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January 30, 2003

CONFIDENTIAL

Gregory Sato, Esq., Chairperson  
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**PRIVILEGE WAIVED  
BY  
BOARD ACTION  
ON  
FEBRUARY 6, 2003**

Re: Recovery of Excess Porting

Dear Mr. Sato:

You have asked us to consider what remedies are available to the trustees of the Hawaii Public Employees Health Fund for excess porting to employee organizations during the period from July 1, 1994 to date.

Following is an analysis of the issues that I have prepared in response to your request. This letter has not been reviewed by the Attorney General, and it is subject to revision.

I. Statutory Requirements

Under Section 87-4(a) of the Hawaii Revised Statutes, the State makes a monthly contribution for employees' health insurance:

equal to the amount established under [HRS] chapter 89C or specified in the applicable public sector collective bargaining agreement ... which shall be used toward the payment of costs of a health benefits plan; provided that the monthly contribution shall not exceed the actual cost of a health benefits plan.

HRS § 87-4(a) (1993). The amount established under HRS Chapter 89C, which covers employees who are excluded from collective bargaining, may not be less than contributions made for covered employees in comparable positions. HRS § 89C-2(4) (2002 Supp). As a general rule, therefore, employer contributions for health benefit plans are determined by collective bargaining agreements.

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HRS Sections 87-22.3, 87-22.5, and 87-23 provide that the Health Fund may provide health benefit plans, children's dental plans, and group life plans, respectively, in one of two ways: (1) by establishing such plans itself for employees who do not participate in a union plan, or (2) for employees who do participate in union plans, by paying a monthly contribution or "the actual monthly cost of coverage," whichever is less, "towards the purchase of ... benefits under the [union's plan]." Payments made to unions are known as "porting." Under the Health Fund's administrative rules, unions receiving ported funds must agree to be audited by the State and to "accept adjustments" as may be required under HRS Chapter 87 and HAR Chapters 6-30 through 6-36. HAR § 6-34-9 (health benefits plan); HAR § 6-35-5 (children's dental plan); HAR § 6-36-7 (group life insurance). One such adjustment is for the refund of amounts that were paid by the Health Fund in excess of "the actual monthly cost of coverage."

## II. Porting to Union Plans

In 1979, the law did not provide for porting to employee organizations, except for group life insurance for which the Health Fund was authorized to "allot \$2.25 per month towards the purchase of group life insurance benefits under the group life insurance program of an employee organization." HRS § 87-23. The Attorney General advised the Health Fund that the trustees had no responsibility to monitor union life insurance plans because "[t]he election of the employee to participate in the plan and payment by the Board of Trustees operates to relieve the Board from further obligation to that beneficiary." Op. Haw. Att'y Gen., 7/23/79. The opinion was based upon court decisions exonerating trustees from liability for the payment of trust assets where the beneficiary had acquiesced therein with full knowledge of the facts. It did not, however, consider issues presented for the first time by subsequent changes in the law that extended health benefits and provided for the audit of union plans and adjustments of amounts paid.

The Legislature expanded employee health benefits in 1980 to provide for dental benefits for the children of public employees, Act 61, SLH 1980, and in 1984, coverage was extended to medical benefits for all public employees. Act 71, SLH 1984. Beginning in 1984, employees were given the option of enrolling in union-sponsored health benefit plans, and the Health Fund trustees were authorized to "port" to unions the amount provided by collective bargaining agreements or the actual monthly cost of coverage, whichever is less. *Ibid.*

The Health Fund adopted rules in 1982 that governed porting for the group life insurance and children's dental plans. See HAR § 6-36-7 (life insurance plan); HAR § 6-35-5 (children's dental plan). A similar rule was adopted for the health benefits plan in 1985. HAR § 6-34-9. The administrative rules set forth procedures by which unions may receive porting of employer contributions. Under the rules, unions must agree to maintain books and records for their plans, permit the Health Fund or the State Comptroller to audit those records, and accept adjustments

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required by law.

