Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Index Number: 401.29-00

Thomas Williams, Executive Director
Employees' Retirement System of the State of Hawaii
201 Merchant Street, Suite 1400
Honolulu, HI 96813-2980

Person To Contact: REDACTED

Telephone Number: REDACTED

Refer Reply To:
CC:TEGE:EB:QP1
PLR-131151-16

Date:
March 02, 2017

Plan = Employees' Retirement System of the State of Hawaii
Statute = Act I
State = State of Hawaii

Dear Mr. Williams:

This is in response to your request dated August 26, 2016, in which you request a private letter ruling regarding: (1) whether an election proposed to be offered to certain participants in the Plan would be a cash or deferred arrangement under § 1.401(k)-1(a)(2) of the Income Tax Regulations; (2) if so, whether the cash or deferred arrangement would affect the Plan's qualified status; and (3) if so, the Federal tax consequences of the loss of qualified plan status.

The following facts and representations have been submitted under penalty of perjury in support of the ruling requested:

The Plan is a governmental defined benefit pension plan under section 414(d) of the Internal Revenue Code, established effective January 1, 1926. The Plan covers the employees of every department and agency of the State, including its public hospitals. The Plan's most recent favorable determination letter is dated October 27, 2014.

In anticipation of the State privatizing or closing its public hospitals, the State legislature enacted Statute. Both houses of the State legislature initially passed the legislation, but the State's governor vetoed the legislation. However, the State legislature overrode the veto and enacted Statute. Due to a legal challenge, Statute is not currently effective, pending the outcome of the legal challenge. Statute provides that employees of the State's public hospitals whose positions are being abolished or who are directly affected by a reduction-in-force or workforce restructuring plan, including privatization, could, in lieu of exercising their reduction-in-force rights under State law, elect one of the following:

Voluntary severance benefit – a one-time lump-sum cash payment of a percentage of base salary per year of service worked, not to exceed a certain amount; or

Special retirement benefit – a subsidized early retirement benefit under the Plan that would permit the employee to retire with an unreduced retirement benefit at an earlier age or with less service than previously permitted under the Plan.

Based on the facts and representations stated above, the Plan requests three rulings. First, the Plan requests a ruling whether, if Statute becomes effective, the election created by Statute would constitute a cash or deferred arrangement under § 1.401(k)-1(a)(2). Second, if the election created by Statute would constitute a cash or deferred arrangement under § 1.401(k)-1(a)(2), the Plan requests a ruling whether that cash or deferred arrangement would cause the Plan to fail the qualification requirements for retirement plans under section 401(a). Third, if the existence of the cash or deferred arrangement would cause the Plan to fail the qualification requirements of section 401(a), the Plan requests a ruling on the Federal tax consequences of the disqualification to the Plan and its members and beneficiaries.

With respect to your first ruling request, § 1.401(k)-1(a)(2)(i) defines a "cash or deferred arrangement" as, except as otherwise provided, an arrangement under which an eligible employee may make a cash or deferred election with respect to contributions to, or accruals or other benefits under, a plan that is intended to satisfy the requirements of section 401(a).

Section 1.401(k)-1(a)(3)(i) provides that a "cash or deferred election" is any direct or indirect election (or modification of an earlier election) by an employee to have the employer either provide an amount to the employee in the form of cash (or some other taxable benefit) that is not currently available, or contribute an amount to a trust, or provide an accrual or other benefit, under a plan deferring the receipt of compensation.

The election permitted by Statute allows an employee who is already a participant in the Plan to choose either (a) the voluntary severance benefit, or (b) a subsidized early retirement benefit. The voluntary severance benefit provides an amount of cash (or other taxable benefit) that is not currently available. The early retirement benefit provides an accrual or other benefit under a plan deferring the receipt of compensation. For this purpose, the term "other benefit" in § 1.401(k)-1(a)(3)(i) covers a wide variety of potential benefits, and includes a subsidized early retirement benefit that is paid under a pension plan and that an employee would otherwise not be eligible to receive.

Accordingly, if Statute becomes effective, the election granted to the State employees under Statute with respect to the benefit they receive upon separation from service would constitute a cash or deferred election within the meaning of § 1.401(k)-1(a)(3)(i) because it is an election between an amount in the form of cash (or some other taxable benefit) that is not currently available, and an accrual or other benefit under a plan

deferring the receipt of compensation. Because the election would constitute a cash or deferred election, it creates a cash or deferred arrangement within the meaning of § 1.401(k)-1(a)(2)(i).

With respect to your second ruling request, section 401(k)(1) provides that a profit-sharing or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan shall not be considered as not satisfying the requirements of section 401(a) merely because the plan includes a qualified cash or deferred arrangement.

Section 1.401(k)-1(a)(1) provides that a plan, other than a profit-sharing, stock bonus, pre-ERISA money purchase pension, or rural cooperative plan, does not satisfy the requirements of section 401(a) if the plan includes a cash or deferred arrangement. For this purpose, a cash or deferred arrangement is part of a plan if any contributions to the plan, or accruals or other benefits under the plan, are made or provided pursuant to the cash or deferred arrangement.

In accordance with our conclusion above that Statute, if it becomes effective, would create a "cash or deferred arrangement," the Plan, which is a defined benefit plan (and not a profit-sharing, stock bonus, pre-ERISA money purchase pension, or rural cooperative plan), would not satisfy the qualification requirements of section 401(a) because it would include a "cash or deferred arrangement."

With respect to your third ruling request, in accordance with Rev. Proc. 2017-1, 2017-1 I.R.B. 1, §§ 6.02 and 6.12, we decline to rule on the Federal tax consequences to the Plan and its members and beneficiaries of disqualification of the Plan, because such a ruling would involve facts pertaining to taxpayers other than the Plan and would be hypothetical given that Statute is not currently effective and may never become effective.

The Plan has not been reviewed in addressing this ruling request, and this letter is not a determination as to the whether the Plan, or any provision of the Plan not expressly discussed, satisfies the qualification requirements of section 401(a). For more information about the process for obtaining a determination letter, if available, from the Internal Revenue Service, Tax Exempt and Government Entities Division, Employee Plans, see Rev. Proc. 2016-4, 2017-1 I.R.B. 146. Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party, as specified in Rev. Proc. 2017-1, § 7.01(15)(b). This office has not verified any of the material submitted in support of the request for ruling, and such material is subject to verification on examination. The Associate office will revoke or modify a letter ruling and apply the revocation retroactively if there has been a misstatement or omission of controlling facts; the facts at the time of the transaction are

materially different from the controlling facts on which the ruling was based; or, in the case of a transaction involving a continuing action or series of actions, the controlling facts change during the course of the transaction. See Rev. Proc. 2017-1, § 11.05.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

A copy of this letter has been sent to your authorized representative in accordance with a power of attorney on file in this office.

Sincerely,

REDACTED

Laura B. Warshawsky
Senior Technician Reviewer
Qualified Plans Branch 2
(Tax Exempt & Government Entities)
Office of the Associate Chief Counsel

cc: John Thomas Maloney
John J. D'Amato