

**OPINION
69-14**

October 13, 1969(OPINION)

Mr. Norman G. Tenneson
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RE: Agriculture - Milk Stabilization Act - Application to School Dis

This is in reply to your letter of October 3, 1969, in which you state you have been requested by the Fargo Board of Education and the Grand Forks Public School District to secure the opinion of this office as to the applicability of Chapter 4-18.1 of the North Dakota Century Code, creating the North Dakota Milk Stabilization Board, to school districts.

Your letter, in addition to presenting the question, sets forth various reasons why the statutory provisions should not be construed to apply to school districts. Because of this fact, and because you are questioning the authority of a State agency created by the Legislature, we have also requested the Attorney for the Milk Stabilization Board, Mr. Bruce Bair of Mandan, North Dakota, to present his observations with regard to this matter.

In summary, you make the following points in your letter:

1. Section 4-18.1-03 contains definitions, none of which refer to schools as being included. You believe the failure to specifically include schools, particularly in view of the otherwise extensive detailed and explicit language of the statute, is intentional on the part of the Legislature.
2. Subsection 7 of section 4-18.1-03 defines "retailer" to mean "any person who is engaged in transferring title to milk products or frozen dairy products to consumers at one or more fixed places of business (retail establishments) located in this State." You note while schools do sell milk to pupils, and such sales are made at cost without any profit. In some situations it is distributed free where the need exists. You further note schools have no fixed place of business and are not in any sense "retail establishments." You believe that used in its ordinary sense the term "retailer" would mean a store or place of business where milk and other products are sold at retail at a profit by one engaged in commerce or trade and that to rely on the definition of retailer as bringing schools under this law would be doing violence to the plain and ordinary meaning of the language used.

3. Subsection 5 of Section 4-18.1-07 refers to quantity discounts where a retailer "operates two or more separate places of business." You believe to qualify for such discounts there must be a "retailer" and places of business. You believe schools as such have no place of business where milk products are bought and sold.
4. Section 4-18.1-08 requires certain licenses. Included are dairy farmers, processors, distributors and retailers and the requirement of a license for each separate place of business. Subsection 12 of the same section provides that schools, hospitals, state institutions, and charitable institutions may obtain a retailer license from the Board regardless of whether they fall within the definition of "retailer" set forth in Section 4-18.1-03. You note the word "may" is used and believe this permits the school to come under the law if there was any advantage in doing so. You also note the provision they may obtain a license "regardless of whether they fall within the definition of 'retailer'" is recognition that the Legislature felt that the law could not or should not be properly applied to instrumentalities of the State such as schools and State institutions or intended to exclude them from otherwise mandatory requirements along with hospitals and charitable institutions.

You ask whether school districts must comply with the law by securing licenses. You note that since school districts are placed in the same category as State institutions our opinion would apply to State institutions also.

You also ask, assuming we reach the conclusion that schools must comply, whether school boards must obtain a separate retailer's license for each school building. You note that in the case of Fargo, this would require seventeen (17) different licenses and in the case of Grand Forks a somewhat lesser number. You note the Milk Stabilization Board and its counsel have held that there must be a license for each school and include a copy of their opinion. You note that if schools have a place of business it could necessarily be only the central or administrative office. You state schools are not in the same situation as retailers carrying on a commercial operation where there may be two or more separate places of business and the only function carried on in the individual school is that of education. You state that only incidentally is the distribution of milk products involved. You further note that to require a separate license for each school building would have the effect of reducing the quantity discount rate available. This would be due to the last paragraph of Subsection 5 of Section 4-18.1-07 which provides that when a retailer operates two or more separate places of business upon the quantity of milk products or frozen dairy products purchased for resale at that place of business alone. You note this would mean a substantial increase in the cost of milk for the Fargo and Grand Forks schools.

With respect to the first point in your letter, Section 4-18.1-03(2) also defines the term "person" as used in the chapter to mean "any individual, partnership, corporation,

cooperative corporation or association, governmental agency, or other business entity." Thus, the definition of the word "retailer" as set forth in Subsection 7 would, inserting the statutory definition in lieu of the word "person" as used therein, read as follows:

'Retailer' means any individual, partnership, corporation, corporate corporation or association, governmental agency, or other business entity who is engaged in transferring title to milk products or frozen dairy products to consumer at one or more fixed places of business (retail establishments) located in this state."