III. Health Fund's Right to Recover Excess Porting

Employee organizations provide health coverage to members under either contributory ("primary") plans, where employees contribute a portion of the cost, or non-contributory ("supplemental") plans, where employees make no contributions. Pursuant to collective bargaining agreements, amounts "ported" to the unions equal 60% of the monthly premium paid by the Health Fund for its own medical plan and 100% of the monthly premiums for the group life insurance plan and the children's dental plan. Sections 87-22.3, 87-22.5, and 87-23 of the Hawaii Revised Statutes limit amounts paid, however, to "the actual monthly cost of coverage."

Unions may purchase health coverage from insurance carriers or they may distribute benefits directly to their members. Where the union purchases insurance, the "actual monthly cost of coverage" equals the carrier's premium plus allowable administrative expenses. Where the union administers its health plan directly, "actual monthly cost of coverage" equals the cost of administration.

For non-contributory plans, the Health Fund pays 100% of the cost of coverage, even though under the collective bargaining agreements, payments are limited to 60% of the Health Fund's medical plan premiums. Health Fund contributions might cover the entire cost of a union's plan because retirees are often excluded from coverage and benefits might be less than are provided by the Health Fund's plan. For contributory plans, the Health Fund pays part, and union members pay part. Four situations are possible:

1. Non-contributory plans that purchase insurance – The Health Fund pays 100% of the premiums for the plan, not exceeding, however, 60% of premiums paid by the Health Fund for its own plan. Any rebate paid by the union's insurance carrier would reduce the actual cost of coverage, thus entitling the Health Fund to receive those rebates pursuant to HRS §§ 87-23(2), 87-22.3(2), and 87-22.5(2). Unions might have no incentive to negotiate contract provisions that require refunds, however, because the State would receive 100%, and union officials might have personal or business relationships with carriers that underwrite union health plans.<sup>1</sup> Recovery of excess porting might then

<sup>1</sup>For example, Russell Ogata, executive director of HGEA, is chairman of the board of Royal State Corp., which is a business affiliate of VEBAH, the entity that administers HGEA's health plan. See Royal State Group's website (royalstate.com), State's Joinder and Response to HGEA's Motion for Clarification, etc., in *Anzai v. HGEA, et al.*, 1<sup>st</sup> Cir Ct., Civ. No. 02-1-0685, 5/3/02, Ex. M. Gary Rodrigues, as Executive Director of UPW, received kickbacks from an agent of an insurance company that provided life insurance to UPW's members. See *U.S. v. Rodrigues, D. Haw., Cr. No. 01-00078 DAE, First Superseding Indictment, 12/19/01. at 57-58.*

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require proof that the insurance carrier fraudulently charged unreasonably high premiums in order to prevent the State from recovering the excess.

2. Non-contributory plans administered by union – The Health Fund pays 100% of the union's administrative costs, not exceeding, however, 60% of premiums paid by the Health Fund for its own plan. The actual monthly cost of coverage would equal the reasonable cost of administering the plan, and any refund would be payable to the State because it pays the entire cost. Subject to ERISA limitations, *see* Section IV below, the union would have an incentive to "spend-up" to the amount ported by the Health Fund because any savings would have to be passed on to the State. Recovery of excess porting would thus depend upon proof that the union's administrative costs were unreasonable.

3. Contributory plans that purchase insurance – The Health Fund pays between 70% and 90% of the premiums for contributory plans, and union members pay the balance. *See* Conf. Comm. Rep. No. 124, 2001 Hawaii Senate Journal at 910. Unlike non-contributory plans, unions have an incentive to negotiate for premium rebates because their members contribute to the cost of coverage. However, the Health Fund would be entitled to share in rebates only if amounts ported exceed the actual cost of coverage of a union's plan, *i.e.*, total premiums after any rebates. Since premium rebates would be paid to union members first, the Health Fund would receive nothing until members' contributions had been completely refunded.

