

Opinion No. 69-127

November 6, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General James V. Noble, Assistant Attorney General

TO: Public Employees Retirement Association, P.E.R.A. Building, Santa Fe, New Mexico 87501 *2*Attention: Mrs. Dolores Lee, Chief, Benefits and Claims Division, Mrs. Betty Lujan, State Social Security Director

QUESTIONS

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1. May the North Central New Mexico Economics Development District become an affiliated employer under the Public Employees Retirement Association?
2. Must the North Central New Mexico Economics Development District account to the State Social Security Director for social security payments?

CONCLUSIONS

1. Yes.
2. Yes.

OPINION

{*204} ANALYSIS

The North Central Economic Development District was created by Colfax, Taos, Rio Arriba, Sandoval, San Miguel, Mora, Los Alamos and Santa Fe Counties and the City of Santa Fe. It is a body created pursuant to the Joint Powers Agreement Act (Sections 4-22-7 et seq., N.M.S.A., 1953 Compilation). Although the signature page and approvals do not so state, it appears that the State of New Mexico (State Planning Office) may also be a party to the agreement. The United States, although not a party to the agreement, does participate in the functioning of the District by virtue of federal authorization and agreements.

The authority of the District is set forth in the Joint Powers Agreement, which provides, among other things, that the District shall not supersede or replace any existing political jurisdiction. Any power or authority not specifically granted by the agreement must be agreed upon by a majority of each legal body executing the agreement. The directors of the District are selected as follows:

1. One by each participating county from the membership of its county commission.
2. One elected official of the largest city (by population) within each county.
3. One (plus an alternate) by the O.E.D.P. Committee of each participating county.
4. One lay member (and 1 alternate) selected from each county by the members for such county selected as provided above.
5. Three representatives of Indian jurisdiction (one from the Southern Middle Rio Grande Pueblos, one from the Northern Rio Grande Pueblos and one from the Jicarilla Apache Tribe).

The municipal representatives and the Indian representatives serve at the pleasure of the appointing body. However, any other vacancy, no matter how created, is filled by the executive committee of the District. Any member may be removed from the board by a two thirds vote of a quorum of the board present.

Financing of the District is by contributions from the member counties and the City of Santa Fe and the United States Government.

Section 5-5-1, N.M.S.A., 1953 Compilation (P.S.) provides that all nonexempted employees of affiliated public employers shall be members of the Public Employees Retirement Association. Such employers are the State of New Mexico, and certain designated subdivisions who have elected to affiliate. The District is not the State of New Mexico nor a branch, agency, commission, institution, bureau, board or department thereof. It is not specifically named as one of those governmental subdivisions that may affiliate and which are termed "municipalities."

There is no method available by which an employer may affiliate with P.E.R.A. unless authorized by statute.

The parties to the agreement, with the exception of the Indian Districts, are all eligible to become affiliated public employers. The District may only exercise powers common to the contracting parties. The District is considered as a separate entity, however. See Sections 4-22-5B, supra. The laws under which it is created treat it however as a **governmental** entity and specifically, in Section 4-22-6, supra, grant it the same privileges {*205} and immunities as held by any such public agency **including all pensions, relief and disability benefits**. The only pensions and disability benefits that are or may be afforded to employees of the such participating agencies, except the Indians, are those which are or may be afforded by P.E.R.A. and those under the state insurance plan.

Although the principle of statutory construction known as "**expressio unius est exclusio alterius**" (the expression of one thing excludes others) might, if literally applied, exclude the District from becoming an affiliated public employer because the

District is not specifically named in the enumeration in Section 5-5-1, supra, this maxim is only an aid to statutory construction and not a rule of law. **Wilson v. Brown Drilling Co.**, 55 N.M. 81, 227 P.2d 365. All statutes capable of construction are construed in a manner so as to ascertain the legislative intent and conform, where possible thereto. The expression contained in Section 4-22-6, supra, pertaining to pension and disability rights was enacted in 1961 as a statute separate and apart from Section 5-5-1, supra, the pertinent part of which was enacted in 1953, but does not specifically amend Section 5-5-1, supra.

In ascertaining the legislative intent there are various aids employed in addition to the above mentioned maxim of "expressio unius est exclusio alterius". Among these is the rule that the policy and purpose of the act must be considered, **C de Baca v. Baca**, 73 N.M. 387, 388 P.2d 392. The statute will, where possible, be construed so as to produce a harmonious result, **Reise v. Dempsey**, 48 N.M. 417, 152 P.2d 157. Where inconsistent, a later legislative intent will normally control.

The intent of the legislature in the later enactment contained in the Joint Powers Agreement Act seems clearly to allow a joint and coordinated effort to be undertaken by separate governmental units. The benefits are to insure to all. The effort is to be undertaken by an entity created for such purpose with the power and authority of the separate governmental units within the limitations of the statute permitting its creation. Its employees are to enjoy the same privileges, including pension, as that of the individual agencies creating the District. Construing this apparent intent together with the language of the definition in the earlier enacted statute of "affiliated public employers" it appears clear that the legislature intended to add to the enumeration of that section, although by separate enactment, the entity created under the Joint Powers Agreement Act. Although amendments by implication are not favored in law where, as here, the intent is clear that pension privileges be extended, the P.E.R.A. statute will be considered amended by implication.

It is our conclusion that the district may become an affiliated public employer for the purposes of P.E.R.A.

The second question is answered by what has been said above. Since the District is eligible to participate in P.E.R.A. it becomes one of the absolute coverage groups under the Social Security Act. Such being true it is afforded coverage under the State Social Security Agreement and payments and reporting shall be made thereunder to the state administrator.