Opinion No. 93-05

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OPINION OF: TOM UDALL, Attorney General

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TO: Dr. W. N. ""Bill'' Dixon, President Board of Regents, New Mexico, School for the Deaf, 1060 Cerrillos Road, Santa Fe, New Mexico 87503

QUESTIONS

Are New Mexico school for the Deaf and other state educational institutions confirmed by Article XII, Section 11 of the New Mexico Constitution public employers "other than the state" for purposes of the Public Employee Bargaining Act?

CONCLUSIONS

No. The applicable definitions in the statute indicate the legislature's intent that state educational institutions be included within the term "State," and neither the other provisions of the statute nor constitutional principles require deviation from this apparent intent.

FACTS

Besides the New Mexico School for the Deaf, the following are "confirmed" as state educational institutions in the New Mexico Constitution: the University of New Mexico, New Mexico State University, New Mexico Highlands University, Western New Mexico University, Eastern New Mexico University, New Mexico Institute of Mining and Technology, New Mexico Military Institute, New Mexico School for the Visually Handicapped, New Mexico School for the Deaf, and the Northern New Mexico State School at El Rito. N.M. Const. art. XII, § 11. The Public Employees Bargaining Act, NMSA 1978, §§ 10-7D-1 to -26 (Repl. Pamp. 1993) ("PEBA"), provides that a public employer "other than the "state" may create a local labor relations board similar to the Public Employee Labor Relations Board ("PELR ') to perform the same collective bargaining functions as the PELR Board provides for state public employers. Public employers that constitute the "state" do not have this option and are under the jurisdiction of the PELR Board.[1] Because the PELR does not clearly define "state," confusion has arisen concerning whether state educational institutions identified in Article XII, Section 11 of the state constitution are public employers "other than the state" with the option of creating a local board for purposes of collective bargaining.[2]

ANALYSIS

The PEBA contains several references to "a public employer other than the state" in various contexts. Such an employer has the option, mentioned above, to create a local board instead of being subject to the jurisdiction of the PELR Board. NMSA 1978, §§ 10-7D-10. The PEBA also distinguishes between the state and a public employer other than the state for purposes of collective bargaining agreement provisions requiring the expenditure of funds. For the former, such provisions are contingent on "the specific appropriation of funds by the legislature and the availability of funds," and for the latter, the provisions are contingent on "the specific appropriation for wages by the appropriate governing body and the availability of funds." **Id.** § 10-7D-17 (E). other distinctions between the two types of public employer are made in the impasse resolution procedures,[3] and in provisions governing the effect of ordinances, resolutions or charter amendments providing for collective bargaining existing at the time of the PEBA's enactment. **Id.** §§ 10-7D-26.

When interpreting a statute, the chief aim is to give the legislature's intent, **Roth v. Thompson,** 113 N.M. 331, 332, 825 P.2d 1241 (1992), which is determined primarily from the language of the statute itself. **Rutledge v. Fort,** 104 N.M. 7, 9, 715 P.2d 455 (1986). The PEBA does not define "state" or " public employer other than the state." However, it does define "public employer" to mean "the state or any political subdivision thereof." NMSA 1978, § 10-7D-4 (Q). Accordingly, based on the language of the statute, the phrase "a public employer other than the state" is intended to refer to a political subdivision for purposes of the distinctions mentioned above.

State educational institutions enumerated in Article XII, Section 11, such as the School for the Deaf, are not political subdivisions. A political subdivision "is formed or maintained for the more effectual or convenient exercise of political power within certain boundaries or localities, to whom the electors residing therein are, to some extent, granted power to locally self-govern themselves." **Gibbany v. Ford,** 29 N.M. 621, 626, 225 P.2d 577 (1925). The School for the Deaf does not consist of a territory governed by resident voters or representatives elected by them. It is specifically designated a state institution, under the control of the state, is governed by a Board of Regents appointed by the governor with the consent of the senate, and possesses statewide authority and responsibility. N.M. Const. art. XII, §§ 3, 11, 13.[4]

