below, Washington State law forbids the Port from eliminating Plaintiffs’ right to Retired Employee Benefits.

B. Under Well-Established Washington Law, the Port of Seattle Could Not Eliminate Retirement Type Benefits Plaintiffs Had Earned by Their Years of Service with the Port

Under Washington law, upon employment, an employee’s acquires a vested right to retirement benefits in place at that time. *Bakenhus v.*

Seattle, 48 Wn. 2d 695, 701 (1956). *Bakenhus* established the following rule:

[T]he employee who accepts a job to which a pension plan is applicable contracts for a substantial pension and is entitled to the same when he has fulfilled the prescribed conditions.

The *Bakenhus* court adopted the reasoning that pension benefits “are in effect pay withheld to induce long-continued and faithful service.” Therefore, it is fundamentally unfair to reduce the benefits after the employee has begun to provide the service. In *Dorward v. ILWU-PMA Pension Plan*, 75 Wn. 2d 478 (1969), the court held that the same principles apply to private pension plans.

Several subsequent decisions confirm that the *Bakenhus* prohibition applies to any change that reduces the value of pensions, regardless of the means by which that reduction is achieved. *See, e.g., Eagan v. Spellman*, 90 Wn.2d 248 (1978) (changing mandatory retirement age from 70 to 65, with result that maximum pension accrual was reduced); *WFSE v. State of Washington*, 98 Wn.2d 677 (1983) (one of several cases invalidating limits on amount of vacation that could be cashed out in final year and thus inflate pension calculation under PERS).

The *Bakenhus* rule also applies to benefits payable upon retirement that are not pensions. For example, *Johnson v. Aberdeen*, 14

Wn. App. 545 (1975) held that a rule limiting the amount of sick leave to be cashed out at retirement was invalid because pay to be paid upon retirement is in the form of a retirement benefit, although it did not affect the amount of his monthly retirement check. The *Johnson* decision is consistent with, *Leonard v. Seattle*, 81 Wn.2d 479, 488 (1975), which characterizes the right of a public employee to a pension upon retirement as part of his estate, "like paid up insurance," which has been paid for by the employee's service over time.

C. Retiree Medical Benefits Come Within the Rule of *Bakenhus* and Its Progeny

Retiree medical benefits are also subject to the *Bakenhus* rule. In AGO 1975-2, the Washington Attorney General analyzed RCW §41.26.150, which requires that employers of active or retired fire fighters and police pay for their medical expenses. The AGO rejects the argument that these medical benefits should be treated as a regular fringe benefit, and concludes instead that they should be treated the same as pension benefits under *Bakenhus*.

In the statutory context, the AGO concludes that it is not whether the benefit is "deferred compensation that determines whether it is protected," but rather, "it is simply whether the benefit is made payable

to a qualified employee as a matter of right by a statute that is part of his pension system that is determinative of this question."

While the Retired Employee Benefit is not statutory, the documents regarding both the Pension Plan and the Welfare Plan demonstrate that retiree medical coverage is an element of the retirement package provided to Port of Seattle employees.

The Industry Pension Agreement, executed by the Port of Seattle and Local 9, recites, in a section headed "Retirement," that employees who choose to retire between age 55 and 62 "shall not be entitled to retiree health and welfare benefits until such retiree reaches age 62." (CP 304, ¶4) Thus, the negotiated agreement regarding pension benefits defines the parameters of entitlement to the Retired Employee Benefits at issue here.

Conversely, the Welfare Plan explicitly ties entitlement to Retired Employee Benefits to the employee's status under the Pension Plan. The section of the Welfare Plan Summary Plan Description headed, "Retiree Eligibility" states that the employee is eligible for retired employee benefits upon early retirement if the employee has reached age 62 and "you have a minimum of 15 years credited service under the *Warehousemen Pension Trust Fund*." (emphasis added) (CP 347). Subsequent paragraphs measure eligibility for Retired Employee

Benefits upon Normal and Disability Retirement by the employee's credited service under the Pension Plan. (*Id.*)

In fact, it appears that Retired Employee Benefits are provided by the Welfare Plan, rather than from the Pension Plan, because of federal tax law concerns, rather than a belief that the benefits are not part of the employees' retirement package. An October 6, 1993 opinion letter from legal counsel to the Trustees of the Pension Trust explains that the requirements of IRC §401(h) would require "a very substantial modification of the Pension Plan document" in order to provide retiree medical coverage under that plan. (CP 308) In addition, the tax requirement that medical benefits be "subordinate" to the pension benefits, coupled with the cost of medical coverage in relation to pension benefits, could have compromised the Pension Plan's tax qualification. (*Id.*)

As a practical matter, Retired Employee Benefits constitute a major portion of the retirement benefits provided to the affected employees. The notice sent to retirees by the Port on April 1, 2003 reflects that coverage for an age 62 retiree and spouse, which was available for no more than \$20.35 per person (CP 347), now costs the retiree up to \$964.33 for a retiree and spouse. (CP 328) As of 2003, monthly benefits under the Pension Plan were \$100 per year of service.

