OPINION
68-79

June 5, 1968 (OPINION)

Mr. Martin N. Gronvold, Executive Director

Employment Security Bureau

RE: Employment security bureau - Social security - Referendum

This is in response to your request for an opinion regarding Section 52-10-11, as enacted by the 1967 Legislature through H.B. No. 801 (Chapter 375, 1967 S.L.). Along with your request for an opinion you also submitted correspondence between your office and the Social Security Office located at Kansas City, Missouri, for Region VI. In such correspondence several questions are raised and you have referred those questions to this office for an opinion.

Section 52-10-11 of the North Dakota Century Code was presented to the Legislature as enabling legislation and adopted by it so that the state may, on behalf of its various employees, come within the provisions of Section 218 of Title II of the Federal Social Security Act, which may be cited in the U.S. Code as 42 U.S.C.A. 418. The specific language as found in 42 U.S.C.A., Section 418(d)(6)(C) and, as is material here, provides, in part, as follows:

> "For the purposes of this subsection, any retirement system established by the state of * * * North Dakota * * * which * * * is divided into two divisions or parts, one of which is composed of positions of members of such system who desire coverage under an agreement under this section and the other of which is composed of positions of members of such system who do not desire such coverage, shall, if the state so desires and if it is provided that there shall be included in such division or part composed of members desiring such coverage the positions of individuals who become members of such system after such coverage is extended, be deemed to be a separate retirement system with respect to each such division or part."

During the committee hearings and discussion of H.B. No. 801, which resulted in the enactment of Section 52-10-11, the Legislature was made fully aware of the provisions of the Federal Social Security Act. Every indication supports the legislative intent that the state of North Dakota wished to make available to certain employees the new provisions of the Social Security Act. In construing Section 52-10-11, which is not too specific in its terms, we must recognize the legislative intent and purpose for which it was enacted. The act clearly establishes that employees in a retirement system may be divided into Groups "A" and "B", but it does not in so many words specifically state the purpose of such divisions except by reference to the federal act. Again here, we must look to the purpose for which Section 52-10-11 was enacted which, in part, provides as follows:

> "SYSTEMS DIVIDED - REFERENDUM ON SOCIAL SECURITY.

1. Notwithstanding the provisions of Sections 52-10-05 and 52-10-07, with respect to the employees of any political subdivision who are under a locally administered retirement system in existence prior to April 23, 1957, including the North Dakota teachers insurance and retirement fund for the purposes of this section, the governor is empowered to authorize a referendum for a divided retirement system as provided by section 218 of Title II of the Social Security Act. The system shall be divided as follows:

   * * *."

It is significant to observe that throughout Section 52-10-11 reference is made to Section 218 of Title II of the Federal Social Security Act. The manner in which the reference is made discloses the intent and purpose of the enactment. We cannot conclude that the Legislature performed an idle act. Every effort must be made to give some significant meaning to the enactment. In instances where state legislation is enacted which is in a sense enabling legislation to permit the state to come within certain provisions of a federal act and where specific reference is made to the federal act, it is incumbent upon us to examine the provisions of the federal act and construe the language of the state act in accordance with the federal act. In some instances, as is the case here, certain "voids" must be filled by resorting to the specific provisions in the federal act. This is not a situation where the state is implementing a new program on its own. Without the federal act the state act would be of little or no value.

The obvious inference by comparing the provisions of the two acts is that Section 52-10-11 implies that the retirement system may be divided into two parts so that one part (A) is composed of positions of members of the retirement system who desire coverage, and the other part (B) is composed of portions of members of the retirement system who do not desire coverage. It is our opinion that such is the legal effect on the basis discussed, even though the act (Section 52-10-11) does not state so in specific language.

It also appears that the Legislature employed broad general language in the enabling legislation, thereby permitting considerable latitude for compliance with the federal act. In many instances of this kind it has been determined that the provisions of the federal act will be controlling, consequently the Legislature did not deem it advisable to become too specific in the enabling legislation. This resulted in the enactment of a law which permits considerable latitude on the part of the state, provided the action by the state is in conformity with and in compliance with the federal act.

On this basis, it is our opinion that subsection 1.a.(2) of Section 52-10-11 includes in Group "A" those employees who became members of a locally administered retirement system after April 23, 1957. The term "inactive member" is not defined in the state law but because the reference is to the Federal Social Security Act, and keeping in mind the purpose of the state act, it is our opinion that the same term includes a member of a local retirement system which was in existence prior to April 23, 1957, who had a break before coverage was extended to the retirement system and who now returns to

employment in a position covered by the retirement system.

Subsection 3 of Section 52-10-11 does not specifically provide what action the governor is to take upon receiving the results of a referendum. In this instance we believe that the Legislature simply assumed that the governor would take the necessary action to satisfy the requirements of the federal act in bringing the results of the referendum to the appropriate agency. This is implied from the other provisions of Chapter 52-10 of the North Dakota Century Code.

Section 52-10-11 must be construed, together with the provisions of Chapter 52-10, which certainly implies that the state agency is authorized to take the appropriate steps in providing coverage for the individuals concerned as permitted under the Federal Social Security Act. The authority of the governor and the state agency, in our opinion is adequately implied from the provisions of Chapter 52-10 of the North Dakota Century Code. Section 52-10-11 is not a separate, independent act but is part of Chapter 52-10.

Subsection 4 of Section 52-10-11, in effect, provides a second chance procedure as is permissible under 42 U.S.C.A., Section 418,(d)(6)(F). The second chance procedures set forth in said subsection applies only to those individuals who are members of a locally administered retirement system, as such term is understood in the Federal Social Security Act.

As to "ineligibles", we believe that an earlier modification, No. 171, has, for all practical purposes, resolved that situation for this state. We are not aware of a further need or clarification for the term "ineligibles" at this time. If our understanding of the term "ineligible" is correct - meaning ineligible to participate in a local retirement program, such persons were brought into a former state OASIS program and were automatically covered in a previous modification when the employees covered under the state OASIS program were brought within the Federal Social Security Act.

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