

**OPINION
59-243**

November 25, 1959

SOCIAL SECURITY - Public Employees - Political Subdivisions - Division of Retirement System

This is in reply to your letter in which you state that a question has been raised in regard to the State of North Dakota's so called "Social Security enabling legislation" chapter 52-10 as it may relate to section 281(d)(5)(C) of the Social Security Act. You then ask for an opinion whether or not chapter 51-10 of the 1957 Supplement to the North Dakota Revised Code of 1942 as amended would permit political subdivisions such as a city to divide their retirement system as provided in section 218(d)(6)(C) of the Social Security Act.

Under this section of the Social Security Act, as I understand it, a retirement group may divide its present employees into two parts. (One of which is composed of positions of members who desire to come under Social Security and the other of which is composed of positions of members who do not desire to come under Social Security). Such division, however, applies only to the current present employees (positions) and any new employees would automatically come under the Federal Social Security program.

I realize our interpretation of Federal statutes is not binding on the Federal Government or its agencies. However, assuming that we have interpreted this provision correctly, we must examine the state enabling legislation to determine whether or not such division is permissible. Chapter 52-10 makes no specific reference to the aforementioned section. nor does it make specific mention of the provisions in such section. It is noted that the substantive provisions throughout chapter 52-10 are general in nature. It is particularly noted that the declaration of policy as found in section 52-1001 amongst other things provides:

". . . it is hereby declared the policy of the legislative assembly, subject to the limitations of this Act (chapter), that such steps be taken as to provide such protection to employees of the state and political subdivision within the State on as broad a basis as is permitted under the Social Security Act. . ."

Being there is no specific limitation on this subject in chapter 52-10 it is reasonable to assume that it does not prohibit such division.

It is therefore my opinion that the North Dakota law is in harmony with section 281(d)(5)(C) of the Federal Social Security Act.

However to give full recognition to the provisions of the Social Security Act and the administrative problems involved, it appears mandatory that the retirement group, dividing its group into two parts, furnish the state agency a complete list of the employees who will not come under the Social Security Act and also the list of those employees that will come

under the Social Security Act. This would all have to be accomplished on or before the plan is submitted for approval, etc., provided all of the other mechanics required by the Act are performed. The plan would also have to provide that all new employees of such political subdivision, whether filling new or old positions would come under the Social Security Act. Once the list has been prepared, submitted and approved no new names could be added to the group excluded from the Social Security Act. I also wish to bring to your attention that once a selection or division having been made, those excluded can come in later only by filing a written request with the state before the expiration of one year after the date the agreement was entered into, provided they remain in the same employment (positions).