On the other hand, the term "state" consistently has been interpreted to include state educational institutions identified in the state constitution in a variety of contexts. **See, e.g., Korgich v. Regents of the New Mexico School of mines,** 582 F.2d 549 (10th Cir. 1978) (New Mexico's institutions of higher learning are state agencies and perform a state function for purposes of Eleventh Amendment immunity from suit); **Clothier v. Lopez,** 103 N.M. 593, 711 P.2d 870 (1985) (discussion of venue for tort claims describing a state educational institution employee as "state employee" and state educational institutions as "state entities"); **Silver City Consol. School Dist. No. 1 v. Board of Regents of New Mexico Western College,** 75 N.M. 106, 112, 401 P.2d 95 (1965) (state college was "not separate from or independent of the state,..."); **Eyring v. Board of the New Mexico Normal Univ.,** 59 N.M. 3, 277 P.2d 550 (1954) (action against regents sounding in tort was really against the state); **State v. Regents of**

University of New Mexico, 32 N.M. 428, 258 P. 571 (1927) (constitution makes the state owner of state educational institutions); AG Op. No. 91-05 (1991) (employees of state educational institutions are employees of the "state" subject to statute prohibiting a legislator from receiving compensation for services performed as an officer or employee of the state); AG Op. No. 70-27 (1970) (state educational institutions are instrumentalities whose action is necessarily state action). State statutes also typically include state educational institutions within the term "state." **See, e.g.,** NMSA 1978, §§ 13-1-99 (Repl. Pamp. 1992) (defining "state agency" to include "institution" and "educational institutions" for purposes of the Procurement Code, and excluding state educational institutions from requirement of procurement through the state purchasing agent but not from the requirements of the Code); NMSA 1978, § 22-10-2 (A) (Repl. Pamp. 1993) (defining "state agency" to include the school of the Deaf and other "state institutions" listed therein for purposes of the School Personnel Act); N.M.S.A. 1978, § 41-4-3 (H) (Cum. Supp. 1993) (Tort Claims Act definition of "state" or "state agency").

The legislature is presumed to know existing law, including case law, when it enacts a statute. **Bettini v. City of Las Cruces,** 82 N.M. 633, 635, 485 P.2d 967 (1971); **State ex rel. Stratton v. Roswell Indep. Sch.,** 111 N.M. 495, 502, 806 P.2d 1085 (Ct. App. 1991) (legislature is presumed to have known constitutional and statutory distinctions between the state and its political subdivisions and the judicial decisions relating to those distinctions at the time it enacted provisions limiting legislators' compensation as employees of the "state"). Based on the above authorities, the legislature presumably knew that entities like the state educational institutions would be included in the term "state" for purposes of the PEBA.

Other provisions of the statute, though perhaps confusingly drafted, do not necessarily conflict with the legislature's apparent intent.[5] Most significantly, Section 10-7D-7 provides, in pertinent part:

The appropriate governing body of any public employer shall be the policymaking individual or body representing the public employer. In the case of the state, the appropriate governing body shall be the governor or his designee or, in the case of a constitutionally created body, the constitutionally designated head of that body. At the local level, the appropriate governing body shall be the elected or appointed representative body or individual charged with management of the local public body.

It has been contended that the second sentence quoted above distinguishes between the "state" and a "constitutionally created body," and indicates that the latter is a "public employer other than the state" for purposes of the statute.[6] However, this interpretation directly contradicts the definition of public employer discussed above, and arguably would exclude from the state not only the state educational institutions identified in Article XII, Section 11, but also other entities created or confirmed by the constitution with a "constitutionally created head," including the state corporation commission, the state highway commission and state offices such as the secretary of state, state auditor, state treasurer, attorney general, the commissioner of public lands and the judicial and legislative branches of state government. **See** N.M. Const. art. IV; art; V, §§ 1, 14; art.

VI; art. XI, § 1; art. XIV, § 1. Given this potential result, and in the absence of any express exclusion, it seems most likely that the legislature intended in Section 10-7D-7 to treat constitutionally created entities differently from other executive branch state agencies only for purposes of defining their appropriate governing body.[7] The provision can easily be harmonized with the rest of the PEBA by focusing on the initial clauses of the second and third sentences of Section 10-7D-17, which distinguish the state from local government entities or political subdivisions. Thus, the second sentence designates the governor as the appropriate governing body for all state entities except the constitutionally created bodies, for which the appropriate governing body is the constitutionally designated head.[8]

