ISSUE: Suspension of benefits/denial of early retirement issues.

Client is trying to obtain an early retirement pension from the *Grocer/Storage Pension Plan* – a multiemployer plan. Client began working at Fairway Foods in 1977 as a warehouse worker. He was a member of Local 503.

Twenty (20) years later, in 1998, he was elected to be an Officer of the Union. He continued to receive pension contributions to the *Grocer/Storage Pension Plan.*

In 2003, Local 503 merged with Local 120 (with 503 going away) and client worked for one year as a union Organizer, still receiving pension contributions.

In 2004, client transferred to Local 320 – and took a job as "business agent" for local 320. Local 320 is *not* a contributing member to the *Grocer Pension Fund* (it is part of Central States) where he currently works. He would like to take his early retirement in February 2010 (when he will turn 55).

Under the 2009 SPD – an individual is eligible for "early retirement" at age 55 if you have earned 25 or more years of Vesting Service. (My client has 27 years – 1977 thru July 2005).

However, client is concerned that his current work is "disqualifying employment" meaning he cannot begin to receive his pension as long as he continues to work, even though his current position is not connected to his *Grocer* Pension Plan.

Local 503 (which merged with 120) is no longer a contributing member to the *Grocer* Pension Plan.

The Plan provides that "Disqualifying employment" means employment or self-employment that is:

(a) In an industry (the public warehousing, wholesale garage, and cold storage industries and any other business activity of a type engaged in by Contributing Employers) covered by the Plan when the Participant's pension payments began or would have begun if the Participant had Not remained in or returned to employment; and

(b) In the geographic area (Minnesota and the remainder of any Standard Metropolitan Statistical Area falling in pat in Minnesota) covered by the Plan when Participant's pension payments begin or would have begun if the Participant had not remained in or returned to employment; and

(c) In a trade or craft in which the Participant worked under the Plan at any time.

Under this Plan, the following terms are defined:

The term "Employer" means any employer who employs an Employee represented by the Union for purposes of collective bargaining, which Employer has executed a Collective Bargaining Agreement requiring contributions to the Pension Fund. The term "Employer" also means the Union. (p.12).

The term "Union" shall mean the Warehouse Employees Union Local No. 503, its successor, or such other affiliate of the International Brotherhood of Teamsters as may require jurisdiction over existing Participants of the Plan. (p. 15)

The argument is that the client is not currently engaged in the industry - the public warehousing, wholesale garage, and cold storage industries and any other business activity of a type engaged in by Contributing Employers.

The client works as a Union representative for Local 320. Local 320 is a different industry from the public warehousing, wholesale garage, and cold storage industry. Local 320 represents public employees – such as court reporters, court house employees, court clerks, police dispatchers, and custodians.

There is some commonality in the position/job the client held with Local 120 and his current Local 320 – in each he acted as a "business agent." As a business agent with Local 320, the client represents public employees in school districts, court houses, and other city employees negotiate union contracts, handle grievances, and makes certain employee rights' are protected. These employees are members of PERA.

Also, current Local 320 represents *public* employees – and thus is governed by the Public Employees Labor Relations Act. Local 503 (and Local 120) represented *private sector* employees – and thus is governed by the National Labor Relation Board.
Question – Does this public vs. private distinction matter?

UPPER MIDWEST PENSION RIGHTS PROJECT

2365 N. McKnight Rd. Suite 3 • North St. Paul, MN 55109
• (651) 251-5765 • (866) 783-5021 • (651) 641-8612

June 30, 2010

Grocery/Storage Pension Plan
9422 Ulysses Street NE – Suite 130
Blaine, MN. 55434

RE: Leland Johnson – SSN# 470-64-2526
Section 4.14(c)(4) Determination

Dear Grocery/Storage Pension Plan:

My name is David A. Bonello, and I am an attorney with the Upper Midwest Pension Rights Project ("UMPRP"). The UMPRP assists individuals who are trying to obtain pension/retirement benefits and/or who have questions regarding their pensions. I am writing regarding my client, Leland Johnson (please see the enclosed Client Authorization form signed by Mr. Johnson).