(CP 289-90, ¶13) Thus, elimination of Retired Employee Benefits effectively reduced a 25 year employee's effective retirement income by over 38% ($\$2500 - 964.33 = \1535.67 , as opposed to $\$2,500 - 20.35 = \2479.65). Framed another way, elimination of the benefit reduces the overall value of retirement benefits for a 62 year old married employee with 25 year years of credited service from $\$3464.33$ to $\$2,500$.

As both pension and Retired Employee Benefits were tied to length of credited service under the Pension Plan, it exalts form over substance to treat the Retired Employee Benefits as something entirely separate from the pension benefit, when it is the combination of the two that defines the standard of living for a retiree.

Decisions under ERISA distinguish between pension benefits and retiree medical benefit plans, based on the technical definitions in ERISA §3(1) and (2), 29 USC §1002(1) and (2). Because the ERISA definition of welfare plan in §3(1) encompasses all forms of insurance, and the vesting provisions of ERISA apply only to pension plans, as defined in §3(2), courts have held that under ERISA, there is no "vesting" of retiree welfare benefits.

But ERISA does not apply to governmental plans. Such plans are subject to state, not federal law. And the Washington State authorities discussed above establish that an irrevocable right to the medical

coverage aspect of a retirement package vests, if not when the employee begins service, when the employee has fulfilled the length of service requirement to receive the benefit. All Plaintiffs in this case had fulfilled the length of service requirements to receive retiree medical benefits, only to have their right to receive those benefits terminated as a result of the cessation of contributions by the Port.

There is nothing inconsistent about providing better protection to employees under Washington State law than is provided under ERISA. To the contrary, as noted above, it was precisely because governmental plans typically provided superior vesting protections that ERISA was not applied to public employees. *Rose v. LIRR Pension Plan*, 828 F.2d at 920. It would turn that policy decision on its head to conclude that ERISA now establishes a ceiling to the protections provided by state law.

D. Recent Decisions Establish that the Rule of *Bakenhus* Applies to All Benefits That Vest Based on Length of Service

In *Jacoby v. Grays Harbor Chair & Mfg.*, 77 Wn.2d 911, 915 (1970), the court adopted the rule that, in public or private employment, pensions are deferred compensation, which cannot be denied after the employee has provided the requisite services, regardless of how the pension plan came to be established:

We have held that a pension granted to a public employee is not a gratuity, but is deferred compensation for services rendered and that the obligation of a public employer to pay a pension when the employee has fulfilled the prescribed conditions is contractual in nature. *Bakenhus v. Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956). **This principle has been extended to private pension plans established by collective bargaining agreements. *Dorward v. ILWU-PMA Pension Plan*, 75 Wn.2d 478, 452 P.2d 258 (1969).** We here recognize the application of this principle to voluntary, noncontributory (employer financed) pension plans.
(Emphasis added)

This rule was elaborated *Frank v. Day's Inc.*, 13 Wn.App. 401, 404 (1975), which explained that, once the employee had satisfied the specific conditions to qualify for payment of a pension, the benefit could not be denied:

In this jurisdiction, pensions or retirement programs, whether public, established by collective bargaining, or voluntarily employer-funded, constitute deferred compensation for services rendered and are designed to promote continued and faithful service to the employer and economic security to employees. **A pension agreement is contractual in nature, and the employer is obligated to pay the pension if an employee fulfills the specific conditions of the agreement.** (Emphasis added)

See also, Int'l. Assoc. of Firefighters, Local No. 2088 v.

Tukwila, 22 Wn.App. 683 (1976)

Later decisions establish that, even if retiree medical benefits are not treated as an element of Plaintiffs' retirement income, because they have completed the requisite length of service, they must be provided the benefit. This is because the rule stated in *Jacoby* and *Frank* applies

to benefits that are not related to retirement. *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1014 (9th Cir. 1997) (*Vizcaino II*)

In *Vizcaino II*, plaintiffs challenged their exclusion from Microsoft's Employee Stock Purchase Program (ESPP). The ESPP permitted current employees to purchase Microsoft stock at discounted prices, provided they qualified by remaining employed through the applicable six month period.⁷ The *en banc* Ninth Circuit applied Washington common law to the plaintiffs' claim that they had a contractual right to ESPP participation. The court first reviewed decisions establishing the general rule in Washington that pension programs are not gratuities, but "deferred compensation."

The *Vizcaino II* court went on to conclude "**that same form of reasoning applies to all employee benefits.**" (emphasis added) The court quoted at length from the *Dorward* decision, and then held that because the plaintiffs had a general knowledge of the benefit, "their labor gave them a right to participate."

Other courts have applied *Jacoby* and its progeny to non-retirement benefits. For example, in *Dangott v. ASG Ind., Inc.*, 558 P.2d 379, 382 (OK 1976), the court granted a claim for severance benefits. The court relied upon *Jacoby* for the principle that the

⁷ The ESPP program is described in the panel decision, *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187, 1191 (9th Cir. 1996).

employer's offer of benefits was an offer of a unilateral contract, which the employee accepted by his service. Therefore, the benefit could not be withheld after the service was provided.

