

Opinion No. 91-06

May 14, 1991

OPINION OF: TOM UDALL, Attorney General

BY: Andrea R. Buzzard, Daniel Yohalem, Assistant Attorneys General

TO: Robert Vigil, State Auditor, PERA Building Room 302, Santa Fe, New Mexico 87503. Honorable Ben Lujan, State Representative, Route 1, Box 102, Santa Fe, New Mexico 87501

QUESTIONS

Is the Retiree Health Care Authority ("RHCA") a state agency and thus subject to the various regulations that apply generally to state agencies?

CONCLUSIONS

The RHCA is a state agency and thus is subject to the various regulatory provisions that apply to state agencies absent express statutory exemptions.

FACTS

The Retiree Health Care Act, NMSA 1978, §§ 10-7C-1 to -16 (Repl. Pamp. 1990), establishes the RHCA to provide group health insurance for state, school district, municipal and county retirees. §§ 10-7C-4; 10-7C-5. The RHCA's board members are entitled to per diem and mileage under the Per Diem and Mileage Act. § 10-7C-6(F). The RHCA, in contracting for fiscal agent services and for health insurance, must adhere to the Procurement Code. § 10-7C-7(A) and (G). The state investment officer invests the long-term reserves of the RHCA, and the state treasurer invests the RHCA's other money. § 10-7C-8(D). The RHCA's receipts and disbursements are subject to audit by the state auditor. § 10-7C-8(C).

The retiree health care fund consists of contributions by public employers and public employees, premiums from eligible retirees and their dependents, participation fees from current retirees and certain specified income tax revenue. §§ 10-7C-8(B); 10-7C-13; 10-7C-15; NMSA 1978, § 7-1-6.30 (Repl. Pamp. 1990). After 1995, the legislature may adjust contribution levels to ensure actuarial soundness of the fund. § 10-7C-15(F). The 1990 legislature appropriated \$6,000,000 from the general fund operating reserve to the retiree health care loan fund for the establishment and administration of the Retiree Health Care Act. 1990 N.M. Laws, ch. 6, § 18.

The legislature expressly requires that the RHCA's operating budget be approved by the Budget Division of the Department of Finance and Administration ("DFA") § 10-7C-16(A). The RHCA's expenditures for administration are expressly subject to

appropriation by the legislature. Id. The 1991 legislature appropriated funds for expenditure by the RHCA by specific category. 1991 N.M. Laws, ch. 10, § 4 at 42-43.

ANALYSIS

As the Facts section of this opinion details, the Retiree Health Care Act makes applicable to the RHCA a number of specific legal requirements. Typically, these apply to any state agency. In addition to those requirements set forth in the Facts section of this opinion, state agencies are required to comply with a number of other statutory requirements. The importance of the question posed here-----is the RHCA a state agency-----is that if it is a state agency, then those other statutory requirements which govern the conduct of state agencies and which are not specifically addressed by the Act will also apply to the RHCA.

In our view the RHCA is a state agency. When the legislature has intended to insulate public entities from the application of the laws that govern state agencies, it has done so expressly. For example, the Mortgage Finance Authority Act, NMSA 1978, §§ 58-18-1 to -27 (Repl. Pam. 1986 & Cum. Supp. 1990), creates the mortgage finance authority as a "public body politic and corporate, **separate and apart from the state.**" § 58-18-4 (Emphasis added.) Section 58-18-4(F) of that Act also provides:

The authority shall be separate and apart from the state and shall not be subject to the supervision or control of any board, bureau, department or agency of the state.... In order to effectuate the separation of the state from the authority, no use of the terms "state agency" or "instrumentality" in any other law of the state shall be deemed to refer to the authority unless the authority is specifically referred to therein.

The Retiree Health Care Act contains no similar language separating the RHCA from the state.¹

In addition, only state or local public agencies are authorized to receive appropriations of public funds from the state legislature. The New Mexico Constitution, Art. IV, § 31 provides:

No appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state....

Similarly, Art. IX, § 14 (the antidonation clause) prohibits appropriation of public funds to private persons or entities. As the New Mexico Supreme Court stated at the dawn of statehood:

To be within the terms of the constitutional provision, the state must have complete control over the corporation, so that the corporation is then but a subordinate governmental agency.

Harrington v. Atteberry, 21 N.M. 50, 63-64, 153 P. 1041, 1045 (1915)(ruling unconstitutional, on both antidonation and Art. IV, § 31 grounds, an appropriation of public funds to a private fair association).