4. Contributory plans administered by union – Unions might have no incentive to incur excessive administrative costs because a portion thereof would be paid by union members. However, even if costs of administration were inflated, the Health Fund (as opposed to plan beneficiaries suing under ERISA) would not be entitled to recover excess porting unless amounts paid exceeded the actual costs of coverage (*i.e.*, reasonable administrative costs). That situation would arise only where contributions by union members had been completely refunded because the members would have first claim to any cost savings.

In sum, the Health Fund could recover excess porting in the case of non-contributory plans, but it might be difficult to do so if unions have not negotiated refund provisions with their insurance carriers. The case might also require a detailed audit of self-insured plans for which records might not be available. Excess amounts ported to contributory plans would be subject to reduction for contributions made by union members before the Health Fund would be entitled to any rebate.

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#### IV. Administrative Expenses

The union health plans are "employee welfare benefit plans" within the meaning of Section 3 of the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. § 1002(1). The sponsoring unions are "parties in interest" for purposes of ERISA, 29 U.S.C. § 1002(14)(D) (the term "party in interest" means "an employee organization any of whose members are covered by such plan"), and they are, therefore, subject to prohibitions on certain transactions, including the "furnishing of goods, services, or facilities between the plan and a party in interest." 29 U.S.C. § 1106(a)(1)(C).

Section 408(b) of ERISA exempts from prohibited transactions "[c]ontracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor." 29 U.S.C. § 1108(b)(2). The exemption does not apply, however, to self-dealing by fiduciaries. See 29 C.F.R. § 2550.408b-2(a) (2002); *Patelco Credit Union v. Sahni*, 262 F.3d 897, 911 (9<sup>th</sup> Cir. 2001). A "fiduciary" means a person who "has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). Furthermore, employees of unions are prohibited from receiving compensation for services rendered to the union's plan, "except for reimbursement of expenses properly and actually incurred." 29 U.S.C. § 1108(c)(2).

Under the foregoing rules, unions may not be reimbursed for staff salaries, but they could be reimbursed for other reasonable administrative expenses that are necessarily incurred in connection with establishing and providing a health plan, provided they have no discretionary authority. Thus, if the union administers the plan itself, it would be precluded from recovering administrative expenses from the plan's assets, but if it contracts with a separate plan administrator, the union could be reimbursed for reasonable expenses (other than staff salaries) that it incurs as a result of independent discretion exercised by the plan's administrator. See 29 C.F.R. § 2550.408b-2(e)(2) (2002)<sup>2</sup>; 29 C.F.R. § 2550.408b-4(a) (2002).

<sup>2</sup> 29 C.F.R. § 2550.408b-2(e)(2) provides:

... A fiduciary does not engage in an act described in section 406(b)(1) of the Act if the fiduciary does not use any of the authority, control or responsibility which makes such person a fiduciary to cause a plan to pay additional fees for a service furnished by such fiduciary or to pay a fee for a service furnished by a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary. This may occur, for example, when one fiduciary is retained on behalf of a plan by a second fiduciary to provide a service for an additional fee. However, because the authority, control or responsibility which makes a person a fiduciary may be exercised "in effect" as well as in form,

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V. Enforcement Efforts

In 1998, the Hawaii Legislature adopted House Concurrent Resolution No. 88 which requested the State Auditor to examine the Health Fund's operations. Pursuant to that resolution, the State Auditor published Report No. 99-20 ("Actuarial Study and Operational Audit of the Hawaii Public Employees Health Fund") in May 1999. The Report stated that premiums paid to union health plans had grown substantially during the 1990's, with the number of union members participating in such plans increasing from 8% in FY 1994 to 53% in FY 1997. For three unions - HGEA, UPW, and HSTA - amounts ported by the Health Fund increased during the three years from \$15 million to almost \$60 million.

