U.S. Department of Labor **Employee Benefits Security Administration**
Washington, D.C. 20210

April 27, 2006

2006-04A
ERISA SEC.
403(c) & 406(b)

Charles E. Blitman, Esq.
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Dear Mr. Blitman:

This is in response to your request for an advisory opinion on behalf of the I.B.E.W. Local 910 Pension Fund (Fund) regarding the application of the fiduciary responsibility provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to the trustees' amendment of the Local No. 910 I.B.E.W. Pension Plan (Plan) to permit a retroactive contribution to the Fund on behalf of an owner of a corporation that contributes to the Fund as an employer.

You represent that the Plan is a multiemployer defined benefit plan, setting forth the terms for the payment of benefits from the Fund. The Fund was established effective as of July 1, 1966, pursuant to an agreement and declaration of trust (Trust Agreement) between Local 910 of the International Brotherhood of Electrical Workers of Watertown, N.Y. (the Union) and the St. Lawrence Valley Electrical Contractors Association Inc. Albany, N.Y. Chapter N.E.C.A. The Fund has two employer trustees and two union trustees (Trustees). You represent that the Trustees are authorized to amend the Plan. You further represent that the relevant plan documents (collective bargaining agreements, Trust Agreement and Plan document) are silent as to whether the Trustees will act as fiduciaries in carrying out activities which would otherwise be settlor in nature.

You represent that the Fund provides benefits to individuals working in covered employment under a collective bargaining agreement that requires contributions to the Fund. The Fund provides benefits to certain individuals whose employment is not covered by a collective bargaining agreement but who work for an employer that is a party to such agreement and contributes to the Fund on behalf of other employees covered by such agreement. You represent that the Trust Agreement specifically contemplates participation by corporate employees who are not members of the bargaining unit covered by the collective bargaining agreement requiring contributions to the Fund. You further represent that it is equally apparent that the Fund anticipates providing coverage to officers and shareholders of the contributing employers so long as the terms of the governing document are met.

Your inquiry concerns an individual who, in 1951, began work in employment covered by the collective bargaining agreement to which the Union was a party, and who subsequently started his own business. In 1957, this individual, Eric D. Young, formed E.D. Young, Inc. (Corporation), a corporation that contributes to the Fund as an employer and has common law employees who participate in the Fund. You represent that Mr. Young continued to perform work for the Corporation that would otherwise be covered by the collective bargaining agreement if he were not a "supervisor" under federal labor law. Between 1957 and 1981, the Corporation made contributions on behalf of Mr. Young based on his work performed for the Corporation. Mr. Young effectively owned 100% of the Corporation between 1981 and 1993. In 1993, Mr. Young retired and began receiving a benefit from the Fund based on his work in covered employment between 1951 and 1981, including work performed for the Corporation. You represent that Mr. Young has acted as a Trustee of the Fund since approximately January 1, 1987. You represent that contributions on behalf of Mr. Young ceased in 1981 because the Trustees were concerned that a violation of the nondiscrimination rules contained in section 410(b) of the Internal Revenue Code (Code) would occur if Mr. Young, but no other non-bargaining employees of the Corporation, participated in the Fund. You also represent that the rules in section 410(b) of the Code have been revised retroactively so that contributions on behalf of Mr. Young as a non-bargaining employee who had previously worked in covered employment would have been permissible, without violating these nondiscrimination rules, for all periods relevant to this request.

You represent that the Plan was amended effective July 1, 2001, to provide that any non-bargaining employee or pensioner who was at one time a bargaining unit employee will be granted retroactive pension service to the date he became a non-bargaining employee provided that the employer makes a one-time lump sum contribution to the Fund (“Alumni Contribution Amendment”). You represent that the amount of the contribution is equal to the amount of all employer contributions that would have been made to the Fund on the employee’s or pensioner’s behalf since becoming a non-bargaining employee or pensioner, based on the contribution rate in effect under the applicable collective bargaining agreement, as well as an amount representing the earnings that would have accrued on such contributions. Such earnings will be calculated based on the lesser of the rate assumed by the Fund’s actuary for purposes of preparing the annual report or the Fund’s actual net rate of earnings based on the annual report from the Fund’s independent auditor. You represent that Mr. Young has absented himself from consideration of this matter by the Trustees.

The Corporation proposes to make a lump sum contribution to the Fund equal to the amount of all employer contributions that would have been made to the Fund on Mr. Young's behalf during the period between 1981 when contributions ceased and his retirement in 1993. The lump sum amount would be determined based on the contribution rate in effect under the applicable collective bargaining agreement at the time such contribution would have been made and would also include earnings that would have accrued on such contributions had they been made at that time. You represent that the benefit formula used for determining the lump sum contribution would be based on years of service, as it is for all other Fund participants. You also represent that the Fund's Trustees have determined that the proposed transaction would have no adverse financial effect on the Fund and that Mr. Young did not participate in the Corporation's decision to make the proposed lump sum contribution to the Fund.

You represent that the proposed transaction will not violate the Code's nondiscrimination rules because the Internal Revenue Service has made a favorable determination with respect to the Alumni Contribution Amendment to the Plan document that authorizes the contribution.

You have requested the views of the Department as to the application of section 403(c), 404 and 406(b) of ERISA to the proposed retroactive contribution by the Corporation to the Fund on behalf of Mr. Young. Specifically, you ask: (1) whether Mr. Young is considered an "employee" under ERISA for purposes of participation under the terms of the Plan; and (2) whether the proposed retroactive contribution would result in a prohibited benefit to the Corporation or to Mr. Young as a fiduciary.