Under the applicable Plan rules of the *Restated Grocery/Storage Pension Plan*, an individual is eligible for an early retirement at age 55 if the employee has earned at least twenty-five years of vesting service. According to information obtained from the Plan, the records demonstrate that Mr. Johnson qualifies for this early retirement pension by virtue of having acquired 27 years of vesting service.

Mr. Johnson would like to submit an application and begin receiving his pension benefits at this time. Pursuant to Section 4.14(c)(4) of the *Restated Grocery/Storage Pension Plan*, Participant Leland Johnson hereby does request that the Plan Administrator provide a determination as to whether Mr. Johnson's current employment is considered "disqualifying employment" under the Plan.

<u>Employment Background</u>

Mr. Johnson previously worked for *Fairway Foods* from 1977 to approximately 1998. He worked as a warehouse worker. During this time, Mr. Johnson was a member of Teamsters Local 503 and also a member of the *Grocery/Storage Pension Plan*, and his employer contributed on his behalf to this Plan.

Around 1998, Mr. Johnson left his employment with *Fairway Foods* and became an officer of Teamsters Local 503. However, he continued to receive pension contributions on his behalf to the *Grocery/Storage Pension Plan* while working as a union officer. In 2003, Local 503 merged with Local 120. Mr. Johnson worked for approximately one year as a union organizer.

In 2004, Mr. Johnson stopped working as a union organizer for Local 120, and began working for Teamsters Local 320 as a business agent for the union. As a result, he no longer received pension contributions for this employment to the *Grocery/ Storage Pension Plan.* Instead, as a result of his new employment, Local 320 contributed to the *Central States Southeast and Southwest Areas Pension Fund* on behalf of Mr. Johnson. It is important to note that Local 320 has never been a contributing member to the *Grocery/Storage Pension Plan.* Mr. Johnson would like to continue his employment with Local 320 while receiving his pension from *the Grocery/Storage Pension Plan.*

Argument

The applicable Plan Document governing the *Grocery/Storage Pension Plan* is the *Restated Grocery/Storage Pension Plan* effective January 1, 2002, as well as the January 1, 2009 Summary Plan Description ("SPD"). The SPD amended the Restated Plan of January 2002. Section 4.14(a) of the Plan defines "Disqualifying Employment" as follows:

"'Disqualifying Employment' means employment or self-employment that is:

A. In an industry (the public warehousing, wholesale storage, and cold storage industries and any other business activity of a type engaged in by contributing Employers) covered by the Plan at any time; AND

B. In the geographic area (Minnesota and the remainder of any Standard Metropolitan Statistical Area falling in part in Minnesota) covered by the Plan when the Participant's pension payments begin or would have begun if the Participant had not remained in or returned to employment; AND

C. In a trade or craft in which the Participant worked under the Plan at any time."

These Plan provisions mirror and are consistent with the regulations found in the Employee Retirement Income Security Act ("ERISA") and the Department of Labor's regulations' definition of "disqualifying employment." (See ERISA §203(a)(3)(B) and DOL regulations at 2530-203-3).

The *Grocery/Storage Pension Plan* describes the "industry" as the "public warehousing, wholesale storage, and cold storage" industries. Local 503 – and subsequently Local 120 – represent Teamsters whose employers made contributions to the *Grocery/Storage Pension Plan* on behalf of employees employed in the public warehousing, wholesale, and cold storage industries. These are employers in the private sector who are contributing members. Mr. Johnson left this "industry" after 2003, when he left his position at Local 120, and began working in an "industry" involving *public sector* employees and employers.

