

Opinion No. 69-130

November 17, 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 M. Lee, Chief, Benefits & Claims Division, Mrs. Betty M. Lujan, Director Social Security Division

QUESTIONS

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1. Is the Las Vegas Board of Utility Commissioners an affiliated public employer or may it become such an employer, if not?
2. Is the Las Vegas Board of Utility Commissioners a governmental subdivision or an instrumentality of the City or Town of Las Vegas, or either or both of them, so that social security coverage is handled through your office?

CONCLUSIONS

1. No.
2. No.

OPINION

{*209} ANALYSIS

An entity known as the Las Vegas Board of Utility Commissioners was created to maintain and operate the gas distribution system of the City of Las Vegas and the Town of Las Vegas. It also is to operate the transmission system owned by the city of Las Vegas. The Board is composed of five members, two of whom are named by the City and two by the Town. They, in turn, name the fifth member. It is my understanding that this is the extent to which either municipality is involved in the functioning of the Board. There is no power of removal or authority to control the method or manner in which it conducts its business, except as to accounting for money to be paid under the terms of the contract.

A joint operating agreement was entered into by the City and the Town with the Board after its creation. Under its provisions the Board is to operate and maintain the gas system, which together with allied equipment and accounts, were placed under its control. The Board is required to account for expenditures and profits to the respective

municipalities and make payments of its net profits according to the formula established by the agreement. **The agreement was not entered into under the provisions of the Joint Powers Agreement Act**, nor does it appear to have been organized pursuant to the provisions of Section 14-27-1 et seq., N.M.S.A., 1953 Compilation, as amended, since it is not to purchase or construct a gas system. This agreement may only be terminated upon one year's notice or by the mutual consent of all signatories.

One municipality was at the time of the execution of the operation agreement, and is, an affiliated public employer for the purposes of the Public Employees Retirement Act but did not and does not come under the State Social Security Agreement. The other municipality was not then and is not now an affiliated public employer under the said retirement act but did and does com [ILLEGIBLE WORD] under the State Social Security Agreement. The employees of the Board or the majority of them, were employed by one or the other of the municipalities prior to the formation of the Board and were subsequently employed by the Board.

Section 5-5-1, N.M.S.A., 1953 {**210*} Comp. (P.S.) defines affiliated public employers. Section 5-5-6, N.M.S.A., 1953 Comp. (P.S.) provides that all employees of affiliated public employers are members of the association. **Unless the Board comes within the definition of a municipality it is not and cannot be an** affiliated public employer and its employees are not and cannot be considered members of the association. No statutes are involved which constitute an amendment to Section 5-5-1, supra, either specifically or by implication. It is our opinion that the Board is not within the definition and cannot be an affiliated public employer.

As above stated the sole area in which either municipality has exercised or may exercise any degree of control over the Board is in the appointment of some of its members. No area of control as to its policy, hiring and firing practices, employment conditions, manner of conducting business or time thereof may be excised by either municipality. The contract may not be terminated by either or both municipalities except by consent of all parties. It is not an entity created under the Joint Powers Agreement Act. See Attorney General Opinion No. 69-127, dated November 6, 1969. There is no necessary unity of composition of the governing body of the Board and the municipalities or either of them. It is not a board, department, bureau or agency of either municipality since the requisite control of or by either municipality is lacking. There is no specific statutory provisions authorizing or directing the creation of such a board as there is in the case of a municipal housing authority. It is an independent contractor insofar as any question of being considered an affiliated public employer is concerned. The first question is answered in the negative.

If, within the meaning of Social Security laws and regulations and the state agreement with the Department of Health, Education and Welfare, the Board is included as an employer, it and the employees make their Social Security payments through the state administrator, a division of the Public Employees Retirement Association.

Section 218(b)(5) provides in pertinent part that employees of a governmental subdivision of a state engaged in government, or a single proprietary function, constitute an absolute coverage group. A political subdivision is defined as including an instrumentality of a political subdivision. An instrumentality is defined as being organized to carry on some **function of government** for the political subdivision, but which is an independent legal entity.

The state agreement with Health, Education and Welfare does call for inclusion of such an absolute coverage group under certain conditions.

In order to now be included for coverage under the state agreement the employees in question must either be employees of a political subdivision of the state brought within its terms as provided for in the Social Security Act or of an instrumentality of such subdivision or subdivisions.

The Board is created as a separate entity and its employees are not employees of the municipalities. The function of the Board is not to carry on a function of government but proprietary functions. Such being the case its employees are not within the coverage afforded under the state agreement. Their social security coverage should be handled in the same way as that of any employer-employee relationship not covered by the state agreement. Reporting and payments should be made to the Director of Internal Revenue rather than to the State Social Security Administrator.