The Auditor found that the Health Fund had never audited union benefit plans and stated that this violated its fiduciary duties. The lack of monitoring was attributed to the trustees' understanding of the 1979 opinion of the Attorney General referred to in Section II above, but porting requirements changed substantially after that opinion was written, and amounts paid to unions increased from \$186,000 in FY 1979 to \$63,571,634 in FY 1997. The situation in 1997 was, therefore, substantially different from 1979, and even from 1994. Prior to the mid-1990's, union health plans were not widely used, and amounts ported to those plans were not large enough to generate concern. The situation had changed by 1997, however.

On December 19, 2001, after a three-year investigation, the U.S. Attorney for Hawaii filed a First Superseding Indictment against Gary Rodrigues, State Director of UPW, and Robin Sabatini, his daughter. Count 95 of the indictment alleged that during 1996, Pacific Group Medical Association ("PGMA"), a Hawaii mutual benefit society, had paid \$146,361.32 in "consulting fees" to Sabatini, even though no services had been rendered. The indictment charged the defendants with money laundering for attempting to hide the transaction from the union and its members. The defendants were convicted of the charges on November 19, 2002.

On January 3, 2002, the State Comptroller advised UPW and HGEA of his intent to audit their benefit plans in order to determine whether excess funds had been ported. Correspondence with Gary Rodrigues on behalf of UPW followed in which UPW refused to cooperate. Correspondence also followed with the Voluntary Employees' Benefit Association of Hawaii ("VEBAH"), acting on behalf of HGEA, and Russell Ogata, Executive Director of HGEA. VEBAH refused to cooperate on the grounds that the Health Fund's administrative rules were

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mere approval of the transaction by a second fiduciary does not mean that the first fiduciary has not used any of the authority, control or responsibility which makes such person a fiduciary to cause the plan to pay the first fiduciary an additional fee for a service....

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"outside of the authority of Chapter 87" and that there was no legal authority for an audit.<sup>3</sup> The entity threatened to sue the State Comptroller in his personal capacity if he persisted in his efforts to audit HGEA's books and records.

The Attorney General filed suit against HGEA and UPW on March 15, 2002, seeking a mandatory injunction that would direct the defendants to make their financial records available. The suit also sought an order requiring Defendants to account for payments made by the Health Fund from July 1, 1994 through June 30, 2001 "and the actual cost of providing health, dental, and group life insurance benefits to those enrolled in Defendants' Welfare Benefit Plans, including any premium credits or refunds received by the Defendants." The State moved for a preliminary injunction on March 22, 2002 that would require the Defendants to produce specified records being sought by Ernst & Young, the accountants retained by the Comptroller to conduct the examination.

The Court granted the State's motion for a preliminary injunction on April 11, 2002 and ordered UPW and HGEA to make their records available. The Comptroller sought to implement the order, but he advised you that "neither HGEA nor UPW maintain reasonable enrollment and accounting records relating to their employee welfare benefit plans." Okimoto to Sato, 5/28/02. Both unions stated that with few exceptions, their records were in VEBAH's possession; VEBAH refused to produce them. The Comptroller urged the Health Fund to de-certify HGEA and UPW and to suspend further porting on the grounds that they had not maintained records as required by the administrative rules. *Ibid.*

On April 23, 2002, HGEA moved for clarification of the preliminary injunction, asking whether the order required VEBAH to produce its records. The Court granted the motion and ordered HGEA and UPW to subpoena VEBAH's records, after which VEBAH and others raised various discovery issues. It does not appear that the issues have been resolved, and as a result, information received from HGEA and UPW has not been sufficient to determine whether the Health Fund is entitled to recover excess porting. The other public employee unions have apparently cooperated with the auditors, but in most cases, their books and records are incomplete, and the Comptroller's review is, therefore, inconclusive.