Local 320, where Mr. Johnson is currently employed, is a contributing member to the *Central States Southeast and Southwest Areas Pension Fund,* and Local 320 represents individuals in the *public* sector, including court reporters, court house employees, court clerks, and police dispatchers. These employees also are NOT members of Local 120 – or the *Grocery/ Storage Pension Plan;* rather they are participants in the *Public Employees Retirement Association ("PERA").* Also, because Local 320 represents *public* employees, it is governed by the Public Employees Labor Relations Act. By contrast, Local 120 represents employees in the *private* sector. Furthermore, U.S. Department of Labor regulation

29 C.F.R. Section 2530-203-3 further defines the meaning of the term "industry" as it is applied to disqualifying employment. The regulation provides that one must be working in "an industry in which employers covered by the Plan (in this case, the *Grocery/Storage Plan*) were employed and accrued benefits under the Plan as a result of such employment at the time that the payment of benefits commenced or would have commenced if the employee (Leland Johnson) had not remained in or returned to employment." Mr. Johnson works for local 320. No members of Local 320 are accruing benefits in the *Grocery/Storage* Plan.

Since Local 320 and its members - including Mr. Johnson – are <u>not</u> involved in the "public warehousing, wholesale storage, and cold storage" industries, Mr. Johnson is therefore not engaged in "Disqualifying Employment" and thus should be entitled to begin receiving his pension from the *Grocery/Storage Pension Plan,* pursuant to the rules of the Plan document.

Under DOL regulations and ERISA, the suspension of benefits provision (in the context of a multiemployer plan) is written in the conjunctive, (NOT disjunctive) and therefore, only applies when a pensioner obtains reemployment which meets <u>each</u> of the three conditions set forth in the rule. (See *Whisman v. Robbins*, 810 F. Supp. 936). These conditions are the same as the conditions defining "Disqualifying Employment" under the *Grocery/Storage* Plan document.

In other words, under the Plan, in order for Mr. Johnson to be engaged in disqualifying employment – and thus precluded from receiving his pension benefits at this time – Mr. Johnson would have to be working in 1) the same industry, AND 2) the same geographical area, AND, 3) the same trade or craft. As demonstrated above, Mr. Johnson is not working in the "same industry."

The official Plan Document – the *Restated Grocery/Storage Pension Plan* effective January 1, 2002, defines the term "employer" as "any employer who employs an employee represented by the union for the purposes of collective bargaining, which employer has executed a collective bargaining agreement requiring contributions to the Pension Fund. The term 'employer' also means the union."

The official Plan Document referenced above defines "union" as "the Warehouse Employers Union Local 503, its successor, or such affiliate of the International Brotherhood of Teamsters as may require jurisdiction over existing Plan Participants." This definition thus includes Local 120 – the successor to Local 503. However, it does not include Local 320, Mr. Johnson's current employer. Mr. Johnson's employment with a union *could* be "disqualifying employment" if the union he worked for represented individuals in the public warehousing, wholesale storage, and cold storage industries. But this is not the case. Local 320 does *not* represent any employees in these industries.

Under the three-part test, Mr. Johnson may be working in "the same trade or craft" (a union representative) and he stipulates he is working in the same "geographical area" covered by the *Grocery/Storage Pension Plan.* However, this is not enough to establish that Mr. Johnson is working in "disqualifying Employment" under the Plan. Mr. Johnson must also be found to be working in "the same industry." As set forth above, the "industry" covered by the Plan is "the public warehousing, wholesale storage, and cold storage industries." Mr. Johnson's employment as a business agent for Local 320 is not "the same industry" as those working under the *Grocery/Storage Pension Plan.*

Conclusion

Mr. Johnson is not working for any employer who contributes to the *Grocery/ Storage Pension Plan*, and the union he works for - Local 320 – never contributed to the *Grocery/Storage Pension Plan*, and is not a successor of Local 503 (or Local 120). As such, Mr. Johnson's work as a business agent for Local 320 cannot be considered "Disqualifying Employment" and thus preclude him from collecting his pension benefits at this time.