Here, the legislature has appropriated public funds, consisting of tax revenue and public employers' contributions of public monies, to the retiree health care fund for administration by the RHCA. Therefore, absent explicit instructions to the contrary from the legislature, it is our opinion that the RHCA is a state agency and that all state laws which govern state agencies apply to the RHCA.²

That the RHCA is a state agency is bolstered by the fact that the legislature expressly subjected the RHCA to the laws that apply only to state or local government agencies, such as the state budget laws, the general appropriations act, the Procurement Code, and other laws set forth above in the Facts section of this opinion. Thus, NMSA 1978, § 6-3-17 states: "[A]ll state agencies are subject to the provisions of this act [provisions of the budget laws]." Further, the laws set forth above define "state agency" in terms that include the RHCA. For example, the state budget laws, NMSA 1978, §§ 6-3-1 to -22 (Repl. Pamp. 1987), define "state agency" to mean "any department, institution, board, bureau, commission, district, or committee of government of the State of New Mexico...." §§ 6-3-1; 6-3-9.³

Accordingly, we conclude that the RHCA is a "state agency." Because we have been asked by the State Auditor to explain how this determination affects the application of specific state laws and regulations to the RHCA, we turn now to those provisions. The discussion below is not intended to be exhaustive, but covers merely those laws about which we were asked.

Procurement Code and Per Diem and Mileage Act.

The statutes governing the RHCA expressly reference the Procurement Code and the Per Diem and Mileage Act. Therefore, the regulations promulgated by the general services department ("GSD") to implement the Procurement Code and those promulgated by DFA to implement the Per Diem and Mileage Act clearly apply to the RHCA.

Conflict of Interest Act.

As a "state agency," the RHCA is subject to those provisions of the Conflict of Interest Act that apply to a "state agency." That Act's definition of "employee" includes board members.⁴ Therefore, the RHCA's governing board members and its employees are subject to that Act's provisions that apply to "employees." See NMSA 1978, §§ 10-16-3 to -6; 10-16-10; 10-16-11; 10-16-14.

Public Records Act.

As a "state agency," the RHCA is subject to record retention regulations adopted by the state commission of public records pursuant to NMSA 1978, § 14-3-4 (Repl. Pamp. 1988).

Property Control Regulations.

The RHCA is subject to leasing regulations of the Property Control Division of the GSD in accordance with the Property Control director's obligation to "control the lease or rental of space in private buildings by state executive agencies other than the state land office." NMSA 1978 § 15-3-2(A)(5) (Repl. Pamp. 1986).

Personnel Act and DFA Exempt Salary Schedule.

The Personnel Act covers "any state office, job or position of employment," subject to certain exceptions. NMSA 1978, §§ 10-9-3 and 10-9-4 (Repl. Pamp. 1990). Although the Retiree Health Care Act provides that the RHCA's board may "employ or contract for persons to assist it ... and determine the duties and compensation of these employees," § 10-7C-7, that authority does not conflict with the Personnel Act and, therefore, the Personnel Act applies to non-exempt employees of the RHCA.

Under that Act, the personnel board promulgates rules providing for a classification plan, pay plan, competitive entrance tests, hours of work, holiday and leave, and dismissal and demotion procedures. NMSA 1978, § 10-9-13 (Repl. Pamp. 1990). The RHCA's authority to determine compensation can be harmonized with § 10-9-13 to require that the RHCA's salary determinations be made in a manner that is consistent with law, including the personnel board's classification and pay plan adopted pursuant to law.⁵ See AG Op. No. 64-121 (1964) (provision in general appropriations act that insurance department personnel "shall have qualifications established by the superintendent of insurance" does not irreconcilably conflict with the Personnel Act's classification plan established by the personnel board).

Similarly, DFA's exempt-salaries plan for heads of agencies appointed by boards, assistants and secretaries to those heads, and policy-making employees apply to the RHCA. See NMSA 1978, § 10-9-5 (Repl. Pamp. 1990).

DFA Vouchering.