In light of *Vizcaino II*, Plaintiffs here would be entitled to the benefits sought, even if they were not properly characterized as retirement benefits. Of course, retiree medical benefits are a critically important aspect of the Plaintiffs' retirement security. But the Court need not decide that under Washington State law, retiree medical coverage stands on the same footing as pension benefits. After *Vizcaino*, any benefit earned by length of service is protected as deferred compensation for services rendered.

E. Statements in the Welfare Plan Purporting to Reserve the Right to Eliminate Retired Employee Benefits Cannot Override the Washington Common Law Rule that Benefits Based on Length of Service Cannot Be Eliminated After Service Is Rendered

Statements in the Welfare Plan regarding the Trustees' right to modify or eliminate the retiree benefits do not absolve the Port of Seattle from the obligation to provide the disputed benefits to its employees.

Various versions of the Welfare Plan Summary Plan Description contain language comparable to the 1998 SPD, which states that Retired Employee Benefits are "not guaranteed for any definite period of time and will be provided only to the extent that sufficient funds are available

to the Trust.” The same passage states that the Trustees reserve the right to make any changes in th[e] retiree Plan they deem necessary, or to terminate the retiree Plan.” (CP 347)

These passages relate to the question of whether the *Trust Fund* will provide retiree medical benefits. But the issue in this case is the obligation of the Port of Seattle, as employer, not the Trustees or the Plan they administer. Under Washington State law, the plaintiffs earned a right to their entire package of retirement benefits, including retiree medical benefits, by working well over 15 years (in some cases, over 30 years – *see*, CP 314, line 4 – Newenhof seniority date of 4/25/70) for the Port of Seattle. Whether the Port of Seattle arranges to provide those benefits through the Trust Fund, or out of its own coffers, is irrelevant to the existence of the Plaintiffs’ right to the benefits.

In *Rose v. LIRR Pension Plan*, 828 F.2d at 918, the court explained that the government exemption from the funding requirements of ERISA Title IV was based in part on the belief public employees can rely on the government’s taxing authority to assure their benefits. It would be inconsistent with that approach to permit a government employer to cease contributions to a jointly administered trust fund, and then rely on the absence of funding to defeat employees’ right to benefits.

The argument that a disclaimer in a plan document can defeat Plaintiffs' right to benefits otherwise protected by state law proves too much. Such an arrangement would be seen as plainly impermissible in the case of a pension plan. For an employer to promise a pension of \$2,500 per month for a 25 year employee, but only if the employer gives the pension trust the money needed to pay it would be condemned as a brazen attempt to circumvent the protections of state law. The retiree medical benefits at issue here are equally central to Plaintiffs' retirement security as their cash benefits, and are similarly protected from elimination by employer decisions.

In other words, public employees' statutory rights – and the public employer's corresponding statutory obligation – cannot be eliminated by the simple expedient of inserting a statement that benefits are not guaranteed. If that were the case, the extensive body of Washington law regarding the vesting of retirement benefits for public employees (as well as private employees – although that area is now preempted by ERISA) could be eviscerated with the stroke of a pen.

After *Vizcaino II*, notice to the employee that the employer reserves the right not to pay the benefit does not defeat a claim for the benefit. In *Vizcaino II*, it was undisputed that the plaintiffs had been advised they would not receive the benefit at issue.

Vizcaino II is not a departure from prior Washington State Law. In fact, in *Jacoby v. Grays Harbor Chair & Mfg. Co.*, the Washington Supreme Court quoted with approval language rejecting the argument that a reservation of rights could defeat a right to an otherwise vested benefit:

Therefore, whether a retirement plan is contributory of noncontributory and **even though the employer has reserved the right to amend or terminate the plan**, once an employee, who has accepted employment under such plan, has complied with all the conditions entitling him to participate in such plan, his rights become vested and the employer cannot divest the employee of his rights thereunder. (emphasis added)

77 Wn.2d at 916, quoting *Cantor v. Berkshire Life Ins. Co.*, 171 Ohio St. 405, 410, 171 N.E.2d 518 (1960).

This rule has been applied to claims for retiree medical coverage. In *Sheehy v. Seilon, Inc.*, 10 Ohio St.2d 242, 243 (1967), the Ohio Supreme Court held that the principles articulated in *Cantor* required that an employer continue its retiree medical coverage, for those who had retired after earning the benefit by their years of service, “despite the considerable cost,” and despite a “proviso in the contract of employment” that permitted the employer to change benefits. *See also, In re Erie Lackawanna Railway Co. Non-contract Employees*, 548 F.2d 621, 627 (6th Cir. 1977) (retiree life insurance could not be terminated, despite reservation of right to modify or terminate plan);

Hoefel v. Atlas Tack Corp., 581 F.2d 1, 14 (1st Cir. 1978) (In pre-ERISA case, reservation of right to amend or terminate did not defeat claim for retirement benefits by retirees who had satisfied length of service requirements).

These decisions simply acknowledge that after the employee has provided the service that is the *quid pro quo* for the benefit, the employer may not invoke the reservation of rights to eliminate the benefit that was already earned.

