

LETTER OPINION
98-L-183

October 15, 1998

Honorable Alvin A. Jaeger
Secretary of State
600 East Boulevard Avenue
Bismarck, ND 58505-0500

Dear Secretary of State Jaeger:

Thank you for your letter concerning a trade name which you indicate was mistakenly registered with your office. You state that although the individual obtaining the trade name has no official connection with the state or state government, the trade name contains the phrase "State of North Dakota." You enclosed a photocopy of a business card used by this individual which contains both a reproduction of the Great Seal of the state of North Dakota and the phrase "State of North Dakota" as part of the name of the entity listed on the card. You ask what action your office may take to correct this erroneous filing.

N.D.C.C. § 47-25-03, regarding trade names, provides, in part:

No trade name registered may be the same as or deceptively similar to . . . a name the right to which is in any manner reserved or registered in the office of the secretary of state. . . .

Article XI, Section 1 of the North Dakota Constitution provides:

The name of this state shall be "North Dakota."

Article XI, Section 2 of the North Dakota Constitution describes the Great Seal of the state of North Dakota which includes "the words 'State of North Dakota' at the bottom." N.D.C.C. § 54-02-01(1) provides, in part:

The great seal of the state is that prescribed in section 2 of article XI of the Constitution of North Dakota. A description in writing of such seal must be deposited and recorded in the office of the secretary of state and must remain a public record.

(Emphasis supplied.)

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Because N.D.C.C. § 54-02-01(1) provides that a written description of the Great Seal, which includes the words "State of North Dakota," must be deposited and recorded in the office of the Secretary of State, it is my opinion that the name "State of North Dakota" is "reserved or registered in the office of the secretary of state" within the meaning of the trade name statute, N.D.C.C. § 47-25-03.

In an opinion issued in 1982 by former Attorney General Robert O. Wefald to then Secretary of State Ben Meier, it was noted:

[O]ne primary goal behind the enactment of statutes providing for the registration of trade names is the prevention of fraud, deception, and public confusion as to the identity of one's business. See 74 AmJur2d Trademarks and Tradenames, § 2 (1974). . . . If persons were able to register an existing corporate name, other than their own, as a trade name, the result would be widespread public confusion and deception. No one would be capable of distinguishing the corporate name entity from the trade name entity.

1982 N.D. Op. Att'y Gen. 180, 182. This reasoning applies with even more force when a trade name contains the name "State of North Dakota" because of its propensity to cause public confusion and deception as to the identity of the entity involved. The business card you enclosed containing both the Great Seal and the name "State of North Dakota" is a graphic example of such potential confusion and deception. Any person viewing this card could easily mistake the presenter as being either affiliated with the state of North Dakota or with a state agency, when that is, according to your information, not the case. In fact, you stated that your office has already received two calls from the public questioning the status of the entity depicted on that business card.

The phrase "State of North Dakota" has a very specific meaning applying to the state or state government. The name is mentioned in the Constitution and enshrined in the Great Seal which is recorded in your office. This is potentially a much more serious matter than the possible confusion of two business entities that may have similar or deceptively similar names, since it may appear to clothe a private individual or organization with the power and authority specifically only granted to the state, or to state officials or entities. The Legislature has clearly recognized the seriousness of this matter as evidenced by the fact that it has criminalized the use of the Great Seal by commercial entities and any person not specifically approved

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to use the seal. See N.D.C.C. § 54-02-01(2) (making it a class B misdemeanor to place the Great Seal on any advertisement or to use it for any commercial purpose). The Legislature has also made it a criminal offense for an individual to falsely impersonate a public official. See N.D.C.C. § 12.1-13-04. Consequently, it is my further opinion that no trade name may be registered¹ which includes the phrase "State of North Dakota."²

Because the trade name in question contains the phrase "State of North Dakota," which is the same as a name the right to which has been reserved or registered in the office of Secretary of State, it is also my opinion that this trade name could not have been lawfully registered³ and thus, in this particular case, was void from its inception, and the filing was a nullity. Consequently, the application for the trade name containing the words "State of North Dakota" and any filing fee should be returned to the filer. The filer, of course, is free to refile an application for a trade name as long as it does not contain the phrase "State of North Dakota" and is otherwise lawful.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

jjf/pg

¹ Similarly, under federal trademark law, a trademark which consists of or comprises the "flag or coat of arms or other insignia . . . of any State . . . or any simulation thereof" shall be refused registration as a trademark. 15 U.S.C. § 1052(b).

² This does not mean that a trade name may not use the words "State" or "North Dakota" in a valid trade name under most circumstances. Trade names may, and often do, utilize those words if not otherwise deceptive or confusing. It is in the situation where the phrase "State of North Dakota" is used where the most danger of public confusion and deception could occur since that phrase can only legitimately be used to describe the state or an entity of the state.

³ Cf. 15 U.S.C. § 1052(b). See note 1, supra.