It seems obvious that a school district or a school board or a State institution or the governing board thereof, is a governmental agency and it would appear the Legislature specifically determined to include same within the definition of the word "retailer" by including them within the definition of the word "person." Such inclusion is not by implication but by statutory definition. This becomes particularly pertinent when we consider the definition of the words "retailer" and "person" as defined by the 1967 Legislature. Thus, Section 3 of Chapter 79 of the 1967 Session Laws provided:

"As used in this Act, unless the context otherwise requires:

* * *

2. 'Person' means any person, firm, corporation, or association.

* * *

6. 'Retailer' means any person who buys milk from a dealer licensed under this Act, for resale over the counter at retail, of for consumption on the premises.

* * *."

The amendment of the word "person" as used in the definition of the word "retailer" indicates an intent to include governmental agencies within the definition of the word "retailer."

Insofar as the profit factor is concerned, we find nothing in the definition which indicates such milk must be sold by the retailer at a profit in order to be included within such definition. While ordinarily such would be the case and may perhaps be implied, it is not a part of the legal definition. In addition, to base the decision as to whether a school district was a "retailer" within the meaning of the Act on the basis of whether the district did or did not make a profit would appear to create confusion since it is possible that in some instances a school might make a slight profit in selling the milk and at other times not make any profit. We do have some difficulty with the definition of the word "retailer" insofar as it indicates it means a person who is engaged in transferring title to milk products to consumers at one or more fixed places of business (retail establishments) in this State. While a school district obviously transfers title to milk to the student, whether

by sale or gift, and while a school building is the place of business of a school district, its business being the education of students, we would not consider it as a "retail establishment" within the ordinary sense of the term. "Retail establishment" is not defined by the Act.

However, Section 4-18.1-08(12) provides:

Schools, hospitals, state institutions, and charitable institutions may obtain 'retailer' licenses from the board regardless of whether they fall within the definition of 'retailer' as set forth hereinabove."

It appears that this is recognition by the Legislature that a school district does not necessarily fall within the provisions of the term "retailer" in the ordinary operations of the school district because it does not have a place of business which is similar to a "retail establishment." Assuming that a school district is not a "retailer" within the definition of the statute, and does not choose to avail itself of the provisions of Section 4-18.1-08(12), it would appear the school district must purchase milk as a consumer and pay the minimum prices specified for sale of milk to consumers in the orders established by the Milk Stabilization Board. (See Section 4-18.1-07 of the North Dakota Century Code, as amended.) Thus, we would conclude that the permissive provisions of Section 4-18.1-08(12) were to permit a school district, by securing a retailer's license, to take advantage of quantity discounts or whatever other price advantage might accrue to a retailer as opposed to a consumer.

In summary, therefore, it is our opinion that a school district, regardless of whether it is a "retailer" within the statutory definition, may secure a retailer's license as provided in Chapter 4-18.1 of the North Dakota Century Code, as amended. If the school district determines it will not secure a retailer's license it would then be considered as a consumer and persons selling to the school district would be required to charge the school district the minimum price for sale of milk to consumers.

With regard to your second question, we note that Subsection 5 of Section 4-18.1-07 of the North Dakota Century Code, as amended, provides in part as follows:

When the retailer operates two or more separate places of business, the board shall base the quantity discount rate for each place of business upon the quantity of milk products or frozen dairy products purchases for resale at that place of business."

As we indicated above, we believe that the ordinary place of business of a school district is the school or schools within that district, since the business of the district is operating schools. However, it would appear that the term "place of business" as used in the provisions of Section 4-18.1-07, quoted above, must be considered in view of the definition of the word "retailer" as found in Section 4-18.1-03(7) of the North Dakota Century Code, since we are concerned with places of business operated by a retailer. As also noted above, we have serious doubts that the schools can be considered "retail establishments." The definition of the word "retailer" indicates that places of business

mean "retail establishments" since that term is set forth in parentheses immediately following the term "places of business." It is perhaps arguable that this parenthetical explanation was included to differentiate between the office of the business and the place where retail sales are actually made. However, it appears to us that the inclusion of the parenthetical expression must be considered to limit the definition of the term "place of business" to retail establishments.

As stated herein, we do not believe a school can be considered as a "retail establishment." Therefore, we do not believe the law requires the school district to obtain a license for each school operated by the district. In reaching this conclusion, we are aware that Section 4-18.1-08 uses the term "schools" rather than "school districts."

HELGI JOHANNESON
Attorney General