Finally, interpreting the PEBA to include state educational institutions within the term "state" and subjecting those institutions to the jurisdiction of the PELR Board does not impermissibly interfere with the boards of regents' constitutional authority to control and manage those institutions. N.M. Const. art. XII, § 13. The PEBA guarantees all public employees the right to organize and collectively bargain with their employers, and the PELR Board administers certain procedural aspects of the bargaining process. **See** NMSA 1978, § 10-7D-9 (PELR Board is responsible for designating appropriate bargaining units, certifying exclusive representatives and hearing complaints of prohibited practices). However, the PEBA specifically reserves to public employers the right to direct the work of, hire, promote, assign, transfer, demote, suspend, discharge or terminate their employees, determine qualifications for employment and the nature and content of personnel examinations and all other rights not specifically limited by a collective bargaining agreement or by statute. **Id.** § 10-7D-6. Thus, the boards of regents retain all significant control over the terms and conditions of employment, subject to any collective bargaining agreement they negotiate with their employees.[9]

Moreover, we note that in other states, similar state educational institutions have been subjected to public employee collective bargaining laws and the jurisdiction of state (rather than local) labor relations boards despite their status as constitutionally created and independent government entities. For example. the Michigan Supreme Court affirmed a ruling by the Michigan Employment Relations Commission that the universities were "Public employers" subject to the Michigan Employee Relations Act. **Regents of the Univ. of Michigan v. Michigan Employment Relations Comm'n,** 204 N.W.2d 218 (Mich. 1973). The court acknowledged the universities' constitutional authority to entirely control and manage their affairs and property, but agreed with earlier cases holding that "[T]he public policy of this state as to labor relations in public employment is for legislative determination," and that autonomy in the area of labor relations was not necessary for the universities to maintain their constitutional management authority. **Id.** at 222. **See also Levi v. University of Hawaii,** 628 P.2d 1026, 1029 (Haw. 1981) (holding that, under the state constitution, the board of regents has exclusive jurisdiction over the internal organization and management of the state university, but it must act in accordance with legislative enactments that deal with statewide matters such as collective bargaining laws); **Kansas Bd. of Regents v. Pittsburg State University Chapter of Kansas-Nat'l Educ. Ass'n,** 667 P.2d 306 (1983) (Kan. 1983) (holding that the board of regents of the state university was the

pertinent "public employer" under the Kansas Public Employer-Employee Relations Act subject to the jurisdiction of the Public Employee Relations Board).

Other out-of-state cases do not directly address the issue, but clearly indicate that boards of regents with constitutional control over state educational institutions are subject to public employee collective bargaining statutes and the administration of statewide collective bargaining boards. **See, e.q., Alaska Community Colleges' Fed'n of Teachers v. University of Alaska,** 669 P.2d 1299 (Alaska 1983) (collective bargaining case involving unfair labor practice charges filed against the state university with the Alaska Labor Relations Agency); **Regents of the Univ. of Cal. v. Public Employment Relations Bd.** 715 P.2d 590, 592 n. 3 (Cal. 1986) (discussing statute according state university employees collective bargaining rights administered by the state public employment relations board).[10]

ATTORNEY GENERAL

Tom Udall, Attorney General

GENERAL FOOTNOTES

n1 In our view, the Act does allow the Board, through its rulemaking and contracting powers, to authorize advisory panels to assist it in performing its functions under the Act. See NMSA 1978, §§ 10-7D-9 (A) and (E).

n2 This opinion is limited to the question of whether state educational institutions are included within the term "state" for purposes of the Public Employee Bargaining Act and the jurisdiction of the PELR Board. On its face, we believe that the statute's inclusion of state educational institutions within the term "state" for these purposes is constitutional. This opinion does not address or speculate about the enforceability or constitutionality of other provisions of the Act as they may be applied to state educational institutions in the future.

n3 For the state and exclusive representatives for state employees, the impasse resolution procedures provide that if no agreement is reached by the parties, "the unresolved issues will be resolved through the appropriation process." For all other public employers and exclusive representatives, the statute provides that a factfinder assigned by the board or local board shall conduct hearings and submit findings and recommendations to be published by the board or local board if the parties cannot reach agreement. A public employer other than the state also has the option of entering into a written agreement with the exclusive representative setting forth an alternative impasse resolution procedure. NMSA 1978, § 10-7D-18.

n4 **See also regents of Univ. of Cal. v. City of Santa Monica,** 143 Cal.Rptr. 276, 281 (Cal. Ct. App. 1978) (statutory definition of "local agency" required to comply with applicable municipal building and zoning ordinances excludes the "state" and by implication, such statewide agencies with plenary constitutionally granted powers as the

state university regents); **State ex rel. Miller v. State Bd. of Educ.,** 52 P.2d 141, 142-43 (Idaho 1935) (state university board of regents is not a subdivision of the state subject to constitutional limitations on indebtness); **Pope v. Parkinson,** 363 N.E.2d 438 (Ill. Ct. App. 1977) (state university is not a unit of local government subject to Local Records Act); **Mitchell v. University of Montana,** 783 P.2d 1337, 1339 (Mont. 1989) (state university board of regents is not a local governmental entity under statute granting immunity from suit for legislative acts or omissions).