We understand that the parties have discussed settlement under which the Attorney General's lawsuit would be terminated with prejudice, but the State could seek reimbursement

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<sup>3</sup> VEBAH is an affiliate of Royal State Corporation, which administers HGEA's and UPW's welfare benefit plans. VEBAH, Royal State, and the Mutual Benefit Association of Hawaii, which provides administrative services to HSTA, have interlocking directorships. See Plaintiff's Joinder and Response to HGEA's Motion for Clarification, etc., in *Anzai v. HGEA, et al.*, 1<sup>st</sup> Cir Ct., Civ. No. 02-1-0685, 5/3/02, at 8.

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for excess porting. We objected to those terms because UPW and HGEA have still not accounted for the disposition of funds ported to them, and an accounting is required before the State can recover any overpayments. We are not aware that the matter has been resolved.

#### VI. Individual Union Audits

On June 18, 2002, Ernst & Young, accountants retained by the Comptroller to conduct a review of the union plans, released their "Report on Agreed-Upon Procedures." The report considers, but does not audit, union plans that have contracts with insurance carriers, it does not distinguish between primary and supplemental plans, and it does not report separately on any union-administered plans. It is not possible, therefore, based upon the Ernst & Young review, to determine whether excess amounts were ported and, if so, how much.

Based upon the Ernst & Young report, the State Auditor's analysis, information received by The Segal Company ("Segal"), and other sources, the following conclusions can be drawn respecting the various employee organization plans:

##### A. Hawaii Government Employees Association (HGEA)

Ernst & Young's review could not be completed because of the lack of cooperation by HGEA and VEBAH, its plan administrator. According to the State Auditor, amounts ported to UPW, HGEA, and HSTA in FY 1997 totalled approximately \$60 million. Ernst & Young states that \$18.8 million was ported to HSTA that year, leaving approximately \$41.2 million being ported to UPW and HGEA in FY 1997. Unaccounted funds are substantial.

An audit should be conducted of HGEA's supplemental health plans and any primary plans for which employee contributions were repaid through premium refunds. The auditors should also determine whether amounts ported by the Health Fund were used to pay for plans administered by the union. If so, an audit of the self-administered plan's income and expenses is required.

##### B. Hawaii State Teachers Association (HSTA)

According to the Ernst & Young Report, amounts ported to HSTA and the plan's premium expenses were as follows:

	<u>FY 95</u>	<u>FY 96</u>	<u>FY 97</u>	<u>FY 98</u>	<u>FY 99</u>	<u>FY 00</u>	<u>FY 01</u>	<u>Total</u>
Ported	13,932,100	16,687,800	18,823,700	21,439,300	23,323,300	24,956,000	28,471,600	147,633,800
(Premiums)	18,275,100	22,531,200	25,610,400	28,053,200	33,546,500	35,771,600	38,042,200	201,830,200
Refunds	4,062,400	2,873,300	2,566,200	1,205,300	1,515,400	1,389,200	2,801,300	16,413,100

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Premiums after refunds (the "actual cost of coverage") exceeded amounts ported for every year, while employee contributions (totaling approximately \$56 million) represented between 24% and 29% of total plan contributions. The Ernst & Young Report does not show what premium refunds relate to supplemental (non-contributory) plans or primary plans, however. That information must be provided before we can determine whether there was excess porting in the fiscal years 1995-2001.

According to figures reported by Segal, in 2002,<sup>4</sup> amounts ported to HSTA for its supplemental prescription and medical plans totaled \$6,390,247, while actual costs of coverage were \$5,134,474. The difference, excess porting, amounts to \$1,255,773. We recommend that the Health Fund request that HSTA accept an adjustment to FY 2002 porting in order to comply with HRS §§ 87-22.3, 87-22.5, and 87-23. If HSTA accepts the adjustment, the Health Fund may deduct the agreed upon sum from future porting. Otherwise, it would have to rely upon the remedies discussed in Section VIII below.

C. United Public Workers (UPW)

Information incomplete. See HGEA.