The decision in *Vizcaino II* cited *Jacoby* in support of its conclusion that applying the concepts in *Dorward v. ILWU-PMA Pension Plan* to non-pension benefits was appropriate, as “the Washington Supreme Court . . . has adopted a protective view toward employees’ rights.” 120 F.3d at 1014. As noted above, the carefully reasoned opinion in *Jacoby* quotes the very passage in *Cantor* that refuses to give effect to reservation of rights language. This is a clear indication that the Washington Supreme Court will not permit reservation of rights language to defeat rights that have vested by length of service. It would therefore be error to rely on the ERISA decisions presented by the Port.

As noted above, ERISA requires that employers fund pension benefits, and forbids employers from eliminating pension benefits that

have already been earned. Under ERISA, the same protections are not provided for retiree medical benefits because they are treated as welfare, rather than retirement, benefits. As state law neither requires nor supports the artificial distinction between cash pension benefits and what are, in effect, in kind pension benefits in the form of medical coverage, this Court should not adopt the artificial dichotomy created by ERISA's statutory definitions.

F. The Extent of the Port's Obligation to Provide Retiree Medical Benefits is Properly Measured by the Benefits Provided to Active Employees as of the Date Immediately Before Coverage Terminated

The extent of the Port's obligation is readily determined. As noted above, immediately prior to April 30, 2003, the Port, through the Welfare Trust, provided certain identified benefit plans to retirees, who were charged either nothing, or a nominal sum up to \$20.35, for those benefits. (CP 347) The obligation of the Port is to continue to provide the same levels of benefits, at the same expense to retirees, as was in place at that time. The Port is free to obtain those benefits directly from the insurance companies or HMO's that had been available to retirees before April 30, 2003, and to require the same level of contribution.

V. CONCLUSION

For the reasons stated above, the decision of the trial court should be reversed, and the matter remanded, with directions that the trial court is to enter Partial Summary Judgment in favor of Plaintiffs, establishing the Port must immediately provide retiree medical coverage to Plaintiffs who have achieved the age or disability status and Pension status required by the Welfare Plan immediately prior to April 30, 2003, and shall provide such coverage on substantially the same terms as were in place on April 30, 2003.

Such Partial Summary Judgment shall further provide that the Port must provide the same coverage, on substantially the same terms, to the remaining Plaintiffs when they achieve the age or disability, and pension status required under the Welfare Plan as of April 30, 2004.

Respectfully submitted, this 10th day of January, 2006.

LAW OFFICES OF JAMES D. OSWALD


James D. Oswald WSBA# 11720
100 South King Street, Suite 560
Seattle, WA 98104-3844
206-264-8558

Attorney for Appellants Jack Navlet, et al

APPENDIX A

Opinion No. 86-22A, 1986 WL 38860 (E.R.I.S.A.)

***1** Mr. Steven Bloom
Kaplan, Sicking & Bloom, P.A.
1675 Palm Beach Lakes Blvd.
Suite 200 Forum III
West Palm Beach, Florida 33401

Sep 9 1986

ERISA Sections
Sec. 3(32)
4(b)(1)

Dear Mr. Bloom:

This is in reply to your request for an advisory opinion as to whether the West Palm Beach Firefighters Benefit Fund (the Fund) is a "governmental plan" within the meaning of section 3(32) of title I of the Employee Retirement Income Security Act of 1974 (ERISA) and is, therefore, excluded from coverage under title I of ERISA pursuant to section 4(b)(1) thereof.

Your correspondence and the accompanying documents contain the following facts and representations. The City of West Palm Beach (the City) is a political subdivision of the State of Florida. Local 727 of the International Association of Firefighters, AFL-CIO (Local 727) is the exclusive bargaining representative for all employees of the West Palm Beach Fire Department in the bargaining unit certified by the Public Employees Relations Commission. Pursuant to Article 27, Section 2 of the Agreement between the City and Local 727, (the collective bargaining agreement), amendments were provided to the collective bargaining agreement, Section 6 of which provides for the establishment of a health insurance plan with benefits which are reasonably comparable to or better than the health insurance program sponsored by the City. The Fund was established to provide such benefits. Participation is mandatory for bargaining unit employees and is optional for all non-bargaining unit employees who are members of Local 727. The Fund is operated in accordance with an Agreement and Declaration of Trust, (the trust agreement) effective March 1, 1985.

You indicate that benefits for employees are funded entirely by the City while dependent coverage is funded by both City and employee contributions. Specifically, the City contributes \$88.35 to the Fund per month per employee for health coverage, and \$2.40 per month per employee for life insurance coverage. Currently, each employee who desires dependent coverage contributes \$79.00 per month while the City contributes \$167.37 per month per such employee.

Retirees are eligible to be covered for benefits under the Fund at the same rates charged by the Fund to cover active employees at no cost to the City. In this regard, you indicate that currently there is only one retiree covered for benefits under the Fund in comparison to approximately 140 active bargaining unit employees covered for benefits. Pursuant to the trust agreement, there are five trustees of the Fund who currently are all officers of Local 727 (Article III, Section 3.1). Further, there are four alternate trustees of the Fund who are members of Local 727's executive board (Article III, Section 3.2). The term of office for all trustees is coincident with their term of office as a union officer or member of Local 727's executive board and each such trustee or alternate trustee is automatically removed at such time as he or she ceases to hold such office (Article III, Section 3.3). The board of trustees is responsible for, among other things, receiving contributions, paying expenses, paying benefits, managing and investing Fund assets, and adopting plan provisions and amendments thereto (Article V). The City does not appoint trustees or otherwise participate in the day-to-day operations of the Fund. Beyond being a party to the collective bargaining agreement, pursuant to which the Fund was established, the City's involvement with the Fund is limited to making contributions to the Fund at the same rate and in the same manner as it does for its non-Fire Department employees who participate in the City-sponsored health plan and the right to review, upon request, any records related to the Fund, except employee medical information, to the extent permitted by law (collective bargaining agreement amendments, Sec. 6).