Thank you for your assistance in this matter. Please review this letter, and contact me if you have any further questions or need additional information. I may be reached at 651-251-5766.

Sincerely,

David A. Bonello

David A. Bonello
Attorney
Upper Midwest Pension Rights Project

Exhibit H

GROCERY / STORAGE PENSION PLAN

ARTICLE IV, SECTION 4.14 (a) Suspension of Benefits -

(1) If a Participant has retired or has attained his/her Normal Retirement Date, his/her monthly benefit shall be suspended for any calendar month for which he/she was paid for at least 40 hours in Disqualifying Employment. "Disqualifying Employment," means employment or self-employment that is:

A. In an industry (the public warehousing, wholesale storage, and cold storage industries and any other business activity of a type engaged in by Contributing Employers) covered by the Plan when the Participant's pension payments began or would have begun if the Participant had not remained in or returned to employment; and,

B. In the geographic area (Minnesota and the remainder of any Standard Metropolitan Statistical Area falling in part in Minnesota) covered by the Plan when the Participant's pension payments begin or would have begun if the Participant had not remained in or returned to employment; and,

C. In a trade or craft in which the Participant worked under the Plan at any time.

(2) Paid non-work time shall be counted toward the measure of 40 hours if paid for vacation, holiday, illness or other incapacity, layoff, jury duty, or other leave of absence. Time compensated under a 'Workers' Compensation or temporary disability law shall not be counted.

(b) **Definition of Suspension** – "Suspension of Benefits" for a month means non-entitlement to benefits for the month. If benefits were paid for a month for which benefits were later determined to be in suspension, the over-payment shall be recovered through deductions from future pension payments, pursuant to Section 4.14 (e) 2.

(c) **Notices** -

1. Upon the earlier of commencement of pension payments or attainment of Normal Retirement Date, the Plan Administrator shall notify the Participant of the suspension of benefit rules.

2. A Participant shall notify the Plan Administrator in writing within 21 days after starting any work of a type that is or may be disqualifying under the provisions of the Plan, whether or not such employment is to be for less than 40 hours per month. If a Participant has worked in Disqualifying Employment in any month and has failed to give timely notice, the Trustees' shall presume that he/she worked for at least 40 hours in such month and any subsequent month before the Participant provides such notice. This presumption may be overcome by establishing to the Trustees' satisfaction that the work should not have resulted in suspension of benefits.

3. A Participant whose pension has been suspended shall notify the Plan Administrator in writing when Disqualifying Employment has ended. Benefit payments shall be withheld until such notice is given.

4. Upon written request, the Plan Administrator shall provide a Participant with its determination as to whether a particular employment is Disqualifying Employment.

5. The Plan Administrator shall inform a Participant of any suspension of his/her benefits by notice given by personal delivery or first class mail during the first calendar month in which his/her benefits are withheld. The Plan shall further inform retirees at least once each plan year of the notification requirements and presumptions contained in this Section 4.14.

ANDERSON, HELGEN,
DAVIS & NISSEN, LLC
ATTORNEYS AT LAW

David S. Anderson
Direct Dial: (612) 435-6341
dsa@andersonhelgen.com

VIA U.S. MAIL &
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

July 12, 2010

Mr. David A. Bonello
Upper Midwest Pension Rights Project
2365 N. McKnight Road
Suite 3
North St. Paul, MN 55109

Re: Leland Johnson—Determination in Respect to Disqualifying Employment
Our File No.: 18700-0999

Dear Mr. Bonello:

This firm represents the Grocery/Storage Pension Plan (the "Plan"). Mr. John Muehlbauer, the Plan's Administrative Manager, directed your letter of June 30, 2010, to us for reply. Your letter requests the Plan's advance determination as to whether or not the current employment of your client, Mr. Leland Johnson, as a Business Agent for Teamsters Local 320 would be deemed to be disqualifying employment as defined by the Plan.