D. State of Hawaii Organization of Police Officers (SHOPO)

Information is incomplete. Premium refunds received for medical, drug, and vision plans in FY 1998 through FY 2001 totaled \$594,400.

E. University of Hawaii Professional Assembly (UHPA)

Information provided to the Health Fund shows that UHPA charged administrative fees of 5% of ported amounts for both its contributory and non-contributory plans. See *Anzai v. HGEA, et al.*, 1<sup>st</sup> Cir. Ct., Civ. No. 02-1-0685, Motion for Preliminary Injunction, 3/22/02, Ex. 10-a. Those payments would be prohibited transactions under the ERISA regulations if UHPA exercised discretion over the administration of the plan or if the amounts were unreasonable.

F. Hawaii Fire Fighters Association (HFFA)

Information is incomplete. HFFA's medical plan is non-contributory, but the only premium refunds noted by Ernst & Young relate to the life insurance plan for FY 1995.

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<sup>4</sup> Ernst & Young's figures are for fiscal years ended August 31. Segal's figures are for the plan year ended June 30, 2002.

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G. Hawaii Education Association (HEA)

Information is incomplete. Porting is limited to group life insurance for which refunds in FY 2001 were \$81,700.

H. Honolulu Fire Department Fireman's Fund (HFDF)

Information is incomplete. Porting is limited to group life insurance. No refunds noted.

I. Honolulu Police Relief Association (HPRA)

Information is incomplete. Porting is limited to group life insurance. Refunds in FY 1996 and 1997 totaled \$134,500.

J. Public Employees Management Association of Hawaii (PEMAH)

Information is incomplete. Porting is limited to group life insurance. No refunds noted.

K. Employees Association of the City and County of Honolulu (EACCH)

Information is incomplete. Porting is limited to group life insurance. No refunds noted.

L. Hawaii Police Relief Association (HIPRA)

Information is incomplete. Porting is limited to group life insurance. No refunds noted.

M. Hui Waipuna, Inc.

Information is incomplete. Porting is limited to group life insurance. Refunds noted for FY 1997 through FY 2001 totaled \$36,800.

VII. Trustees' Obligations to Recover Excess Porting

It appears that substantial amounts were paid to UPW, HGEA, and HSTA in excess of statutory limits during fiscal years 1995-2002. We are unable to determine the extent of

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overpayments because of the refusal of UPW and HGEA to cooperate with the Ernst & Young examination, limitations placed on the scope of that examination, and the unavailability of records. Under the circumstances, full and complete audits should be conducted of HSTA's plans for fiscal years 1995-2001 and for the other union plans for fiscal years 1995-2002. Priority should be given to audits of UPW, HGEA, and HSTA because of the amounts ported to those unions.

The trustees have an obligation to recover overpayments under the Health Fund's regulations and the Hawaii Revised Statutes. They may also have a fiduciary duty to take appropriate action to recover amounts that should be repaid to union members, although we express no opinion about that issue in this letter.

#### VIII. Remedies

##### A. Offset

The Health Fund could recover overpayments through offset, subject to due process requirements. As a general rule, the government may not withhold benefits or entitlements unless it provides an opportunity for a trial-type hearing prior to or immediately after its action. *Mortenson v. Board of Trustees*, 52 Haw. 212, 473 P.2d 866 (1970) (denial of service-connected disability retirement benefits requires hearing); *Aguiar v. Hawaii Housing Authority*, 55 Haw. 478, 522 P.2d 1255 (1974) (denial of statutory right to low-cost housing requires due process hearing); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) ("the means to obtain essential food, clothing, housing, and medical care" are subject to procedural safeguards).

