

Opinion No. 74-14

April 22, 1974

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. David W. King State Planning Officer Capitol Building Santa Fe, New Mexico 87501

QUESTIONS

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1. Are the organizations created under the Regional Planning Act (Sections 14-57-1 to 14-57-9) and the Joint Powers Agreement Act (Sections 4-22-1 to 4-22-7) subject to the Mileage and Per Diem Act? (Sections 5-10-1 to 5-10-4 (P.S.)). If so, what agency of State government or division thereof is empowered to authorize out-of-state travel by employees and members of these organizations?
2. Are the above organizations prohibited by State law from borrowing funds from commercial lending institutions to finance general operations, pending receipt of reimbursements from the U.S. Government for expenses already incurred pursuant to contractual agreements to which the State is a party?

CONCLUSIONS

1. See analysis.
2. No.

OPINION

{*26} ANALYSIS

At the outset, it is necessary to note the conclusion of an advisory letter issued by this office on March 31, 1972 to Mr. Raymon Lara, Chief, Local Government Division, Department of Finance and Administration. After an analysis of a number of pertinent cases, it was concluded that the Middle Rio Grande Council of Governments was not a political subdivision. That organization was formed pursuant to the statutory authority of the Regional Planning Act, **supra**, and its articles of agreement state that it was created pursuant to the Regional Planning Act of the State of New Mexico and under the Joint Powers Act, **supra**. It was also concluded that Section 11-2-57, NMSA, 1953 Comp., dealing with the Local Government Division of the Department of Finance and Administration of New Mexico, did not apply to the Middle Rio Grande Council of Governments. See also Attorney General's Opinion 73-61 (August 23, 1973). The

application of these conclusions to your first question will become evident as our discussion progresses.

The Per Diem and Mileage Act, **supra**, is designed to be referred to where applicable in statutes setting compensation of public officers and employees. In Section 5-10-2, NMSA, 1953 Comp. (P.S.) "public officer" is defined by that Act as "every elected or appointed officer of the state or local government." "Employee" is defined as "any person who is in the employ of any state agency or local government and whose salary is paid either completely or in part from public money. . ." "Local government" is defined as "every **political subdivision** of the state created under either general or special acts, which receives or expends public money from whatever source derived, including but not limited to counties, county institutions, boards, {27} bureaus or commissions, incorporated municipalities, drainage, conservancy, irrigation, school, junior college or vocational technical institute or other districts." (Emphasis supplied) It does not appear that organizations created under the above acts are State agencies, nor, in view of the advisory letter issued by this office, does it appear that such organizations may be included under the definition of "political subdivision" in the Per Diem and Mileage Act. By itself, therefore, the Per Diem and Mileage Act does not necessitate application of its provisions to the organizations in question.

It is necessary, however, to refer to the acts under which the organizations were created to see whether those acts have provisions relating to the Per Diem and Mileage Act. Section 14-57-3(b) of the Regional Planning Act reads as follows, in pertinent part:

"Members of the regional planning commission shall serve without compensation, but shall be reimbursed for expenses incurred in pursuit of their duties on the commission pursuant to the Per Diem and Mileage Act (5-10-1 to 5-10-6)."

Thus, while regional planning commissions are not considered to be political subdivisions, the specific statutory requirement above results in the commissions being subject to provision f of Per Diem and Mileage Act. In addition, Section 14-57-3(c) of the Regional Planning Act would seem to require approval by the State Planning Office for out-of-state travel which would utilize funds from "grants or other aid from the federal government or any of its agencies or from any other source." A reading of the Joint Powers Agreements Act does not reveal a similar statutory requirement, so the organizations created under that Act should not be subject to the Per Diem and Mileage Act.

Regarding out-of-state travel, Section 5-10-3.1(A) of the Per Diem and Mileage Act reads, in pertinent part, as follows:

"Public funds shall not be expended to reimburse any **public officer or employee** for expenses for out-of-state travel without written authorization from the director (of the Department of Finance and Administration) or his authorized representative. The governing body of a local government may request authority to approve expenses for out-of-state travel from the director who shall grant such authority unless he states in

writing to the governing body his reasons for not granting the authority." (Emphasis supplied)

We believe that even though the officers or employees of organizations created under the above acts are not, technically, officers or employees of the State or a political subdivision of the State, the intent of the legislature in subjecting the regional planning commissions to the Per Diem and Mileage Act was that written and Mileage Act was that written authorization for out-of-state travel should be obtained from the director or his authorized representative. Again, because the Joint Powers Agreements Act does not contain language placing the organizations formed pursuant to it under the Per Diem and Mileage Act, it should not be necessary for the director to approve out-of-state travel for those organizations. The Joint Powers Agreements Act does have the following provision at Section 4-22-4(D):

"The agreement shall provide for strict accountability of all receipts and disbursements."

In addition, Section 4-22-3 provides, in part, as follows:

"Provided, however, nothing contained in this Joint Powers Agreements Act (4-22-1 to 4-22-7) shall authorize any state officer, board, commission, department, or other state agency, institution or authority, or any county, municipality, public corporation, or public district to make any agreement without the approval of the state board of finance as to the terms and conditions thereof."

{*28} Ordinarily, it is the practice of parties to the agreements and of the State Board of Finance to obtain or require a fiscal agent who will keep accounts of all receipts and disbursements of the organization. It seems logical that out-of-state travel by officers or employees of an organization created under the Joint Powers Agreements Act would be authorized, pursuant to the agreement, by someone within the organization, or perhaps by the fiscal agent.

The answer to your second question is also influenced by the prior decision of this office that organizations created under the above two acts are not to be considered political subdivisions. Section 11-1-1.1, NMSA, 1953 Comp., provides as follows:

"If the state board of finance determines that an emergency exists that warrants such action, it may lend or grant to any state agency, board, commission, municipal corporation or other political subdivision organized under the laws of the state that sum of money the board determines reasonable and appropriate from any funds appropriated to the board for use in meeting emergencies."

It appears, from what we have said previously, and from the provisions of the last quotation, that organizations created under the above two acts may not obtain loans from the State Board of Finance. They do not appear to be State agencies or local political subdivisions. Nor would the organizations be subject to the Constitutional restrictions upon county or municipal indebtedness in Article IX, Sections 10 and 12 of

the New Mexico Constitution. Therefore, our conclusion is that if operating funds are needed by the organizations in question, they may be obtained from commercial lending institutions.

By: Bill Primm

Assistant Attorney General