The financial control laws, NMSA 1978, §§ 6-5-1 to -9 (Repl. Pamp. 1987), establish a voucher-warrant system for the disbursement of public funds which incorporates safeguards against erroneous payments. Before a state agency issues vouchers or purchase orders or enters into contracts to spend money, the Financial Control Division of DFA must determine that the payment is authorized and must encumber the agency's funds. § 6-5-3. Vouchers must be certified as true and correct by the officer responsible for approving payments of claims against the state agency. § 6-5-8. "All warrants upon the state treasury must be issued by the [DFA] secretary." § 6-5-5. "No warrant upon the state treasury for the disbursement of funds shall be issued except upon the

determination of the financial control division that the amount of the expenditure" is within the agency's appropriation and is for a lawfully authorized purpose. § 6-5-6. The secretary of DFA may, when she determines that efficiency or economy so requires, authorize a state agency to issue warrants and exempt that agency from the requirement of prior submission of proposed vouchers, purchase orders and contracts. § 6-5-9. The Secretary of DFA has not so authorized and exempted the RHCA pursuant to § 6-5-9.

These financial control laws define "state agency" as "any department, institution, board, bureau, commission, district or committee of the government of the state of New Mexico..." § 6-5-1. The RHCA is within that definition of "state agency" and, unless the Retiree Health Care Act provides otherwise, it must comply with the financial control laws.

The Retiree Health Care Act provides: "All premiums and other money collected by the authority shall be received and disbursed directly by the authority." § 10-7C-8(C). The question is whether the RHCA's authority to "disburse directly" means that the RHCA is exempted from the requirements of the financial control laws described above (i.e., that proposed vouchers be submitted to DFA before an agency spends money and that all money spent be made by warrant drawn upon the treasury by DFA's secretary). We think not.

When the legislature has authorized other agencies to "disburse directly" and intended those agencies to be outside the financial control laws, it has expressly exempted those agencies from DFA's voucher-warrant process. See statutes regarding: the Public School Insurance Authority;⁶ the Peanut Commission;⁷ the Agricultural Commodity Commission;⁸ the Livestock Board;⁹ and the Beef Council.¹⁰

In contrast to the laws governing these exempted agencies, the Retiree Health Care Act neither provides that the RHCA need not submit proposed vouchers to DFA nor that the RHCA may issue its own warrants. To reach the conclusion that DFA's voucher-warrant system is not applicable to the RHCA would require that we add to the Retiree Health Care Act language similar to that contained in the other statutes. We decline to read language into a statute which the legislature did not include. The legislature is presumed to be informed as to existing law, and thus presumably would have explicitly exempted the RHCA from the financial control laws if that had been its intent. See, e.g., *State v. Trivitt*, 89 N.M. 162, 166, 548 P.2d 442, 446 (1976) (legislature is presumed to know laws in existence).

It has been argued that RHCA's authority to disburse directly means that the RHCA may issue its own warrants. But in view of § 6-5-5's express requirement that all warrants upon the state treasury must be drawn by DFA's secretary, we are unable to conclude, by inference, that a warrant drawn by an officer of RHCA would be valid. See, e.g., *State ex rel. Stratton v. Gurley Motor Co.*, 105 N.M. 803, 737 P.2d 1180 (App.), cert. denied, 105 N.M. 781, 737 P.2d 893 (1987) (for a specific statute to control over a general, there must exist conflicting statutory provisions, such that a necessary

repugnancy cannot possibly be harmonized). RHCA's vague authority to disburse directly is not necessarily repugnant to § 6-5-5.

Even if the legislature intended by § 10-7C-8(C)'s "direct disbursement" language to permit the RHCA to issue warrants,¹¹ the RHCA would not thereby be excused from the pre-disbursement statutory procedures, specifically the requirement that proposed vouchers be submitted to DFA. Sections 6-5-3 and 6-5-6 do not impede an agency's lawful expenditure of public funds. In approving vouchers and authorizing warrants, DFA determines that (1) the agency has the authority to spend the money for the intended purpose, which must be within the appropriation authorized by law, and (2) the expenditure does not exceed the agency's appropriation or the unencumbered balance of funds at its disposal. These requirements do not supplant RHCA's lawful discretionary authority to determine the objects and purposes of its expenditures. Instead, these requirements complement the agency's authority by providing checks against error or defalcation.¹² These vouchering requirements are so important to the proper and honest operation of government that it is a felony to make a false voucher which is relied on for the expenditure of public money. NMSA 1978, § 30-23-3 (Repl. Pamp. 1984).

DFA and Attorney General Approval of Contracts.

Section 13-1-118 of the Procurement Code provides:

All contracts for professional services with state agencies shall be reviewed as to form, legal sufficiency and budget requirements by the general services department or the department of finance and administration if required by regulations of either or both of the departments. This section shall not apply to contracts entered into by the legislative branch of state government, the judicial branch of state government or the boards of regents of state educational institutions named in Article 12, Section 11 of the constitution of New Mexico.