Due process guarantees protect not just individuals, but organizations as well. See *Downtown Auto Parks, Inc. v. City of Milwaukee*, 938 F.2d 705 (7<sup>th</sup> Cir. 1991) (failure to renew contract deprived contractor of property interest); *Abercrombie v. City of Catoosa*, 896 F.2d 1228 (10<sup>th</sup> Cir. 1990) (wrecker service had property interest in receiving equal referrals from City). Thus, before the Health Fund may discontinue porting that is mandated by HRS Sections 87-22.3, 87-22.5, and 87-23, notice and a meaningful opportunity for hearing must be provided, consistent with the standards contained in HRS Chapter 91. A declaratory ruling proceeding could satisfy those requirements if a contested case hearing is held.

##### B. Lawsuit

Standing to enforce ERISA is limited to plan participants or beneficiaries, fiduciaries, employers, and the Secretary of Labor. 29 U.S.C. § 1132. The right of States to bring suit in federal court is limited to the enforcement of qualified medical child support orders. 29 U.S.C. § 1132(a)(7). Thus, the Health Fund lacks standing to sue for the recovery of administration

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expenses on the grounds that they violate ERISA, but it may be able to claim recovery in a proper action over which the court has independent jurisdiction.

The Circuit Courts of Hawaii would have jurisdiction over a suit to compel an accounting and to recover excess porting. The Health Fund may not, however, be able to commence a separate action while the suit brought by the Attorney General, *Anzai v. HGEA, et al.*, remains pending or if that suit is dismissed with prejudice. Although the Health Fund is a separate trust that is administered by its own board of trustees, it is still an agency of the State. The Health Fund may, therefore, be bound by a judgment entered in the pending lawsuit because the State is a party.

If *Anzai v. HGEA* is dismissed without prejudice, as we have recommended, the Health Fund would be free to commence its own action for an accounting. If the suit is dismissed with prejudice, the Health Fund could be precluded from obtaining an accounting, and it may not be able to pursue its claim to recover excess porting. An administrative proceeding to de-certify unions from further porting for failure to account might, then, be the only available remedy, but that would not allow for the recovery of excess payments. If *Anzai v. HGEA* is not dismissed, the Health Fund may move to intervene as a separate party, or rely upon the Attorney General, suing on behalf of the State Comptroller, to obtain an adequate accounting. The Comptroller, not the Health Fund, would have control over the suit, but the Health Fund could file its own administrative offset proceeding or separate lawsuit to recover amounts found to be due and owing.

#### IX. Recommendations

A. 1. We recommend that HSTA be advised in writing of the results of Segal's examination of porting during FY 2002, and that the Health Fund propose an adjustment reducing the amount ported that year by \$1,255,773.

2. If HSTA accepts the adjustment, future porting should be reduced by \$1,255,773, and HSTA should be billed for any unrecovered amount.

3. If HSTA does not accept the adjustment, the Health Fund may request that the Office of Administrative Hearings at DCCA schedule a contested case hearing pursuant to Chapter 91 to authorize an offset against future porting. If DCCA is unable or unwilling to hold such a hearing, a declaratory order proceeding could be commenced before the board of trustees, or an action to recover \$1,255,773 could be filed in Circuit Court. In the meantime, porting should be continued unless a court orders otherwise.

B. If *Anzai v. HGEA* is not dismissed, the Health Fund may move to intervene in the

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case or ask the Comptroller to move for a further audit of UPW's and HGEA's health plans that provides the information described above.

C. The Health Fund should request a further audit of HSTA's plans for FY 1995-FY2001. The audits should report income, expenses, and premium refunds separately for primary and supplemental plans. If HSTA does not cooperate, a motion could be made to join the union as a defendant in *Anzai v. HGEA*, or the Health Fund could commence a separate action. Administrative proceedings could also be initiated to de-certify the union's health plan.

D. Of the remaining union plans, only those sponsored by SHOPO, UHPA, HEA, and HPRA show significant premium refunds or questionable transactions. We recommend that the Health Fund request information from those unions on a voluntary basis before proceeding further. It does not appear that further action regarding the other union plans is required at this time.

We would be pleased to consider any further questions you or the other trustees may have.

Very truly yours,



John P. Deller  
Deputy Attorney General

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