LETTER OPINION
2000-L-170

December 4, 2000

Mr. Jeff Knudson
Seed Arbitration Board Designee
of the Commissioner of Agriculture
Department of Agriculture
600 E Boulevard Ave Dept 602
Bismarck, ND 58505-0020

Dear Mr. Knudson:

Thank you for your letter asking for an Attorney General's opinion relating to North Dakota's Seed Arbitration Law.

You have asked for an opinion on whether N.D.C.C. § 4-09-20.2 gives the Seed Arbitration Board (Board) the authority, by rule, to require arbitration of a seed-related dispute as a prerequisite to any civil action regarding the dispute. However, I believe the more basic and pertinent issue is whether the statute itself requires arbitration of a seed transaction dispute prior to the commencement of a civil action. N.D.C.C. § 4-09-20.2 provides:

> A seed labeler or a seed customer shall petition the commissioner of agriculture in writing for a hearing to settle a dispute involving a seed transaction. The commissioner of agriculture shall submit the dispute to the seed arbitration board, and the board shall arbitrate the dispute. The board, within thirty days after the hearing, shall make a nonbinding recommendation for the resolution of the dispute. Evidence presented to the board and any findings or recommendations by the board are admissible as evidence in any subsequent proceeding. The board shall adopt rules and procedures for arbitration proceedings, including a formula for reimbursement by the parties of the expenses of the arbitration process.

(Emphasis supplied.) The Board has adopted administrative rules, found in N.D.A.C. Article 100-02. In particular, subsection (2) of N.D.A.C. § 100-02-01-01 provides, in relevant part:

> 2. The seed labeler must provide anyone who alleges damage with information regarding seed arbitration and that seed arbitration is a prerequisite to any civil action.

While this subsection requires that seed labelers provide information stating that seed arbitration is a prerequisite to any civil action, neither the administrative rules nor N.D.C.C. § 4-09-20.2 specifically state such a prerequisite. Therefore, the question requires an inquiry into whether the language in N.D.C.C. § 4-09-20.2 including the statement that a seed labeler or a seed customer shall petition the commissioner for a hearing means that such labeler or customer is required to do so before bringing a civil action, and whether the requirement that the Board "adopt rules and procedures for arbitration proceedings" allows the Board to adopt rules implementing mandatory arbitration as a prerequisite to a civil action.

Unless words in a statute are defined in the code, they are to be given their plain, ordinary, and commonly understood meaning. Kim-Go, H.K. Minerals, Inc. v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694 (N.D. 1990). The first sentence of N.D.C.C. § 4-09-20.2 states that a seed labeler or a seed customer shall petition the commissioner of agriculture in writing for a hearing to settle a dispute involving a seed transaction.

The word "shall" in a statute ordinarily creates a mandatory duty. City of Devils Lake v. Corrigan, 589 N.W.2d 579, 581 (N.D. 1999), citing In Interest of C. J. A., 473 N.W.2d 439, 442 (N.D. 1991). The use of the term "shall" in N.D.C.C. § 4-09-20.2 imposes a mandatory duty on a seed labeler or seed customer to petition the commissioner in writing for a hearing. In addition, because the statute provides that evidence presented to the board and its findings are admissible in "any subsequent proceeding" the Legislature apparently contemplated that arbitration would precede any civil action. However, this still does not definitely answer the question of whether the mandatory duty to petition is also a mandatory prerequisite to bringing a civil action. The mandatory duty to petition the commissioner, in writing, could simply establish the requirements for requesting a hearing. Therefore the statute is ambiguous about whether arbitration is a mandatory prerequisite to a civil action.

When construing an ambiguous statute to ascertain the Legislature's intent, a court may consider extrinsic evidence. City of Fargo v. Ness, 529 N.W.2d 572 (N.D. 1995). Among the extrinsic aids useful in construing an ambiguous statute are the object sought to be attained, legislative history, and administrative construction of the statute. N.D.C.C. § 1-02-39; Reed v. Hillsboro Pub. Sch. Dist. No. 9, 477