GSD Rule 89-601, ch. 3, Para. 17 provides: "All contracts for professional services with state agencies shall be reviewed as to form, legal sufficiency and budget requirements by the department of finance and administration, if such review is required by DFA Rule 87-1 or subsequent DFA regulations."

DFA Rule 87-1 "govern[s] the review ... of professional services contracts of state agencies by the Department of Finance and Administration." Under DFA Rule 87-1, § 1(B), an agency is not required to submit its professional services contracts to DFA if each of the following requirements is met: (1) it issues its own warrants; (2) it is exempt from submitting vouchers to the financial control division of DFA; (3) it maintains pre-audit and post-audit fiscal controls; (4) it maintains its own administrative unit for procurement and controls its own encumbrances of funds; (5) it provides its own administrative unit to control and review professional services contracts; (6) it employs in-house legal counsel to prepare, review and approve professional services contracts and to advise the agency generally about applicable laws; and (7) the state agency is

not funded by general fund appropriations. Even if an agency is exempt from DFA contract review, DFA Rule 87-1 expressly requires approval by the Attorney General of all contracts over \$200,000.

The RHCA is unable to satisfy requirements (1) and (2). The RHCA is not authorized to issue its own warrants and is not exempt from submitting vouchers to the financial control division of DFA. Accordingly, DFA and Attorney General approval of RHCA's professional services contracts over \$200,000 is required.

Information Systems Act.

Under the Information Systems Act, NMSA 1978, §§ 15-1-1 to -13 (Repl. Pamp. 1986 and Cum. Supp. 1990), the Information Systems Council must approve information systems plans for state agencies and must approve the acquisition of information systems resources for each state agency. § 15-1-7. "Information systems resources" means "software and hardware." § 15-1-4. The state budget division of DFA must approve information systems expenditures. § 15-1-7. The RHCA is not excluded from the provisions of the Information Systems Act. Therefore, the RHCA's purchases of computer software and hardware and its information systems plan are subject to approval by the Information Systems Council.

State Rules Act.

Under the State Rules Act, NMSA 1978, §§ 14-3-24, 14-3-25, 14-4-1 to -9 (Repl. Pamp. 1988 and Cum. Supp. 1990), agencies of state government, excluding the judicial and legislative branches of the state government, must file rules that they adopt with the Records Center. § 14-4-2; 14-4-3. The RHCA is not excluded from the State Rules Act; therefore, the RHCA must file its rules with the Records Center.

Bank Accounts of the RHCA.

The RHCA board has authority to use the services of the state's fiscal agent or to select its own fiscal agent. § 10-7C-7. Under NMSA 1978, § 6-1-13(A) (Repl. Pamp. 1987), a state agency may not open a deposit account unless that agency has received authorization from the State Treasurer for such deposit account. Section 6-1-13(C) defines "state agency" as "the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities, or institutions other than state educational institutions designated by Article 12, Section 11 of the constitution of New Mexico." The RHCA is not excluded from that definition of "state agency." But section 6-1-13(A) does not apply to deposits made pursuant to NMSA 1978, § 6-10-35 (Repl. Pamp. 1988) (authorizing the state's fiscal agent agreement). Therefore, if the RHCA deposits money using the state's fiscal agent agreement, such deposit does not require authorization under § 6-1-13(A). If, however, the RHCA maintains an independent account with a bank that also is the state's fiscal agent, that account does require authorization from the state treasurer. One purpose of § 6-1-13(A)'s requirement is to enable the state treasurer to report to the state board of finance the amount of money on deposit in state

depositories and other information. NMSA 1978, § 6-10-26 (Repl. Pamp. 1988). The authorization to the RHCA to employ a fiscal agent does not conflict with § 6-1-13(A)'s requirement that the state treasurer authorize a deposit account, in the absence of evidence that the state treasurer has usurped or nullified the RHCA's reasonably exercised statutory discretion to choose fiscal agents.

ATTORNEY GENERAL

TOM UDALL Attorney General

GENERAL FOOTNOTES

[n1](#) In fact, the legislature's February 7, 1990 amendments to HAFC substitute for H.B. 124 (the Retiree Health Care Act bill) rejected an attempt to exempt the RHCA from general state controls. Specifically, the legislature amended § 5 to strike proposed language stating that the RHCA was independent from "any other board, commission or office created under the laws of this state."

