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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

AUG 13 2003

T:EP:RA:T1

Attn:

Legend:

State =

Department B =

Plan X =

Group C Employees =

Statute D =

Act E =

Code F =

Manual G =

Program H =

Community Officers =

Number J =

K Corporations =

Dear

This is in response to correspondence dated October 16, 2001, as supplemented by additional correspondence dated February 1, 2002, March 15, 2002, May 16, 2002, November 1, 2002, November 15, 2002, November 27, 2002, December 6, 2002, March 31, 2003 and May 6, 2003, from your authorized representative, in

which you request a ruling on whether the status of Plan X as a governmental plan under §414(d) of the Internal Revenue Code ("the Code") will be adversely affected by the inclusion of Community Officers.

The following facts and representations have been submitted:

Pursuant to Statute D, the State created Plan X (also referred to herein as "the System") in 1961 as a defined benefit pension and retirement system to provide retirement and other benefits for Group C Employees. Plan X is intended to meet the qualification requirements of Code §401(a) to the extent that section applies to a governmental plan within the meaning of §414(d) of the Code.

Effective January 1, 1987, all participating employees are required to contribute a percentage of their compensation to Plan X. No option to receive this amount in cash has ever been permitted. Statute D also allows the State to pick up and pay the mandatory contributions to Plan X pursuant to §414(h) of the Code. As of January 1, 1987, the State has treated the employee contributions in a manner consistent with §414(h)(2).

In 1985, the State established Program H within Department B pursuant to State Statute. Program H was established to assist local governments and villages in protecting life and property in rural areas of the State and to provide probation and parole supervision services. Program H, however, was not designed to be a village or community police force. Under Program H the role of a Community Officer is more than just law enforcement, and the vast majority of requests for the services of a Community Officer are for non-criminal matters. The Community Officer provides (1) support in the rendering of emergency medical services, (2) search and rescue support, (3) fire safety and prevention support, (4) water and boating safety, and (5) minor law enforcement service to a community, primarily the handling of misdemeanor infractions of the State's criminal code. Community Officers are not obligated to respond to or participate in any type of armed conflict. In accordance with Code F, Community Officers are prohibited under the state funding grants from carrying firearms in the regular course of their duties, except in an emergency.

Community Officers are employed by certain K Corporations established pursuant to Act E. All K Corporations (which may be nonprofit or for profit) employing Community Officers intended to be covered by this ruling are organized under state law as nonprofit corporations and have been in existence prior to the establishment of Program H. Under Act E, Native Indians of the State own the stock in the K Corporations. The State, including Department B, does

not participate in the selection of the board of directors for the K Corporations. The involvement of K Corporations in Program H is separable from the other activities and functions of the K Corporations.

Program H is funded through grants issued by Department B. Department B and the K Corporations enter into a written grant agreement detailing the Program responsibilities and duties. Program H sets forth detailed policies and procedures that must be followed in order for a grant to be approved and maintained. In addition, several key personnel positions are required by the Program H enabling legislation to ensure that Program H operates as intended and in accordance with State Statutes. The written agreement between Department B and a K Corporation must also name the K Corporation as the employer, for all purposes, of a Community Officer.

State Troopers are Department B employees. A State Trooper is responsible for making periodic visits to a village or community in which a Community Officer has been assigned, acting as a mentor and as a liaison between the Department and the community or Community Officer, providing on-the-job training to the Community Officer, reviewing the Community Officer's log book, monitoring the Community Officer for compliance with applicable rules and providing the K Corporation with an evaluation of the Community Officer's performance. State Troopers, however, do not supervise the daily activities of Community Officers. The State Trooper is responsible for providing state law enforcement services to a village or community to which a Community Officer is assigned. The Community Officer is not a police officer, and ultimate responsibility for criminal law enforcement lies with the State Trooper, particularly in regard to crimes more serious in nature than mere misdemeanor violations.

State Trooper superiors participate in the review of certain Program H documentation required to be provided by the K Corporation to Department B. The Program H Coordinator is a Department B position that has responsibility for overseeing the overall operation of the Program. The K Corporation Coordinator is an employee of the K Corporation who has responsibility for evaluating the performance of Community Officers, as well as allocating and distributing the funds supplied by a grant.

