



June 22, 2005

Aaron D. Krakow, Esq.
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225 Friend Street
Boston, Massachusetts 02114

2005-17A
ERISA SEC.
3(32)

Dear Mr. Krakow:

This responds to your request for an advisory opinion on behalf of the Massachusetts Public Employees Fund (Fund) concerning the applicability of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether participation by five employees of the Fund would adversely affect the Fund's status as a "governmental plan" within the meaning of section 3(32) of ERISA.

Your correspondence and the materials you provided contain the following facts and representations. The Fund was established in 1984 pursuant to collective bargaining between the Commonwealth of Massachusetts (Commonwealth) and Council No. 93 of the American Federation of State, County and Municipal Employees, and Local Nos. 509 and 888 of the Service Employees International Union (collectively "the Alliance"). Since 1984, the Fund has expanded to cover other public employees represented by Alliance member unions as well as some state, county and public housing authority employees represented in collective bargaining by other unions. The Fund currently provides dental and vision benefits to approximately 33,600 public employees of the Commonwealth, various counties within the Commonwealth, the City of Boston, and other related Massachusetts public entities. The Fund also covers a small number of common law employees of public employers who are not bargaining unit employees, *i.e.*, whose benefits are not collectively bargained but are funded by their employer by agreement with the Fund. You represent that the Fund is a "governmental plan" under ERISA section 3(32), and that the Fund does not cover any private sector employees. We assume, without examining the issue, that the Fund as it currently is structured and operates, constitutes a "governmental plan" within the meaning of ERISA section 3(32).

A board of trustees consisting of four union trustees and five employer trustees governs the Fund. You represent that the Alliance designates three union trustees, and that another union, which you identified as the State Police Association of Massachusetts, designates one trustee. The Commonwealth appoints the five employer trustees. The Trustees are responsible for the administration and management of the Fund, adopting Fund provisions and amendments, determining the level of benefits, and hiring service providers for the Fund. The Trustees propose to amend the Fund's governing documents to extend eligibility to the Fund's five employees and provide for the Fund

to make contributions on their behalf in accordance with the contribution scheme applicable to the Commonwealth and other participating public employers.

ERISA section 4(b)(1) provides that Title I of ERISA does not apply to any employee benefit plan that is a “governmental plan” as defined in ERISA section 3(32). 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 any of the foregoing.” It is the Department’s view that the term “governmental plan” is not limited to plans established by the unilateral action of governmental employers, but includes plans established and maintained pursuant to collective bargaining between a governmental employer (or employers) and a labor union (or unions) where the plan covers only governmental employees and former employees and is substantially funded by the governmental employer (or employers). *See, e.g.,* Advisory Opinion 2002-11A. The Department has also previously stated its view that a plan’s governmental plan status would not be adversely affected by participation of a de minimis number of private sector employees. *See, e.g.,* Advisory Opinion 2000-08A and Advisory Opinion 95-27A. However, if a benefit arrangement is extended 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.

Based on the information and representations provided in your request, the Fund’s five employees would constitute only a small fraction of one percent of the total number of participants in the Fund. Accordingly, and based on the assumption that the Fund currently is a “governmental plan” within the meaning of ERISA section 3(32), it is the Department’s view that participation of Fund’s five employees would not adversely affect the status of the Fund as a “governmental plan” for purposes of Title I of ERISA.

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