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OPINION
OF
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Opinion No. 89-04

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TO: Carlos A. Gallegos
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QUESTION:

May the City of Las Cruces pay a portion of its retirees' health insurance premium costs for employees who retire under the Public Employees' Retirement Act ("PERA"), Sections 10-11-1 to 10-11-140 NMSA 1978 (Repl. 1987)?

CONCLUSION:

No.

ANALYSIS:

By resolution adopted June 6, 1988, the City of Las Cruces amended Section V of its manual of personnel policies to alter the conditions under which employees, who thereafter retired under PERA, might continue to participate in Las Cruces' Employee Health Insurance Plan ("Plan"), a self-insured insurance program for Las Cruces' employees. Before the amendment, those retirees were required to pay 100% of the required premium to continue participation in the Plan. After the amendment, Las Cruces assumed a portion of the retirees' cost under certain conditions. That amendment provides:

> Retiree Health Insurance. Any employee who terminates his/her employment with the City

> and immediately draws retirement benefits from the New Mexico Public Employees Retirement Association shall, if such employee was a participant in the City Employee Health Care Plan, be entitled to continue participation in the Health Care Plan. Except as set forth below, the retired employee shall be solely responsible for the payment of any applicable premium cost for such participation. The City will pay a portion of the premium for participation based upon the following formula: 10% for each five full years of employment, up to a maximum of 50% of premium; provided, however, that before an employee shall be eligible for benefits under this section, the employee must have had 15 years of continuous[1] service with the City....

(Emphasis in original.) This amendment applies to employees on June 6, 1988 who thereafter retire.[2]

No New Mexico statute authorizes municipalities to pay all or a portion of the health insurance premium cost for public employees who retire under PERA. However, Las Cruces is a home rule municipality and therefore has authority to enact ordinances "not expressly denied by general law or charter." Article X, §6(D) of the New Mexico Constitution.[3] Las Cruces' charter does not

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1 By resolution adopted June 20, 1988, Las Cruces eliminated the requirement of "continuous" service and required only 15 years of service to qualify for the cost assumption.

2 Because Las Cruces has not sought to assume any portion of the health insurance cost of retirees who retired before June 6, 1988, we are not required to address the constitutional objections to such an assumption based on N.M. Const. art. IX, §14 and art. IV, §27. See Att'y Gen. Op. No. 88-66 (1988) (unconstitutional to provide a cost of living increase to annuities of judges who left the state's service before the enactment date of statute providing increase).

3 Article X, Section 6, paragraph D provides:

> A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general

prohibit the June 6, 1988 resolution. The question, therefore, is whether legislative enactments expressly limit Las Cruces' authority to adopt the June 6, 1988 resolution. City of Albuquerque v. Chavez, 91 N.M. 559, 559, 577 P.2d 457, 457 (Ct. App.), cert. denied, 91 N.M. 610, 577 P.2d 1256 (1978); Apodaca v. Wilson, 86 N.M. 516, 521, 525 P.2d 876, 881 (1974).

In 1941, the Legislature enacted chapter 188, entitled "An Act Authorizing All State Departments, State Institutions and Political Subdivisions of the State of New Mexico to Cooperate in Providing Group or Other Insurance for the Benefit of Their Employees, and Repealing All Acts... in Conflict Herewith." 1941 N.M. Laws, ch. 188, §1. This law was permissive, applied to governmental employees, and limited the maximum amount that the state and political subdivisions could contribute on behalf of employees to 20% of the cost of the insurance. The Legislature has amended this law over the years to expand it to include governmental salaried officers, to increase the maximum contributory amount that governmental employers could make on behalf of their employees and officers, and to make the governmental contribution mandatory. 1965 N.M. Laws, ch. 181, §1 (authorizing municipalities to pay 50% of cost); 1969 N.M. Laws, ch. 86, §1 (authorizing counties to pay 50% of cost); 1970 N.M. Laws, ch. 73, §1 (authorizing the state to contribute 50% of cost); 1973 N.M. Laws, ch. 387, §1 (authorizing political subdivisions to pay 60% of cost); 1981 N.M. Laws, ch. 151, §1 (authorizing the state to pay 60% of cost); 1986 N.M. Laws, ch. 84, §1 (providing a sliding scale dependent on salary to determine the state's contributory amount); and 1987 N.M. Laws, ch. 289, §7 (adding a subsection

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> law or charter. This grant of powers shall not include the power to enact private or civil laws governing civil relationships except as incident to the exercise of an independent municipal power, nor shall it include the power to provide for a penalty greater than the penalty provided for a petty misdemeanor. No tax imposed by the governing body of a charter municipality, except a tax authorized by general law, shall become effective until approved by a majority vote in the charter municipality.