The K Corporation may not use grant money to employ a Community Officer for a particular village unless the village, through its governing body, enters into a written agreement with the K Corporation. According to relevant provisions of Code F, the village or community, in its agreement with the K Corporation, sets out the job description for the Community Officer, specifying duties that the community expects the officer to perform. The community also names a local supervisor to assume the daily control of the Community Officer's work and to act

as a liaison between the Community Officer and the community. The party responsible for supervision of the daily activities of a Community Officer is identified in Code F as the "governing body" of the village or community. The "governing body" means the elected city council, traditional council, or elders council that the State recognizes as having governmental functions and that the K Corporation accepts as appropriate to supervise the daily activities of a Community Officer. All non-criminal activity (the majority of the work) conducted by the Community Officer is at the direction and priority of the village councils. Currently there are approximately the Number J of villages or communities to which a Community Officer has been assigned.

The written agreement between the K Corporation and the village or community recognizes that the Community Officer is an employee of the K Corporation. In the resolution of any dispute arising under the agreement, including the removal of a Community Officer from the position and the position from the village or community, the President of the K Corporation, or his or her designee, has final and conclusive authority to resolve the dispute.

The State represents that Department B has control over Program H by virtue of the fact the K Corporations and the Community Officers are subject to regulations, policies and procedures that are found in the Program H authorizing legislation, the grant agreement, Code F and Manual G. The State maintains that these rules, policies and procedures that the K Corporations and Community Officers must adhere to are enforceable by Department B by (1) controlling the grant of authority and funding, (2) monitoring of Community Officers by the State Trooper, and (3) the requirement by authorizing legislation of a State Trooper, K Corporation Coordinator, and a Program H Coordinator to ensure that the program operates as intended.

The State proposes to permit the K Corporations to adopt the System as the retirement benefit plan for persons employed as Community Officers. Based on the foregoing facts and representations, you requested the following rulings:

1. That the adoption of the System by certain K Corporations with respect to Community Officer employees only, will not adversely affect the System's status as a governmental plan within the meaning of Code §414(d).

2. That the mandatory employee contributions paid to the System by the State on behalf of the Community Officer employees, will qualify as "picked-up" contributions within the meaning of §414(h)(2) of the Code.

Section 414(h)(2) of the Code provides that, in the case of any plan established by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing, where the contributions of employing units are designated as employee contributions but where any employing unit picks up the contributions, the contributions so picked up will be treated as employer contributions.

Section 414(d) of the Code provides that a governmental plan means a plan established and 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.

Revenue Ruling 89-49, 1989-1 C.B. 117, provides that a plan will not be considered a governmental plan merely because the sponsoring organization has a relationship with a governmental unit or some quasi-governmental power. It holds that one of the most important factors to be considered in determining whether an organization is an agency or instrumentality of the United States or any state or political subdivision thereof is the degree of control that the federal or state government has over the organization's everyday operations. Other factors listed in Revenue Ruling 89-49 include: (1) whether there is specific legislation creating the organization; (2) the source of funds for the organization; (3) the manner in which the organization's trustees or operating board are selected; and (4) whether the applicable governmental unit considers the employees of the organization to be employees of the applicable governmental unit. Although all of the above factors are considered in determining whether an organization is an agency of a government, the mere satisfaction of one or all of the factors is not necessarily determinative.

In the instant case, applying the principles set forth in Revenue Ruling 89-49, we find the degree of control exercised by the State over the daily operations of the Community Officers to be minimal, with control in the hands of the K Corporation and the village or community to which a Community Officer is assigned.

As represented, a Community Officer is subject to monitoring by a State Trooper, an employee of Department B. The State Trooper's superior participates in the review of certain Program H documentation that must be provided by the K Corporation to Department B. The Program H Coordinator is a Department B position that has responsibility for overseeing the overall operation of the Program.

The State has not demonstrated that the aforementioned Departmental positions control or supervise the daily activities of Community Officers. The monitoring provided by the State Trooper consists of periodic visits with Community Officers, mentoring and other administrative duties. There has been no representation that the Program H Coordinator is involved with the daily activities of a Community Officer. In addition, Manual G, a Department B field manual for Community Officers, states that the K Corporation Coordinator, an employee of the K Corporation, is responsible for evaluating the performance of Community Officers. The Manual further provides that in completing the evaluation, the "community representative" responsible for the Community Officer's supervision, the individual Community Officer and the assigned State Trooper are contacted for comment.