Section 403(c)(1) of ERISA generally provides that, subject to certain exceptions, the assets of a plan shall not inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan. Section 404(a)(1)(A) of ERISA requires that plan fiduciaries discharge their duties with respect to the plan solely in the interest of the participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan.

Section 3(7) of ERISA provides that a "participant" is "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such employee

benefit." Section 3(6) of ERISA defines "employee" as "any individual employed by an employer." Section 3(5) of ERISA defines "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for any employer in such capacity."

In Advisory Opinion 99-04A (February 4, 1999), the Department opined that there is nothing in the definitions of Title I of ERISA that would preclude a pension plan from extending plan coverage to "working owners," where such coverage is otherwise consistent with the documents and instruments governing the plan and does not violate any other provision of Title I. In Advisory Opinion 99-04A, the Department noted that,

> "[i]n its regulation at 29 C.F.R. 2510.3-3, the Department clarified that the term "employee benefit plan" as defined in section 3(3) of Title I does not include a plan the only participants of which are "[a]n individual and his or her spouse...with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse" or "[a] partner in a partnership and his or her spouse." The regulation further specifies, however, that a plan that covers as participants "one or more common law employees, in addition to the self-employed individuals" will be included in the definition of "employee benefit plan" under section 3(3). The conclusion of this opinion, that such "self-employed individuals" are themselves "participants" in the covered plan, is fully consistent with that regulation."[1]

In that opinion, "working owner" meant any individual who has an equity ownership right of any nature in a business enterprise and who is actively engaged in providing services to that business, as distinguished from a "passive" owner, who may own shares in a corporation, for example, but is not otherwise involved in the activities in which the business engages for profit.[2]

The Supreme Court addressed the meaning of "participant" in its decision in *Raymond B. Yates, M.D., P.C. Profit-Sharing Plan v. Hendon*.[3] In that decision, the Court held a working owner of a business may qualify as both an "employee" and a "participant" in a pension plan for ERISA purposes, provided that there is at least one common law employee of the business other than the working owner and his spouse.

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[1] *See* Advisory Opinion 99-04A, footnote 7.
[2] *See* Advisory Opinion 99-04A, footnote 3.
[3] 541 U.S. 1 (2004).

It is the view of the Department that the foregoing legal principles, as expressed in Advisory Opinion 99-04A and as set forth by the Supreme Court, would apply in the case of an individual who performed work for his own corporation that would otherwise be covered by a collective bargaining agreement if he were not a "supervisor" under federal labor law as described above. In the Department's view, contributions to the Fund that are attributable to service performed by Mr. Young that is considered covered employment would not violate the anti-inurement and exclusive benefit directives of ERISA sections 403(c)(1) and 404(a)(1)(A).

You should be aware, however, that section 404(a)(1)(D) of ERISA provides that a fiduciary must discharge his duties with respect to a plan in accordance with the documents and instruments governing the plan in so far as such documents and instruments are consistent with Title I. Thus, payment of benefits to an individual who is not entitled to them would contravene the duty imposed on plan fiduciaries under section 404(a)(1)(D) to discharge their duties in accordance with governing plan documents and instruments.

With regard to the Alumni Contribution Amendment, the Department has long taken the position that there is a class of discretionary activities which relate to the formation, rather than the management, of plans, explaining that these so-called "settlor" functions include decisions relating to the establishment, design and termination of plans, and generally are not fiduciary activities governed by ERISA. However, while such decisions may be settlor functions, activities undertaken to implement the decisions generally are fiduciary in nature and must be carried out in accordance with the fiduciary responsibility provisions.[4]

In the view of the Department, where relevant documents (*e.g.*, collective bargaining agreements, trust documents, and plan documents) contemplate that the trustees of a multiemployer plan will act as fiduciaries in carrying out activities which would otherwise be settlor in nature, such activities would be governed by the fiduciary provisions of ERISA. However, where, as here, the relevant plan documents are silent, then the activities of the Trustees which are settlor in nature generally will be viewed as carried out by the Trustees in a settlor capacity, and such activities would not be fiduciary activities subject to Title I of ERISA. Accordingly, it is the view of the Department that the Trustees of the Fund did not violate their fiduciary duties under ERISA in amending the Plan to provide for retroactive pension service and a one-time lump sum contribution to the Fund. *See* EBSA Field Assistance Bulletin 2002-2 (Nov. 14, 2002).

[4] *See* Advisory Opinion 2001-01A (Jan. 18, 2001).

However, whether the steps taken by any given fiduciary in implementing a settlor's decision satisfy ERISA's fiduciary standards are inherently factual questions on which the Department generally will not rule. In addition, as indicated in various pronouncements by the Department, expenses incurred in the performance of settlor functions, such as the plan amendment in this instance, are not reasonable plan expenses. *See* Advisory Opinion 2001-01A (Jan. 18, 2001). *See also* EBSA Field Assistance Bulletin 2002-2 (Nov. 14, 2002); DOL Information Letter to Kirk Maldonado from Elliot I. Daniel (March 2, 1987).

The views expressed in this letter relate only to the provisions of ERISA addressed above and not to any other law. In particular, this letter does not rule on the interpretation or application of any Internal Revenue Code sections. Further, this letter makes no comment regarding section 302(c) of the Labor Management Relations Act of 1947 (LMRA) because the Department of Justice rather than the Department of Labor has jurisdiction regarding that provision. Accordingly, the fiduciary of a plan subject to the LMRA that includes "working owners" may want to consider seeking legal advice regarding the propriety of the participation of "working owners" in such plan under the LMRA.

The Department does not interpret the terms of individual pension plans and has relied, in reaching the conclusions expressed herein, on your representations as to the terms of the Plan and the manner in which those terms are interpreted by the Trustees. The Department takes no position regarding the correctness of the representations.

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,

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