***2** We note that the trust agreement contains provisions which would permit entities other than the City of West

Palm Beach and Local 727 to become parties to the trust agreement for the purpose of providing benefits to their employees. Specifically, Article IX, Section 9.3 of the trust agreement provides that "[t]he Board of Trustees may extend the coverage of this Trust Agreement to such other parties and upon such terms and conditions as the Board of Trustees shall determine ..." and Article IX, Section 9.5 of the trust agreement permits the board of trustees to merge the Trust Fund "with any other trust fund established for similar purposes as this Trust Fund...." Article I, Section 1.10 of the trust agreement defines "employee" for the purpose of receiving benefits through the Fund, to include: (1) any employee with respect to whose employment an employer is required to make contributions to the Fund in accordance with a collective bargaining agreement; (2) officers and salaried or hourly employees of an employer and of Local 727, its state affiliate or International parent body accepted by the Fund's trustees; (3) any employee of the Fund or any other trust fund established pursuant to a collective bargaining agreement with Local 727; and (4) any person that is represented by or under jurisdiction of Local 727, employed by a governmental unit or agency and on whose behalf payment of contributions are made to the Fund. The term "employer" is defined in Article I, Section 1.11 of the trust agreement to include: (1) all employers, including the City of West Palm Beach, that are required by a collective bargaining agreement with Local 727 to make contributions to the Fund on behalf of their employees represented by Local 727; (2) other employers who, while not recognizing Local 727 as the bargaining representative of their employees, are required to make contributions to the Fund on behalf of their employees; (3) Local 727, for the purpose of covering its employees; and (4) the board of trustees of the Fund or any other trust fund established pursuant to a collective bargaining agreement with Local 727, for the purpose of covering trust fund employees with plan benefits.

With regard to the above provisions, you represent that coverage by the Fund has not, in fact, been extended to the employees of any employers other than the City and no employees are eligible to receive benefits under the Fund other than the active and retired bargaining unit employees of the West Palm Beach Fire Department represented by Local 727. While officers and executive board members of Local 727, and members of the board of trustees and their alternates are covered by the trust agreement, you represent that, with the exception of the president of Local 727, those persons are all active members of the bargaining unit and employees of the City and contributions are made for them on the same basis as for other active members of the bargaining unit. The president of Local 727 is a retired fire fighter employee of West Palm Beach and contributions made to the Fund are fully paid by the president at the rates to cover retirees as previously discussed herein. You indicate further that there are no contributions being made to the Fund to cover employees of Local 727, employees or officers of Local 727's state affiliate or its parent body, or employees or officers of the Fund other than the board of trustees and its alternates, discussed above, who are employees or retired employees of the City.

***3** Section 4(b)(1) of title I of ERISA excludes from coverage under that title any governmental plan described in section 3(32) of ERISA. Section 3(32) defines the term "governmental plan" to include, in pertinent part, "... 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 agency or instrumentality of any of the foregoing...."

It is the view of the Department of Labor (the Department) that the term "governmental plan" as defined in ERISA section 3(32) is not limited to plans established by the unilateral action of employers which are governmental agencies. In this regard, the Department has interpreted the term "governmental plan" to include plans established or maintained pursuant to a collective bargaining agreement between a governmental entity and a labor union where such plans are funded by and cover only employees of governmental entities.

On the basis of the facts and representations contained in your correspondence and related documents, it is the view of the Department that, because the Fund covers only active and retired employees of the City and their dependents, and receives substantial funding from the City, the Fund was established and is maintained by the City of West Palm Beach, a political subdivision of the State of Florida, for its employees. Accordingly, the Fund constitutes a "governmental plan" within the meaning of section 3(32) of title I of ERISA and thus is not subject to the 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 of West Palm Beach or the Fund is merged with any other trust fund, as permitted under the trust agreement, 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. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Elliot I. Daniel

Assistant Administrator for Regulations and Interpretations

OFFICE OF PENSION AND WELFARE BENEFIT PROGRAMS (E.R.I.S.A.)
U.S. DEPARTMENT OF LABOR
Opinion No. 86-22A, 1986 WL 38860 (E.R.I.S.A.)
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APPENDIX B

Opinion No. 79-83A, 1979 WL 7017 (E.R.I.S.A.)