Paragraph E provides: "The purpose of this section is to provide for maximum local self-government. A liberal construction shall be given to the powers of municipalities."

pertaining to cafeteria plans). As presently codified, Section 10-7-4 NMSA 1978 (Repl. 1987) provides:

> A. All state departments and all political subdivisions of the state may and, by July 1, 1975, shall cooperate in providing group term life, medical or disability income insurance for the benefit of eligible employees or salaried officers of the respective departments, institutions and subdivisions.
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> B. The group insurance contributions of the state... including... the public schools, shall be made as follows:
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> ...
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> As used in this subsection, "cost of insurance" means the premium required to be paid to provide coverages no better than the coverages provided by the public employer's group insurance policy in force on January 1, 1985.... Any contributions of the political subdivisions of the state, except the public schools, shall not exceed sixty percent of the cost of the insurance.

Section 10-7-4 does not authorize the state or cities to cooperate financially in providing health insurance for PERA retirees. Attorneys General have construed strictly Section 10-7-4's authorization. See Att'y Gen. Op. 63-25 (1963) (1941 N.M. Laws, ch. 188 is the exclusive method for insuring city employees; the maximum contribution is 20% cost; and employees' dependents may not be covered); Att'y Gen. Op. 63-44 (1963) (State agency is limited to 20% maximum contributory amount); Att'y Gen. Op. 63-100 (1963) (1941 N.M. Laws, ch. 188's purpose was to provide express authority to the state and its political subdivisions to contribute a limited amount of public funds to pay portion of the cost for group insurance for public employees); Att'y Gen. Op. 64-83 (1964) (students are not "eligible employees" on behalf of whom a school district may pay health insurance); Att'y Gen. Op. 69-59 (1969) (group insurance policies for public employees may include dependent coverage).

Four statutes allow the state's government retirees to obtain health insurance under a governmental health insurance plan. Section 10-11-121 of PERA provides:

> Any member or survivor pension beneficiary may continue to be insured under the provisions of

> any state group insurance plan in effect at the time of retirement or death or under the terms of any separate subsequent state group health insurance plan if the retired member or survivor pension beneficiary pays the periodic premium charges and consents to have the association deduct the periodic premium charges from the retired member's or survivor pension beneficiary's pension.

As enacted by 1975 N.M. Laws, ch. 155, §1, this provision formerly read: "Any member of the association may, upon retirement, continue to be insured under the provisions of any state group insurance plan in effect at the time of retirement... if he pays the entire periodic premium charges...." Section 10-12A-11 of the Magistrate Retirement Act, Sections 10-12A-1 to 10-12A-13 NMSA 1978 (Repl. 1987), provides:

> Any magistrate who is entitled to any annuity... upon ceasing to hold office by reason of retirement, may continue to be insured under the provisions of any state group insurance plan in effect at the time of retirement... if he pays the entire periodic premium charges for the insurance and consents to have the periodic premium charges deducted from his annuity.

Section 10-12-15 of the Judicial Retirement Act, Sections 10-12-1 to 10-12-17 NMSA 1978 (Repl. 1987), provides:

> Any judge or any justice who is entitled to retirement benefits... upon ceasing to hold office by reason of retirement, may... continue to be insured under the provisions of any state group insurance plan in effect at the time of retirement... if he pays the entire periodic premium charges for such insurance and consents to have the association deduct such periodic premium charges from the retired member's annuity benefits.

Subsection 22-11-41(B) of the Educational Retirement Act, Sections 22-11-1 to 22-11-45 NMSA 1978 (Repl. 1986), provides:

> A member employed by a state agency and insured under the provisions of the state group medical insurance plan in effect at the time of retirement... may continue to be

> insured under the state group medical insurance plan after the effective date of his retirement... if he pays the entire periodic premium charge for the insurance and consents to have the periodic premium charges deducted from his retirement... benefit.

Thus, the legislature has stated, in four separate statutes, that governmental retirees must pay the entire premium to benefit from continuation in the state's health insurance program. Whether Las Cruces has authority to provide PERA retiree insurance on different terms requires an analysis of the cases discussing home rule.