n5 The only possible exception is in Section 10-7D-18(A), which governs negotiations and impasse procedures to be followed by "the state and exclusive representatives for state employees," but refers to procedures for "the board or local board." This appears to suggest that some state entities may create or be subject to the jurisdiction of a local board. This inference, however, is strongly contradicted by other provisions of the statute which state that only a public employer "other than the state can create a local board," NMSA 1978, §§ 10-7D-4(K); and, in any event, does not support an interpretation that state educational institutions are "other than the state" for purposes of PEBA.

n6 For purposes of this opinion, we assume that the phrase "constitutionally created body" in Section 10-7D-7 refers to entities like the state educational institutions that are "confirmed" as well as those that are "created " by the constitution. **Compare** N.M. Const. art. XII, § 11 (the specified entities "are hereby confirmed as state educational institutions") **with** N.M. Const. art. V, § 14 ("There is a 'state highway commission' ").

n7 This is only logical. Designating the governor the "governing body" of the state corporation commission, for example, would ignore the constitutionally-created governing bodies of these state entities. **See** N.M. Const. art. XI, § 1.

n8 Likewise, it has been suggested that the impasse resolution and other provisions of the PEBA that refer to appropriations (**e.g.,** NMSA 1978, §§ 10-7D-17(E), 10-7D-18) show that the legislature intended to treat state educational institutions as "other than the state." It is true that those provisions may require interpretation by the PELR Board take into account the exclusive control state educational institutions have over nonstate funds. **See State ex rel. Sego v. Kirkpatrick,** 86 N.M. 359, 370, 524 P.2d 975 (1974) (legislature has no authority to appropriate or control the use of federal and other funds from sources other than the state). However, these provisions are not necessarily incompatible with the regents' authority under Article XII, Section 13 of the New Mexico Constitution to control and manage their respective institutions (**See** discussion in text, **infra**) or with an interpretation finding that state educational institutions are covered by the term "state."

In any event, past Attorney General Opinions and case law from other stares have consistently interpreted similar constitutional grants of authority to the governing bodies of state educational institutions to preclude state legislatures from improperly interfering with governing bodies' autonomy and control in the area of internal management. **See, e.r.,** AG Op. No. 70-73 (1970) (concluding that the authority conferred on the boards of

regents by the New Mexico Constitution precludes the legislature from enacting measures that limit the payment of faculty salaries or prescribe specific codes of conduct for university employees and students); **Board of regents v. Judge,** 543 P.2d 1323 (Mont. 1975) (finding unconstitutional an appropriations measure limiting salary increases for university presidents to five percent); **Board of Regents v. Baker,** 638 P.2d 464, 469 (Okla. 1981) (holding that the "determination of faculty salaries is clearly an intergral part of the power to govern the University and a function essential in preserving the independence of the Board" and finding unconstitutional a statute requiring a minimum salary increase for state university faculty members). Based on these principles, we would seriously question any interpretation of the impasse resolution procedures or other provisions of the PEBA which would allow the legislature to specify wage rates, tenure policies or other personnel matters within the exclusive and independent jurisdiction of the boards of regents.

n9 We believe the PEBA contemplates that collective bargaining will be conducted at the agency level between an exclusive representative and the appropriate governing body designated in Section 10-7D-7. Thus, each state educational institution will be responsible for negotiating collective bargaining agreements with its employees. We acknowledge that Section 10-7D-17(D), which provides that "[n]egotiations at the state level shall be conducted by occupational groups on all issues," might be read to require all state agencies to be treated as one employer for bargaining purposes. However, this is not expressly stated, and the PELR Board has not interpreted or applied the provision to require such an interpretation. **See also** us supra note 1.

n10 **Cf. City of Twinsburg v. State Employment Relations Bd.,** 530 N.E.2d 26 (Ohio 1988) (Ohio Public Employees' Collective Bargaining Act did not intrude on home rule municipality's power to determine wages and terms of employment), **overruled in part on other grounds, City of Rocky River v. State Employment Relations Bd.,** 539 N.E.2d 103 (Ohio 1989).

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