*1 Mr. Thomas W. Jennings
Sagot & Jennings
1300 Two Penn Center Plaza
Philadelphia, Pennsylvania 19102

November 20, 1979

ERISA Sections:
3(32)
4(b)(1)

Dear Mr. Jennings:

This is in reply to your letter of August 10, 1979, on behalf of the Health and Welfare Fund of the Philadelphia Federation of Teachers, Local 3, American Federation of Teachers, AFL-CIO, (the Fund), and your previous correspondence on its behalf. Specifically, your request concerns the applicability of the Employee Retirement Income Security Act of 1974 (ERISA) to the Fund. You request an opinion that the Fund is a governmental plan within the meaning of ERISA section 3(32) and, thus, is excluded from coverage by ERISA title I requirements by ERISA section 4(b)(1).

The following is a summary of representations made in materials submitted to the Department in this matter. The Fund was established in accordance with a collective bargaining agreement between the Philadelphia Federation of Teachers and the Board of Education of the School District of Philadelphia. Your letter states that the School District of Philadelphia is a political subdivision of the Commonwealth of Pennsylvania, [FN1] and the employees covered by the Fund are employees of the School District of Philadelphia. The sole contributor to the Fund is the School District. Section 22b of Article B-IX of the collective bargaining agreement, part of which you submitted as Exhibit M, provides that the purpose of the Fund is '. . . to make payments from principal or income or both, of (1) benefits to employees, their families and dependents for medical and hospital care; (2) benefits on account of sickness, temporary disability, permanent disability, death or retirement; (3) benefits for any and all other purposes which may be specified by the Trustees of the Fund, provided same are within the scope of applicable law.'

The Fund is jointly administered by six trustees appointed by the Philadelphia Federation of Teachers and one trustee who is the Superintendent of Schools or his designee. Article III, section 3, of the Agreement and Declaration of Trust between the School District of Philadelphia and the Philadelphia Federation of Teachers dated September 1, 1971, provides that each trustee shall have one vote and that action by the board of trustees designated therein shall require a majority vote.

Section 4(b)(1) of ERISA states that the provisions of ERISA title I shall not apply to a governmental plan described in section 3(32) of ERISA. Section 3(32) of ERISA, in relevant part, defines the term 'governmental plan' to mean 'a plan established or maintained for its employees by . . . the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing . . .'

In ERISA Opinion 79-36, which you cite in your letter, the Department noted that the phrase 'established or maintained' has been interpreted in the context of regulations under the definitions of 'welfare plan' and 'pension plan' in sections 3(1) and 3(2) of ERISA, respectively, in a manner consistent with the view that a plan is not 'established or maintained' by an employer who makes no contributions to it and who is not involved to a significant degree in its administration. We believe that similar considerations are applicable in interpretation of the words 'established or maintained' as used in section 3(32). The Department further expressed the view that the term 'governmental plan,' as defined in section 3(32) of ERISA, is not so narrow as to include only plans established by the unilateral action of employers which are governmental entities, or to exclude collectively bargained plans and plans jointly administered by trustees appointed by governmental entities and by labor unions from the 'governmental plan' definition if these plans are funded by and cover only employees of governmental entities. In ERISA Opinion 79-36, the Department concluded that several plans maintained pursuant to collective bargaining agreement between a union and employers which were political subdivisions, funded exclusively by the employer, and jointly administered by an equal number of union and employer trustees, were governmental plans within the

meaning of ERISA section 3(32). See also, *Feinstein v. Lewis*, No. 79 Civ. 2204 (S.D.N.Y., October 12, 1979).

*2 In our view, the circumstances described in your letter are not materially different from those at issue in ERISA Opinion 79-36. Although only one of the seven trustees of the Fund represents the School District of Philadelphia, we think that the considerations that led the Department to conclude that the plans at issue in ERISA Opinion 79-36 were governmental plans apply with equal force in the case of the Fund.

Accordingly, it is the Department's position that the Fund is a governmental plan within the meaning of ERISA section 3(32) and, thus, is excluded from coverage by ERISA title I pursuant to ERISA section 4(b)(1).

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,

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs

FN1 In this regard, it appears that the School District of Philadelphia may be more accurately characterized as an agency or instrumentality of a state or of a political subdivision of a state, although this distinction is not legally significant in connection with the definition of the term 'governmental plan.'

OFFICE OF PENSION AND WELFARE BENEFIT PROGRAMS (E.R.I.S.A.)
U.S. DEPARTMENT OF LABOR
Opinion No. 79-83A, 1979 WL 7017 (E.R.I.S.A.)
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APPENDIX C

Source: My Sources > Pension & Benefits > Multi-Source Groups > Fed Pension/Benefits Cases,CFR,FR,ERISA & PBGC Opinions [1](#)

Terms: "95-27" and governmental (Edit Search)

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1995 ERISA LEXIS 39, *

Department of Labor

Pension & Welfare Benefit Programs

OPINION 95-27 A

1995 ERISA LEXIS 39

November 8, 1995

CORE TERMS: ambulance, personnel, elected, elect, subsidy, sector, pension plan, employee organization, governmental entity, advisory opinion, privately owned, local police, de minimis, instrumentality, participating, administers, assurance, privately, eligible, covering

REFERENCE:

[*1] 3(32) Definitions

REQUESTBY:

Ms. Mary M. Vanek
Director, Legislative and Member Services
Public Employees Retirement Association of Minnesota
Suite 200 -- Skyway Level
514 St. Peter Street
St. Paul, Minnesota 55102

