Opinion No. 70-58

June 30, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Mr. Harold G. Thompson State Auditor P.O. Box 2383 Santa Fe, New Mexico 87501

QUESTIONS

QUESTIONS

Is the North Central New Mexico Economic Development District a public employer within the purview of the Public Employees Retirement Act?

CONCLUSION

No.

OPINION

*{*97}* **ANALYSIS**

For purposes of affiliation in the Public Employees Retirement Association, the Public Employees Retirement Act, Section 5-5-1, et seq., N.M.S.A., 1953 Compilation, defines a "public employer" as the State of New Mexico or any municipality in this state. Section 5-5-1 (E), supra. A "municipality" is further defined as "any municipality, city, county, metropolitan arroyo flood control authority and conservancy district in the state, including the boards, departments, bureaus and agencies of the municipality, city, county, metropolitan arroyo flood control authority or conservancy district." Section 5-5-1 (D), supra.

The North Central New Mexico Economic Development District is a *{*98}* body created pursuant to the Joint Powers Agreement Act, Section 4-22-1, et seq., N.M.S.A., 1953 Compilation. It is composed of Colfax, Taos, Rio Arriba, Sandoval, San Miguel, Mora, Los Alamos and Santa Fe counties and the city of Santa Fe. It includes representatives from the Southern Middle Rio Grande Pueblos, the Northern Rio Grande Pueblos and the Jicarilla Apache Tribe. The district is financed by contributions from its various members and the United States Government. The district is not the State of New Mexico, nor is it a branch, agency, commission, institution, bureau, board or department thereof. Nor is it named specifically as one of those governmental subdivisions that may affiliate under the term "municipality." It is our opinion that the North Central New Mexico Economic Development District does not satisfy the statutory requirements for affiliation with the Public Employees Retirement Association.

This office reached the same conclusion in the case of irrigation districts. Attorney General Opinion No. 56-479, issued November 26, 1956. We reached a similar conclusion in the case of metropolitan flood control authorities before the legislature amended Section 5-5-1 to read as it does at this time. Attorney General Opinion No. 64-94, issued July 24, 1964. Furthermore, it is significant that the legislature specifically included flood control authorities as a "municipality" after Attorney General Opinion No. 64-94 reached its conclusion. Had the legislature intended to include all special districts under the Public Employees Retirement Act, it is doubtful that it would have enumerated only flood control authorities in the 1969 revision. See Chapter 249, Laws of 1969. "Expressio unius est exclusio alterius" is a rule of statutory construction, meaning in this context that the express mention of certain members in the class of a "public employer" under the Public Employees Retirement Act, supra, implies the exclusion of others. **State v. Prince,** 52 N.M. 15, 189 P.2d 993 (1948); **In the Matter of the Attorney General,** 2 N.M. 49 (1881). The legislature could have included all special districts in the 1969 revision, but chose not to do so.

This office is not unaware of its earlier opinion, Attorney General Opinion No. 69-127, issued November 6, 1969. That opinion concluded that the North Central New Mexico Economic Development District was a "public employer" entitled to affiliation with the Public Employees Retirement Association. That earlier opinion placed great emphasis upon the Joint Powers Agreement Act, and particularly Section 4-22-6, supra, of that act. In interpreting that statute, our earlier opinion concluded, in essence, that if any member participating in a joint project were entitled to membership in the Public Employees Retirement Association, not only should that member be considered eligible under this joint project but all other members participating in the project should likewise be considered eligible for affiliation with the Public Employees Retirement Association.

We do not believe that this conclusion is consistent with the intent of the legislature, particularly when viewed in light of the 1969 legislation set out above. The Joint Powers Agreement Act was enacted in 1961 (Laws of 1961, Chapter 135), so that at the time of the 1969 revision the legislature presumably considered the existence of the Joint Powers Agreement Act but apparently did not feel it necessary or proper to include bodies created pursuant to that act within the purview of the Public Employees Retirement Act. The emphasis in our earlier opinion, No. 69-127, supra, upon Section 4-22-6, supra, was too broad. That section goes no further than to provide that an official of a participating member of the joint project does not lose his privileges, immunities or benefits during the time that he is serving under the joint project. Thus, participation by an official previously covered by the Public Employees Retirement Act does not remove him from continued participation in the retirement system, but it does nothing whatever to confer or transfer participation to other officials who are not so covered by the system.

An employer may affiliate with the Public Employees Retirement Association only if it is authorized to do so by statute. To this extent, we agree with a portion of our earlier opinion, No. 69-127. We now believe, however, that *{*99}* the conclusion reached in that opinion was unnecessarily broad and incorrect in its analysis of the statutes.

Accordingly, we reverse the conclusion stated in Attorney General Opinion No. 69-127, and anything therein which is inconsistent with this opinion.

By: James C. Compton, Jr.

Assistant Attorney General