In Casuse v. City of Gallup, 106 N.M. 571, 746 P.2d 1103 (1987), the New Mexico Supreme Court held that Gallup, a home rule municipality, lacked authority to provide for "at-large" elections of city councilors, because Section 3-12-1.1 NMSA 1978 (1988 Cum. Supp.) required "single-member district" elections. The Court stated: "[A]ny New Mexico law that clearly intends to preempt a governmental area should be sufficient without necessarily stating that affected municipalities must comply and cannot operate to the contrary." Id. at 573, 746 P.2d 1105 (1987). The Court determined that Section 3-12-1.1 was a "general law," within the meaning of art. X, §6 (D)'s limitation on home-rule authority, meaning "one that affects the community at large, as opposed to a local law that deals with a particular locality." Based on preemption, the Court further determined that Section 3-12-1.1 "expressly denied" authority in Gallup to conduct city councilor elections in a manner contrary to the statute.

In Westgate Families v. County Clerk of Los Alamos, 100 N.M. 146, 667 P.2d 453 (1983), the New Mexico Supreme Court held that Los Alamos County, a home rule municipality, lacked authority to submit county zoning ordinances to referendum by the County's electorate. The Court determined that the "County's authority to promulgate zoning ordinances must come from enabling legislation, and the exercise of power under a zoning ordinance must be authorized by statute." Id. at 148, 667 P.2d at 455. Because the zoning statutes required the board of county commissions to adopt zoning ordinances and did not include a referendum provision, the court held that these statutes "expressly denied" authority to zone by referendum.

In Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974) the New Mexico Supreme Court held that Albuquerque, a home rule municipality, could increase water and sewer rates and could apply the increased revenue to municipal functions other than those set out by statute. The pertinent statutes neither authorized nor forbad the revenue use for other municipal functions. In uphold-

ing the city's exercise of home rule powers, the Court defined art. X, § 6(D)'s limitations:

> [T]he term "general law" can only be interpreted to mean a law that applies generally throughout the state, or is of statewide concern as contrasted to "local" or "municipal" law. The words "not expressly denied" must be given some meaning, and we take it to mean that some express statement of the authority or power denied must be contained in such general law... or otherwise no limitation exists.

Id. at 521-22, 525 P.2d at 881-82. The law contained no express denial and, because the operation of a water and sewer system was a "proprietary" function, the Court believed the activity to be within the city's home-rule authority. See also City of Albuquerque v. N.M. State Corp. Com'n, 93 N.M. 719, 605 P.2d 227 (1979) (upholding the city's authority under home rule to establish an airport limousine service, finding that the city was engaged in a proprietary, not governmental, activity). Casuse, however, did not require, as Apodaca, an "express denial" to limit a home-rule municipality's authority.

Based on this authority, we draw these conclusions about a city's home rule authority: (1) Apodaca's rule that general law must contain an "express denial" statement is not, after Casuse, the law, at least in the case of governmental action; (2) Under Casuse, general law may operate to preempt certain governmental activity; (3) Under Westgate, an authorizing statute that sets forth substantive and procedural requirements to take governmental action does not permit the government to take action in a manner different from that specified by statute; and (4) a city's "proprietary" activity, unless otherwise clearly prohibited by general state law, has been held to be within home rule authority.[4] In

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4 In N.M. State Corp. Com'n, the Court distinguished "proprietary" from "governmental" activity:

> So then, generally speaking, the distinction is this: If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and "private" when any corporation, individual, or group of individuals could do the same thing. Since, in either event, the undertaking must be for a public

undertaking to subsidize the health insurance cost of PERA retirees with public funds, Las Cruces acts in a governmental capacity. Section 10-7-4 is a general law providing municipalities with the authority to pay employee health insurance cost. That authority is confined to coverage for employees and family members and is limited by amounts that may be contributed. No other statute authorizes Las Cruces to pay PERA retirees' insurance cost. Other statutes that authorize governmental retiree insurance continuation require the retiree to pay the entire premium.

Based on Casuse, we believe the Legislature has preempted the area of governmental provision of public employee and retiree insurance. Based on Westgate, a city's exercise of authority to provide public employee and retiree insurance must be authorized by statute and in harmony with it. Las Cruces, therefore, does not possess home rule authority to pay health insurance costs of public retirees otherwise than in accordance with authorizing legislation, which is lacking. Thus, its authority to adopt the June 6, 1988 resolution has been "expressly denied" by general law.

We conclude, therefore, that Las Cruces may not pay a portion of its retirees' health insurance premium costs for its employees who retire under PERA.

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> purpose, any proprietary enterprise must, of necessity, at least incidentally promote or protect the general health, safety, security, or general welfare of the residents of the municipality.

Id. at 722, 605 P.2d at 230 (quoting Britt v. City of Wilmington, 236 N.C. 446, 451, 73 S.E.2d 289, 293 (1952)).