

Opinion No. 57-166

July 12, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Santiago E. Campos,
Assistant Attorney General

TO: Mrs. Natalie Smith Buck, Secretary of State, Santa Fe, New Mexico

QUESTIONS

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1. Is the Public Employees Retirement Association an official Agency of the State of New Mexico, and is it entitled to be quartered in the State Capitol building?
2. Is the State Tourist Bureau by law a specific agency of the Executive Branch of the State Government and entitled to quarters in the Capitol; or is the Tourist Bureau legally a sub-agency of the State Highway Department?

CONCLUSIONS

1. Yes.
2. The State Tourist Bureau is an agency of the Executive Branch of the State Government and under the control of the Governor.

OPINION

ANALYSIS

1. The Public Employees Retirement Association of New Mexico was created originally in 1947 under the provisions of Chapter 167, Laws of 1947, was repealed in 1953 and a substantially new Retirement Act passed then, Chapter 162, Laws of 1953.

The latter, however, was substantially a continuation of the previous Association and its activities.

That which points to the Association as occupying the status of an official agency of the State are the following:

The governing authority of the Association, the Retirement Board, is under legislative direction, composed of the Secretary of State, the State Auditor, the State Treasurer and four members elected by the membership of the Association. Section 5-5-2 1., N.M.S.A., 1953. The functions and powers of the Board in the administration of the Retirement Act are carefully spelled out. Further, the Attorney General is named as the

legal adviser to the Board. Section 5-5-3 3., N.M.S.A., 1953. This indicates legislative intent that the Association occupy State agency status since the Attorney General is, under other laws, made the adviser to State agencies. Section 4-3-2, N.M.S.A., 1953. And the State Treasurer is the treasurer of the Association and disbursements of Association Funds are made only upon warrants issued by the State Auditor. Section 5-5-3 4., N.M.S.A., 1953. And most importantly, the Legislature, by appropriation, directs the amounts of money which shall be spent by the governing authority of the Association, the Retirement Board, in the administration of the Retirement Act. See Section 5, Chapter 287, Laws of 1955 and Section 5, Chapter 235, Laws of 1957. These factors, as well as others not necessary to mention here, persuade us that the Public Employees Retirement Association and its governing body, the Public Employees Retirement Board, is in all respects a State agency.

Having arrived at the above conclusion, it follows that if space is available in the Capitol Building, this agency may legally occupy it.

2. It is assumed that reference to the "Executive Branch of the State Government" in your second question is to the Office of the Governor, since, broadly, all agencies not a part of the Judicial or Legislative Branches of the State Government necessarily are a part of the Executive Branch.

The only possible argument which could be made that the State Tourist Bureau falls within the control and direction of the Highway Department instead of the Governor is based upon the fact that the moneys appropriated by the Legislature to the State Tourist Bureau are appropriated from the proceeds of the State gasoline tax and the fact that heretofore this tax was allocated to the State Road Fund after a 3 % deduction for administrative expenses and a further deduction therefrom for retirement of highway debentures. Section 64-26-19, N.M.S.A., 1953.

And the Constitution provides that:

"The state highway commission is empowered and charged with the duty of determining all matters of policy relating to the design, construction, location, and maintenance of state highways and public roads. It shall have general charge and supervision of all the highways and bridges which are constructed or maintained in whole or in part with state aid. It shall have charge, subject to such regulation as may hereafter be provided by law of all matters pertaining to the expenditure of highway funds."

This argument, however, does not persuade us.

Firstly, Section 2, Chapter 253, Laws of 1955, provided that:

"There is hereby created a special fund to be known as 'The Gasoline Use Fund', to which fund there is hereby appropriated the sum of three-hundred and fifty thousand dollars (\$ 350,000.00) for each of the 44th and 45th fiscal years from the proceeds of the state gasoline tax to be used to promote and encourage the use of gasoline by

vehicles on the highways of the state and to increase the collection of gasoline taxes. The monies so appropriated by this act shall be expended only for the purpose of operating and maintaining an agency within the Executive Department to be known as 'The State Tourist Bureau' and for such other purposes as will encourage the collection of gasoline taxes and use of New Mexico highways."

Now the 1957 Appropriations Act, which contains the appropriation to the State Tourist Bureau, does not provide that it shall be an agency of the Executive Department as did the special appropriation section of Chapter 253, Laws of 1955, above.

However, we believe that Chapter 253, Laws of 1955, evidences a clear intent that the Bureau be attached to the "Executive Department" and the latter we take to mean the office of the Governor. Now whether or not Chapter 253, Laws of 1955, continues in effect is immaterial. Since Section 2 of Chapter 253, Laws of 1955, was a special appropriation, it may, perhaps, be that its effect is now spent. It is of value to us only as indicating legislative intent as to who should have control over the State Tourist Bureau. A conclusion that because for the 44th and 45th fiscal years Chapter 253, Laws 1955, specifically provided that the Bureau should be within the Executive Department and that because such language does not appear in the portion of the Appropriations Act of 1957 appropriating moneys to this agency for the 46th and 47th fiscal years, the control over this agency has now passed to the Highway Department would seem most unreasonable. It is obvious enough to us that the Legislature, when it appropriated moneys to the State Tourist Bureau in Chapter 235, Laws of 1957, meant to appropriate it to an existing agency whose status was fixed and did not intend, by leaving out a further definition of status, to change the existing situation.

Now what is said above does no violence to the provisions of the Constitution quoted.

Firstly, the purpose of the State Tourist Bureau is to "promote and encourage the use of gasoline by vehicles on the highways of the state and to increase the collection of gasoline taxes. . . ." This purpose, as we see it, does not, in any manner, impinge on the constitutional prerogative of the Highway Department to determine ". . . all matters of policy relating to the design, construction, location and maintenance of state highways or public roads . . ." or its ". . . general charge and supervision of all highways and bridges . . ." If the efforts of the State Tourist Bureau prove fruitful and the use of gasoline on the highways is increased, the State Highway Department nevertheless retains its full right and duty to supervise its highways and bridges. General charge and supervision within the meaning of Article V, Section 14, above, is not related, as we see it, to promotional efforts to increase the use of gasoline on highways.

Further, that portion of Article V, Section 14, giving the State Highway Department charge of matters pertaining to expenditure of Highway funds is, in our opinion, inapplicable here. And this simply for the reason that the funds in question are not Highway funds. Where formerly all of the proceeds of the gasoline tax went for highway purposes under Section 64-26-19, the Legislature, as it unquestionably had the power

to do, modified Section 64-26-19 to the extent that so much as is appropriated to the State Tourist Bureau is no longer credited to the State Road Fund.

We conclude that the State Tourist Bureau is an agency under the control of the head of the Executive Branch of our State Government, the Governor.

The conclusion above warrants the further conclusion that the State Tourist Bureau may be legally quartered in the Capitol Building, not, of course, in the particular space demanded by it but in such space as is available and assigned to it by the proper authority.