OPINION:

This responds to your request for an advisory opinion concerning the application of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to the Public Employees Defined Contribution Plan (the Plan), a pension benefit arrangement established under Minnesota Statutes Chapter 353D and administered by the Public Employees Retirement Association of Minnesota (hereinafter, PERA). n1 In specific, you ask whether the status of the Plan as a "**governmental** plan" under section 3(32) of ERISA would be adversely affected if the Plan were extended to cover employees of private ambulance services operating within Minnesota.

n1 PERA, which was established 1938, is a state agency that administers a number of pension plan arrangements, most of which appear to benefit solely **governmental** employees. It is operated by a nine-member board of trustees, which includes the state auditor who serves ex officio as a trustee on the board; five trustees who are appointed by Minnesota's governor to represent, respectively, Minnesota cities, counties, school

boards, retired annuitants, and the general public; and three trustees who are elected by participants in the retirement benefits that PERA administers. PERA is charged by Minnesota statute with administering four separate pension funds: (1) a "basic plan" fund covering eligible public employees; (2) a fund for the benefit of members of local police and fire relief associations that have elected merger with PERA; (3) a fund covering police officers and firefighters who were not members of any local police relief association; and (4) the Plan, which is the subject of your request. [*2]

You advise that the Plan was first established by legislative enactment in 1987 to provide a defined contribution pension plan available, at that time, only to personnel of public and private ambulance services in Minnesota. The governing statutes were amended in 1990, however, to broaden the Plan's potential coverage by permitting certain local elected state officials to elect to participate. In their present form, the governing statutes extend eligibility under the Plan to:

an elected local government official of a **governmental** subdivision who elects to participate in the plan and who, for the elected service rendered to a **governmental** subdivision, is not a member of [PERA], and to basic and advanced life support emergency medical service personnel employed by or providing services for any public ambulance service or privately operated ambulance service that receives an operating subsidy from a **governmental** entity that elects to participate.

Minn. Stat. section 353D.01, Subd. 2.

The statutes further provide that "each public ambulance service or privately operated ambulance service with eligible personnel that receives an operating subsidy from a **governmental** [*3] entity may elect to participate in the plan." Id., section 353D.02. An electing public or private ambulance service "shall fund benefits for its qualified personnel who individually elect to participate." Id., section 353D.03(b). In addition to such employer contributions, "personnel who are paid for their services may elect to make member contributions in an amount not to exceed the service's contribution on their behalf." Id. All "ambulance service contributions must be remitted on a regular basis to [PERA] together with any member contributions paid or withheld. Those contributions must be credited to the individual account of each participating member." Id., section 353D.04(b). A Minnesota board of investment is charged with the responsibility of investing the Plan's assets. Id., section 353D.05. The statutes further prescribe the benefits available to participants, id., section 353D.07, and provide "portability" for ambulance service personnel who change jobs among participating ambulance services. Id., section 353D.08. Further, the statutes provide that the Plan's operations are conditioned on obtaining from the Internal Revenue Service (hereinafter, [*4] IRS) assurance of its tax-qualified status under the Internal Revenue Code (hereinafter, the Code).

You represent that the Plan currently covers the personnel of fourteen ambulance services operating within Minnesota. You state that thirteen of these services are directly owned and governed by the municipalities within which they operate, and that the fourteenth service operates with delegated authority under the direct jurisdiction of the City Council of the city within which it operates.

You further state that the Plan currently has a total of approximately 3,700 participants, of whom 270 are employees of ambulance services. The balance of the Plan's participants, according to your representations, are elected local state officials. However, you represent that many other ambulance services that receive operating subsidies from **governmental** entities operate within Minnesota and that many of such services are privately owned, for-profit organizations. Although none of such privately owned entities have applied to participate in the Plan, you assert that the statutes as drafted would permit their participation, without any further permission from any **governmental** body, including [*5] PERA, and you request our views on the consequences to the Plan of such participation.

Title I of ERISA covers all employee pension benefit plans and employee welfare benefit plans. In general, a covered employee pension benefit plan includes any plan, fund, or program established or maintained by an employer or by an employee organization, or by both, to provide retirement income to employees of the employer or to members of an employee organization. Section 4(b)(1) of Title I of ERISA, however, excludes **governmental** plans from coverage under that title. The term "**governmental** plan" is defined in section 3(32) to include "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 agency or instrumentality of the foregoing."

Based on the information you have provided, it is the view of the Department that many of the private ambulance services that are eligible to participate in the Plan, whose sole connection to government is the receipt of a **governmental** operating subsidy, are not **governmental** agencies or instrumentalities. Although the Plan in operation has apparently not [*6] yet covered any private sector employees, Minnesota law provides no assurance that this de facto limitation of coverage to **governmental** employees will continue.

Because we understand that the Plan, in operation, has not yet covered any private sector employees, we are of the opinion that the Plan, as currently operated, is a **governmental** plan. It is also the opinion of the Department that the status of the Plan as a **governmental** plan should not be affected by the participation of a de minimis number of private sector employees. However, if the Plan were extended, as would apparently be permissible under its authorizing legislation, to cover more than a de minimis number of private sector employees, it would be considered to be a pension plan subject to Title I of ERISA.

