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OFFICIAL OPINION NO. 64

September 30, 1952.

Mr. Ross Teckemeyer,  
Executive Secretary,  
Public Employes' Retirement Fund,  
707 Board of Trade Building,  
Indianapolis 4, Indiana.

Dear Sir:

I have your request for an Official Opinion which reads as follows:

"March 14th, 1952, the Housing Authority of the City of New Albany made an inquiry regarding participation for their employees in the Federal O. A. S. I. Program as provided for by Chapter 313 of the Act of 1951.

"In reply to their inquiry they were notified by this office that they would be considered as (D) 'employees of a political subdivision of the state engaged in performing services in connection with a single proprietary function', as provided for under Section 218 of Title II of the Federal Security Laws, Public Law 734 as amended in 1950. The above quote is taken from Sub-section (b) paragraph 5.

"In compliance with these instructions the City Council of City of New Albany passed O. A. S. I. Ordinance, or Resolution No. 2 (see copy attached). In addition they filed a certificate stating specifically that the employees of the Housing Authority were not participating in a Retirement Plan.

"Pursuant to this record, the New Albany Housing Authority was included in Modification No. 8, Item 16, which reads as follows:

"SECTION 2. The following positions are hereby designated as those which are to be covered: ALL POSITIONS NOT COVERED BY AN EXISTING RETIREMENT OR PEN-

SION PLAN, OF THE HOUSING AUTHORITY IN THE CITY OF NEW ALBANY, INDIANA, A PROPRIETARY FUNCTION OF THE CITY.'

"This Resolution was submitted to the Federal Security Agency who raised the following question, as set forth in their letter of July 1st, copy of which is attached.

"Pursuant to this letter the Executive Secretary asked Mr. Joseph M. McDaniel, Executive Director for an interpretation of the Act (see copy of letter attached).

"On July 10th we were in receipt of an answer from Mr. Jos. M. McDaniel (see copy attached).

"Therefore, I am requesting that you review the attached file together with the Act under which the Housing Authority of the City of New Albany was created and give me your opinion, as to the status of the Housing Authority created under the Indiana law as provided for by Section 48-8104 of BRS Vol. 9 Part II; particularly as to whether it is a proprietary function or a political sub-division and if a political sub-division, does such authority have the right to participate in the O. A. S. I. coverage as provided by Chapter 313 of the Acts of 1951."

Section 4 of Chapter 207 of the Acts of 1937, same being Burns' 48-8104, begins "In each city, town and in each county of the state there is hereby created a public body corporate and politic to be known as the 'Housing Authority' of the city, town or county; \* \* \*". In the case of *Edwards v. Housing Authority of City of Muncie* (1938), 215 Ind. 330, 335, 19 N. E. (2d) 741, the Supreme Court said, concerning a body created pursuant to the above quoted act:

"That the legislature has power to protect public health, safety, morals, and welfare, and to exercise and to authorize the exercising of the power of taxation and eminent domain, and the raising and expenditure of public funds for such purposes cannot be doubted.

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From time to time boards and commissions have been created and authorized and vested with authority to carry out projects for the protection of the public. The name given to such an instrumentality is of no significance, nor do we find any limit upon the character or number of public corporations or bodies politic, which the legislature may authorize or create to accomplish such purposes. The facts found by the legislature and recited in the enactments are not disputed, or their existence denied, and, since the conditions described must be assumed to exist and to affect the public welfare, it can scarcely be doubted that there is a public interest which justifies the undertaking of the projects authorized by the enactments. The various housing authorities are not authorized to levy taxes, but municipalities are authorized to pay the first year's administrative expenses of these projects, and to furnish, and to contract to continue to furnish, certain facilities, such as streets, sanitary services, police and fire protection, street lighting, etc., which, if not necessary, are at least useful and convenient in accomplishing the principal purpose of the projects, which is to replace unsanitary, unsafe, and unhealthy dwellings which are a menace to the community. If such dwellings are a menace to the public, and their replacement necessary for the protection of the public, there is a sufficient basis for the expenditure of public funds. The amount, and manner, and method of the expenditure, unless it be shown to be entirely unreasonable, must be left to the legislative discretion."

In Indiana there has been considerable litigation as to the effect of statutes creating separate bodies corporate to perform functions of various types over areas substantially identical with more conventional governmental sub-divisions. However, the point of interest in these determinations has been the effect of these statutes as an evasion or in avoidance of the debt limitation placed on municipal corporations by the Indiana Constitution.

A not dissimilar question was presented in the case of *Chadwick et al. v. City of Crawfordsville* (1940), 216 Ind. 399, 412, 24 N. E. (2d) 937. In that case the question before the

Court was the propriety of extending tax exemptions to municipally owned utilities, under our constitutional provision allowing public property used for a "public purpose" to be exempted. Supreme Court in that case held that although utility property was held in a private or proprietary capacity that there was sufficient power under the police power to prevent function from being considered private to the extent of its being nonmunicipal.

Section 2, Chapter 313 of the Acts of 1951 defines in subsection (f) what a political sub-division of the State is for the purpose of independent inclusion under Social Security. That sub-section reads as follows:

"(f) The term 'political subdivision of the state' shall mean a county, city, town or township, and shall embrace, for the purpose of this act, a school corporation, a public library, or public utility of any county, city, town or township; said public utility to be included whether operated by the city or town, or under the terms of a trusteeship for the benefit of such city or town."

With another type of problem before it, the Supreme Court in the case of *Long v. Stemm et al.* (1937), 212 Ind. 204, 209, 7 N. E. (2d) 188, said:

"It is true that, in the operation of public utilities, a city acts in its private or proprietary capacity, but these utilities are generally managed by a board of public works, or the city council, or by a waterworks board. Chapter 235 of the Acts of 1933 (Acts 1933, p. 1063), under which it is alleged appellees were appointed, provides for a 'department of waterworks,' as one of the departments of the city government, and appellees were appointed as trustees to manage that department. It cannot be seriously questioned that they are public officers."

In this case the Supreme Court was dealing with the status of officers of a public utility clearly run by the city and in holding that the proper way to try title to offices of the public utility was the way other public offices titles are tried. The court made the above quoted statement.

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Referring again to Chapter 207 of the Acts of 1937, under which the housing authorities were created, the words used in stating that the housing authority shall be "a body corporate and politic assumed a latent ambiguity when compared with other legislation which shows that the governing board of the State Highway Department and other non-independent agencies are also granted, this seeming separate entity by use of these identical words."

From these somewhat confusing authorities it becomes clear that organizations similar to housing authorities have chameleon-like qualities of changing their attributes depending on the situation and light under which they are examined. A general study of the various acts dealing with housing authorities shows a very close link between the housing authority and the regular political sub-division with which they are associated. It seems reasonable to say that unless another view is necessary they are treated as a city department exercising a proprietary function. The wording for inclusion under social security benefits previously quoted would lend credence to the belief that the legislature intended housing authorities to be so treated for the purposes of social security.

Therefore, in answer to your question in regard to all questions having to do with social security, it is my opinion that housing authorities should be considered to be proprietary functions of the associated municipality.

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### OFFICIAL OPINION NO. 65

October 10, 1952.

Mr. Wilbur Young,  
Superintendent of Public Instruction,  
227 State House,  
Indianapolis, Indiana.

Dear Sir:

Your letter of September 20, 1952 has been received, in which you request an official opinion on the following questions:

1. Is it lawful to substitute an agreement of facts when the same are known to the agency to not include