N.W.2d 237 (N.D. 1991). In this case, the legislative history provides some indication that arbitration (or mediation as it was previously termed in the statute) was intended to precede litigation and that it was also a mandatory prerequisite to litigation. During the Senate Agriculture Committee hearing on House Bill 1598, on March 2, 1989, Senator Axtman asked "if a court can mandate mediation process before there is litigation." In response to Senator Axtman's question, North Dakota State Seed Commission member Dennis Bugstad testified that "it would be a prerequisite to any legal action. It must go through this Board before any legal action could be initiated." Hearing on H.B. 1598 Before the Senate Comm. on Agriculture, 51st Legis. Assembly (1989) (Statement of Dennis Bugstad, member North Dakota Seed Commission). Testimony was also offered by a commercial seedman, Bruce Hovland, who commented that the technology involved in seed disputes might confuse jurors and that "[i]f this bill were adopted, the testimony from the experts who sit on the [mediation] committee would send a much clearer message to the jurors." Id. In testimony by Representative Jack Dalrymple on the bill before the House Committee on Agriculture on February 3, 1989, he indicated that the purpose of the mediation board was to settle disputes between producers and farmers and that "[b]efore people get into a full-blown lawsuit, we should get all together." Hearing on H.B. 1598 Before the House Committee on Agriculture, 51st Legis. Assembly (1989) (testimony of Rep. Jack Dalrymple).

The administrative construction of the statute also indicates that arbitration was intended as a mandatory prerequisite to bringing a civil action. In 1992, the Seed Arbitration Board promulgated administrative rules, including the above-referenced subsection requiring seed labelers to inform persons alleging damage that arbitration is a prerequisite to any civil action. The rules adopted by the Board include the "rules and procedures for arbitration proceedings" referred to in N.D.C.C. § 4-09-20.2. According to information supplied by the Board to a member of my staff, when promulgating its rules, the Board interpreted N.D.C.C. § 4-09-20.2 as imposing arbitration as a mandatory prerequisite to bringing a civil action, to the extent that it was deemed unnecessary to repeat the requirement in the rules, and only necessary to require labelers to inform others of the requirement. It is also my understanding that the Board has consistently enforced the mandatory arbitration prerequisite in N.D.A.C. § 100-02-01-01, thereby confirming the interpretation of arbitration as a mandatory prerequisite to civil action.

"The construction of a statute by an administrative agency charged with the execution is entitled to weight and [the court] will defer to a reasonable interpretation of that agency unless it contradicts clear

and unambiguous statutory language." Frank v. Traynor, 600 N.W.2d 516, 520 (N.D. 1999). Furthermore, "[a]lthough interpretation and application of administrative regulations generally presents a question of law, [the court] will accord some deference to an administrative agency's reasonable interpretation of its own regulations." Americana Healthcare Center v. N.D. Dept. of Human Services, 540 N.W.2d 151, 153 (N.D. 1995).

In this instance, I believe the administrative construction of N.D.C.C. § 4-09-20.2 and N.D.A.C. § 100-02-01-01 by the Board are reasonable and do not contradict any clear or unambiguous statutory language and are thus entitled to deference.

Nor does this construction deny a party access to the courts. It only requires that the parties attempt to arbitrate their differences first. This construction is compatible with the well-developed doctrine of exhaustion of administrative remedies. See Johnson v. Traynor, 579 N.W.2d 184, 187 (N.D. 1998) ("'Before someone may sue for declaratory relief, generally, the exhaustion of administrative remedies is required' . . . . 'The requirement for exhaustion is particularly weighty when the agency's decision involves factual issues or administrative expertise'."); Cooke v. Univ. of North Dakota, 603 N.W.2d 504, 506 (N.D. 1999) ("Under exhaustion of remedies theory, an employee generally must pursue available administrative remedies prior to suing for damages.") See also, Rettig v. Taylor Pub. Sch. Dist. No. 3, 211 N.W.2d 743 (N.D. 1973) (statutory binding arbitration provision for school bus drivers, N.D.C.C. § 15-34.2-10, construed to require arbitration remedy to be exhausted by either party prior to bringing civil action.)

Based on the foregoing, including the legislative history and eight years of administrative interpretation, it is my opinion that N.D.C.C. § 4-09-20.2 requires arbitration as a mandatory prerequisite to bringing a civil action[1] and that this requirement may be implemented by rules promulgated by the Seed Arbitration Board.

Sincerely,

[1] Some courts from other states have construed their seed arbitration laws as not mandating arbitration prior to the filing of a civil suit. See e.g. Presley v. P & S Grain Co., Inc., 683 N.E.2d 901 (Ill. App. 5th 1997). However, my opinion is based largely on the specific legislative history of North Dakota's statute, as well as the administrative construction of it by the agency charged by law with executing it.

Heidi Heitkamp
Attorney General

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