[n2](#) For similar reasons, the Attorney General concluded that the Public School Insurance Authority (PSIA) was a state agency, despite the legislature's exemption of PSIA from some of the legal requirements that apply to state agencies. AG Op. No. 90-23 (1990).

[n3](#) The general appropriations act authorizes named "state agencies," including the RHCA, to spend money within authorized limits and defines "state agency" as "any office, department, institution, board, bureau, commission, court, district attorney, council or committee of state government." 1991 N.M. Laws, ch. 10, § 2(G) and § 3(C). The Procurement Code, NMSA 1978, §§ 13-1-28 to -172 (Repl. Pamp. 1988 & Cum. Supp. 1990), defines "state agency" as "any department, commission, council, board, committee, institution, legislative body, agency, government corporation, educational institution...." § 13-1-90.

[n4](#) NMSA 1978, § 10-16-2(D) (Repl. Pamp. 1990) defines "employee" as "any person who has been elected to, appointed to or hired for any state office and who receives compensation in the form of salary or is eligible for per diem and mileage, but excluding legislators and judges."

[n5](#) See State ex rel. Clinton Realty Co. v. Scarborough, 78 N.M. 132, 135, 429 P.2d 330, 333 (1967) (in construing statutes court's duty is to reconcile, so far as practicable, different provisions so as to make them consistent, harmonious and sensible).

[n6](#) NMSA 1978, Section 22-2-6.8 (Repl. Pamp. 1989) provides:

A. All premiums and other money collected by the [public school insurance] authority shall be received and disbursed directly by the authority, but receipts and disbursements are subject to audit by the state auditor. **The authority is not required**

to submit proposed vouchers, purchase orders or contracts to the department of finance and administration as otherwise provided by law.

B. The board shall issue warrants in the name of the authority against funds of the authority.... The authority shall provide its own warrant....

(Emphasis added.)

[n7](#) NMSA 1978, Section 76-17-8 (Repl. Pamp. 1990) provides:

A. All money collected by the [peanut] commission under provisions of the Peanut Act shall be received and disbursed directly by the commission, **and proposed vouchers, purchase orders and contracts need not be submitted to the department of finance and administration under Section 6-5-3 NMSA 1978.**

C. When authorized by the commission, its chairman shall, in the name of the commission:

(1) issue warrants against funds of the commission...

D. The commission shall provide its own warrant....

(Emphasis added.)

[n8](#) NMSA 1978, Section 76-21-21 (Repl. Pamp. 1990) provides:

A. All funds received by the [agricultural commodity] commission shall be received by the commission and disbursed directly by the commission.... **The commission is not required to submit vouchers, purchase orders or contracts to the department of finance and administration as otherwise required by Section 6-5-3 NMSA 1978.**

B. The commission shall issue warrants against funds of the commission.... The commission shall provide its own warrants....

(Emphasis added.)

[n9](#) NMSA 1978, Section 77-2-10 (Orig. Pamp.) provides:

A. All fees and other moneys collected by the New Mexico livestock board shall be received and disbursed directly by the board.... **The board is not required to submit proposed vouchers, purchase orders or contracts to the department of finance and administration as otherwise required by Section 6-5-3 NMSA 1978.**

(Emphasis added.)

[n10](#) NMSA 1978, Section 77-2A-8 (Cum. Supp. 1990) provides:

A. All funds received by the [beef] council shall be received and disbursed directly by the council.... **The council is not required to submit vouchers, purchase orders or contracts to the department of finance and administration as otherwise required by Section 6-5-3 NMSA 1978.**

B. The council shall issue warrants against funds of the council.... The council shall provide its own warrants....

(Emphasis added.)

[n11](#) We do not think this is a reasonable conclusion, however, even as to the issuance of warrants solely for the purchase of insurance contracts. As discussed in the text above and in footnote 12 below, the authority to voucher and issue warrants for the limited purpose of purchasing insurance contracts has been granted to the Public School Insurance Authority by very specific legislative language not present here.

[n12](#) Indeed, the State Auditor in reviewing the expenditures of the PSIA, which did not voucher through DFA, discovered a number of questionable expenditures that appeared contrary to the Per Diem and Mileage Act and implementing regulations. See State Auditor's December 11, 1990 special audit of the New Mexico Public School Insurance Authority at 8-11 (discussing travel expenses). These findings apparently were at least partly responsible for the legislation which sharply limited PSIA's express vouchering and warranting authority. 1991 N.M. Laws, ch. 142, §§ 3 and 5.