The Plan has determined that Mr. Johnson's current employment as a Business Agent for Teamsters Local 320 does, in fact, constitute disqualifying employment under the Plan.

Section 4.14(a)(3) of the Restated Plan Document provides that if a participant retires prior to normal retirement age, a participant's benefits "shall be suspended for any calendar month for which he/she was paid for at least 40 hours in Disqualifying Employment." Normal retirement age is age 65. According to the Plan's records, Mr. Johnson is age 55. Therefore Section 4.14(a)(3) and not Section 4.14(a)(1), which relates to suspensions after normal retirement, applies to his situation.

As your letter points out, the Plan Document defines the term, "Disqualifying Employment" as follows:

"Disqualifying employment" means employment or self-employment that is:

A. in an industry (the public warehousing, wholesale storage, and cold storage industries and any other business activity of a type engaged in by Contributing Employers) covered by the Plan at any time; and,

B. in the geographic area (Minnesota and the remainder of any Standard Metropolitan Statistical Area falling in part in Minnesota) covered by the Plan when the Participant's pension payments begin or would have begun if the Participant had not remained in or returned to employment; and,

C. in a trade or craft in which the Participant worked under the Plan at any time.

Section 4.14(a)(3).

We concur that the standard for disqualifying employment is conjunctive – that is, all three elements must be met before employment is deemed disqualifying. In your letter, you acknowledge or stipulate that Mr. Johnson is currently "working in the same 'geographical area' covered by the *Grocery/Storage Pension Plan*" and that he "may be working in the same trade or craft (a union representative)" in which he worked under the Plan. To the Plan's knowledge, Mr. Johnson's employment as an officer of Teamsters Local 503 included the duties of a business agent. This is the same job, let alone the same trade or craft, in which he now works for Local 320. Accordingly, we consider the geographic area and trade or craft elements of the standard to be undisputed.

Although your letter quotes the Plan's definition of "Disqualifying Employment," your discussion of the issue focuses only on the descriptive phrase, "(the public warehousing, wholesale storage, and cold storage industries . . . ." You omit reference to the remainder of the definition, ". . . and any other business activity of a type engaged in by Contributing Employers)." The applicable definition of Labor Regulation defines an industry as "the business activities of the type engaged in by any employers maintaining the plan." 29 C.F.R. § 2350.203-3. Mr. Johnson does not dispute that Teamsters Local 503 was a Contributing Employer to the Plan. Therefore, business activities of the type engaged in by Local 503 constitute an industry covered by the Plan.

As a "labor organization" Local 503's business activities consisted of, "dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." Labor Management Relations Act §152(5). Teamsters Local 320 is also a labor organization as defined by the LMRA and its business activities are identical to those of Local 503. Your assertion that the industry covered by the Plan is limited to the public warehousing, wholesale storage, and cold storage industries requires a conclusion that Local 503 was engaged in those businesses. That is no more true than saying that Local 320 is engaged in the court reporting, court house, court clerking, or police dispatching industries. Rather, both engage in representing workers in respect to terms and conditions of employment. That is, therefore, their industry.

The term "industry" as used in Section 4.14(a)(3), which governs suspensions after early retirement, includes any industry covered by the Plan "at any time." The Department of Labor Regulations on the subject of suspension of benefits is limited, by their terms, to suspensions after normal retirement. Therefore, your reliance on 29 C.F.R. 2530.203-3 (which refers to "the time that the payment of benefits commenced or would have commenced . . .") is misplaced.

Finally, the Plan's rule is entirely rational and appropriate as applied to Mr. Johnson. He is continuing to work in the same industry, area, and occupation that he did when he earned his accrued benefit. On that basis, the Plan concludes that Mr. Johnson's employment by Local

320 constitutes employment in an industry covered by the Plan. Because of this and because he does not dispute the other two elements of the standard, his employment constitutes disqualifying employment under the Plan.

Sincerely,

David S. Anderson

DSA/dmm

cc: Board of Trustees, c/o Plan Administrator

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