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

Robert J. Doyle
Director of Regulations and Interpretations

Source: [My Sources > Pension & Benefits > Multi-Source Groups > Fed Pension/Benefits Cases,CFR,FR,ERISA & PBGC Opinions](#) 

Terms: "95-27" and governmental ([Edit Search](#))

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APPENDIX D

Opinion No. 2000-04A, Pens. Plan Guide (CCH) P 19,988A, 2000 WL 1154961 (E.R.I.S.A.)

***1** Mr. Richard L. Davenport, F.S.A
Deloitte & Touche LLP
Chase Tower
2200 Ross Avenue, Suite 1600
Dallas, Texas 75201

March 30, 2000

ERISA SECTIONS:
3(32)

Dear Mr. Davenport:

This responds to your request for an advisory opinion on behalf of the International Association of Firefighters, AFL-CIO/CLC Local 176 Board of Trustees, Tulsa Firefighters Health and Welfare Trust. You ask whether the Tulsa Firefighters Health and Welfare Plan (Plan) is excluded from Title I of the Employee Retirement Income Security Act of 1974 (ERISA) as a "governmental plan" within the meaning of section 3(32) of ERISA.

You represent that the Plan covers substantially all of the active employees of the City of Tulsa, Oklahoma (City) who are represented by the International Association of Firefighters, AFL-CIO/CLC Local 176 (Local 176), certain retirees of the City, and dependents. Prior to June, 1994, the Plan's participants were covered under the City's medical, dental and life insurance programs. Pursuant to collective bargaining negotiations and a Memorandum of Understanding between the City and Local 176 executed June 17, 1994 (Memorandum), the City agreed to allow Local 176 to withdraw from the City's medical, dental and life insurance programs and provide those benefits in a separate plan funded and operated under a trust created by Local 176. That trust is the Tulsa Firefighters Health and Welfare Trust (Trust) and its benefit program is the Plan at issue here. The affairs of the Trust are conducted by a seven-person board of trustees. Two trustees are members of the executive board of Local 176, four are elected at large by the Local 176 membership, and one is designated by the Mayor of the City of Tulsa and approved by the Tulsa City Council.

The Memorandum specified, among other things, that full-time employees of Local 176 may also participate in the Plan. You state that the Plan currently covers one such employee and that other individuals could become eligible for coverage in the future. In particular, you indicate that Local 176 might add a business manager and a secretary as full-time employees who would be covered by the Plan. With the exception of these three Local 176 employees, the Plan covers only current or retired employees of the City and their dependents. As of March 1999, there were 838 participants enrolled in the Plan. The Plan provides medical, dental and life insurance benefits to its participants in accordance with the collective bargaining agreement between the City and Local 176. The benefits are funded primarily by City contributions specified in the bargaining agreement, which amounted to approximately 78 percent of total contributions to the Plan for the plan year ending June 30, 1998. The remaining contributions are made by the Plan's participants, including the participant employed by Local 176. The bargaining agreement requires the City to wire its contributions directly to the Trust's bank account identified in the agreement.

***2** ERISA section 4(b)(1) provides that Title I of ERISA does not apply to a "governmental plan" as defined in ERISA section 3(32). Section 3(32) of ERISA 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 agency or instrumentality of any of the foregoing." The Department of Labor (Department) has previously concluded that section 3(32) of ERISA includes in the "governmental plan" definition not only plans established by the unilateral action of employers which are governmental entities, but also collectively bargained plans and plans jointly administered by trustees appointed by governmental entities and by labor unions if these plans are funded by, and cover only employees of, governmental entities. It is also the Department's view that participation by a de minimis number of private sector employees in an otherwise governmental plan will not adversely affect the plan's status as a governmental plan. However, if a benefit arrangement were to cover more than a de minimis number of private sector employees, the Department may not consider it a governmental plan under Title I of ERISA.

Your submission indicates that the Plan is maintained pursuant to a collective bargaining agreement between Local 176 and the City; the Plan is substantially funded by contributions from the City with the remaining contributions being made by the Plan's participants; the City appoints one member of the Trust's seven member Board of Trustees; and, except for the three employees of Local 176 discussed above, the Plan covers only employees and retired employees of the City (and their dependents). Based on this information, it is the view of the Department that the Plan is a "governmental plan" within the meaning of section 3(32) of ERISA, despite its inclusion of three non-governmental employees, particularly inasmuch as the activities of the non-governmental employees relate exclusively to representing the governmental employees in regard to aspects of their employment with their governmental employer. Accordingly, the Plan, as a "governmental plan" within the meaning of section 3(32), is excluded from ERISA Title I coverage by ERISA section 4(b)(1).

This letter constitutes an advisory opinion under ERISA Procedure 76-1, and is issued subject to the provisions of that procedure, including section 10 thereof concerning 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,

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

cc: Sam Schaunaman

OFFICE OF PENSION AND WELFARE BENEFIT PROGRAMS (E.R.I.S.A.)
U.S. DEPARTMENT OF LABOR
Opinion No. 2000-04A, Pens. Plan Guide (CCH) P 19,988A, 2000 WL 1154961 (E.R.I.S.A.)
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