Further, the K Corporation may not employ a Community Officer for a particular village unless the village, through its governing body, enters into a written agreement with the K Corporation setting forth the duties that the village or community expects the Community Officer to perform. In Code F, the term "village" is defined to mean a community with a population of less than 1,000 individuals. The community representative responsible for supervision of the daily activities of a Community Officer is identified in Code F as the "governing body" of the village or community. The "governing body" means the elected city council, traditional council, or elders council that the State recognizes as having governmental functions and that the K Corporation accepts as appropriate to supervise the daily activities of a Community Officer.

Considering the other factors set forth in Rev. Rul. 89-49, the enabling legislation for Program H did not establish the K Corporations or specify that the K Corporations would be the vehicle or medium to implement Program H. The K Corporations were already in place throughout the State when Program H was established.

Funding for Program H is provided entirely by Department B through grants to the K Corporations. The State maintains that it controls the K Corporations due to the fact that Department B, in its discretion, may terminate a grant if the K Corporation or a participating village or community is not complying with all the Program policies and procedures. However, the State's argument that it controls the K Corporations and the Program, through funding, is diminished by the fact that the K Corporation Coordinator, a K Corporation employee, has responsibility for the allocation and distribution of funds supplied by the state grant. The K Corporations formally employ the Community Officers, enter into contracts specifying the terms of Program H and pay officers' salaries with the funds granted by the State. Although Program H is supported by State funds, we do not find this factor to be determinative of agency or instrumentality status in this case

because the K Corporations possess the authority to allocate the funds. No funded Community Officer position can be assigned to a requesting village or community unless the K Corporation, not the State, enters into a written agreement with the village or community.

The State, including Department B, does not participate in the selection of the board of directors for the K Corporations. Pursuant to Act E, the management of the K Corporation is vested in a board of directors, all of whom shall be stockholders over the age of eighteen (the stockholders of the K Corporations are Native Indians of the State). Due to the fact that the State does not participate in the selection process, the board of directors is not controlled by the State. Thus, the State does not possess the requisite degree of control over the K Corporation decision-making process in the day to day implementation of Program H (i.e., through lack of control over key personnel such as the K Corporation Coordinator).

Finally, Community Officers are not employees of the State or a political subdivision thereof. State Statute requires that Department B and the K Corporation enter into an agreement in which, among other requirements, there must be a provision that names the K Corporation as the employer, for all purposes, of a Community Officer. The K Corporation may not use grant money to employ a Community Officer to serve in a particular village or community unless the village or community, through its governing body, enters into a written agreement with the K Corporation. The written agreement between the K Corporation and the village or community recognizes that the Community Officer is an employee of the K Corporation, and that in the resolution of any dispute arising under the agreement, including the removal of a Community Officer from the position, the President of the K Corporation, or his or her designee, has final and conclusive authority to resolve the dispute.

The State has represented that the villages or communities to which a Community Officer has been assigned, as incorporated municipalities or unincorporated villages, are political subdivisions of the State. Although we find that the village or community may exert a significant degree of supervision over the daily activities of a Community Officer, we must conclude that the Community Officer is an employee of the K Corporation and that the K Corporation exerts the ultimate degree of control over a Community Officer's employment.

Thus, we conclude that the K Corporation(s) is not an agency or instrumentality of the State or a political subdivision thereof. Accordingly, as for the first ruling requested, we find that the inclusion in Plan X of Community Officers, who are

employees of a K Corporation which does not qualify as an agency or instrumentality of the State or a political subdivision of the State, will adversely affect the status of Plan X as a governmental plan under §414(d) of the Code.

Similarly, because we have determined in accordance with Revenue Ruling 89-49, that a K Corporation does not qualify as an agency or instrumentality of the State or a political subdivision thereof, it is concluded with respect to ruling request two that the applicability of the provisions of §414(h)(2) of the Code to Plan X will be adversely affected by including as members therein the Community Officer employees of the K Corporations, and that the mandatory contributions of such employees to Plan X which may be assumed and paid by the State will not qualify as "picked-up" contributions within the meaning of §414(h)(2) of the Code.

This ruling is directed only to the taxpayer that requested it. Section 6110(k) of the Code provides that it may not be used or cited by others as precedent.

A copy of this ruling is being sent to your authorized representative pursuant to a power of attorney on file in this office. Should you have any questions pertaining to this ruling, you may contact ********** of this office at *********.

Sincerely yours,

Donzell Littlejohn

Donzell H. Littlejohn, Acting Manager
Employee Plans Technical Group 1