

N.D.A.G. Letter to Jones (Jan. 27, 1986)

January 27, 1986

Honorable Kent Jones
Commissioner of Agriculture
Chairman, Seed Commission
Department of Agriculture
State Capitol
Bismarck, ND 58505

Dear Mr. Jones:

Thank you for your letter of January 10, 1986, concerning the use and misuse of the State Seed Department's seal and its certified seed tag.

N.D.C.C. Ch. 4-09 (State Seed Department) contains a number of statutes which specifically relate to the questions you ask. N.D.C.C. § 4-09-04 requires that the official seal of the seed department shall be used exclusively in connection with the affairs of the seed department. The use of the seal contrary to the provisions of N.D.C.C. Ch. 4-09 or the commissioner's regulations is punishable as an infraction. N.D.C.C. § 4-09-24.

N.D.C.C. § 4-09-16 states, in part, as follows:

4-09-16. REGISTERED AND CERTIFIED SEED. The commissioner shall:

* * *

3. Prescribe all labels, seals, certificates, or similar statements that shall be used for, or in relation to, any seed, or the various kinds, grades, and qualities grown, handled, stored, held for sale, sold, or offered or exposed for sale in North Dakota as "registered", "certified", "elite", "foundation seed", or "inspected seed", and shall specify what written or printed words, terms or figures such labels, seals, certificates, or the containers of such seed shall bear;

* * *

(Emphasis added.)

N.D.C.C. § 4-09-14(1) states, in part as follows:

4-09-14(1). PROHIBITIONS. It shall be unlawful for any person to sell, offer for sale, expose for sale, transport for sale, or hold or store with the intent to sell, any agricultural, vegetable, flower, or tree and shrub seed within this state if:

* * *

- b. Such seed is not labeled in accordance with the provisions of this chapter or bears false or misleading labeling;
- c. There has been false or misleading advertising in connection with such seed;

* * *

- f. Such seed is designated, offered, represented, or advertised under any name or identification other than that by which it was known originally.

* * *

(Emphasis added.)

N.D.C.C. § 4-09-14(2) states, in part, as follows:

4-09-14. PROHIBITIONS.

* * *

- 2. Further, it shall be unlawful for any person in this state to:

* * *

- b. Disseminate any false or misleading advertisement concerning agriculture or vegetable seed in any manner or by any means;

* * *

N.D.C.C. § 4-09-01 defines certain terms for the purposes of N.D.C.C. Ch. 4-09. The two pertinent subsections read as follows:

4-09-01. DEFINITIONS.

* * *

7. "Labeling" shall mean all labels and other written, printed, or graphic representation in any form whatsoever accompanying or pertaining to any seed, whether in bulk or in containers, including representatives on invoices;
8. "Advertisement" shall mean any representation, other than representations made on labels, made in any manner or by any means which relate to seed within the scope of this chapter;

* * *

N.D.C.C. § 4-09-21 requires the commissioner to enforce chapter 4-09 and its regulations. It requires the commissioner to hold a hearing for violations. If after the hearing, the commissioner decides that the evidence warrants prosecution, he must proceed with prosecution.

N.D.C.C. §4-09-22 states that upon a complaint by the commissioner, after a hearing as provided in section 4-09-21, alleging a violation of chapter 4-09 or of its regulations, the attorney general, or the state's attorney of the county wherein the case arises, must cause appropriate legal proceedings to be commenced and prosecuted for the enforcement of the penalties provided in chapter 4-09. No prosecution can be instituted under section 4-09-22 unless the commissioner has held a hearing as provided in section 4-09-21.

First of all, there have been no rules adopted concerning "look-alike" or counterfeit seeds or seed tags.

In regard to look-alike seals used for advertising purposes, it is my opinion that deceptively similar seals used for advertising purposes by businesses may violate the provisions of N.D.C.C. §4-09-04, §4-09-14(1), and §4-09-14(2)(b). Violations of N.D.C.C. Ch. 4-09 are classified as infractions.

Several courses of action may be appropriate. The commissioner has authority pursuant to N.D.C.C. § 4-09-16(3) to prescribe for any seed what is contained on labels, seals, certificates, or similar statements and to specify what is written or printed on such labels, seals, certificates, or the containers of such seed. The commissioner has the authority to prescribe to businesses as part of the seed approval process what is acceptable with regard to words, terms, or figures on labels. If the problem is just a matter of look-alikes on the containers, it may work to simply prescribe what is acceptable as part of the approval process.

If a seed is not subject to approval or it has already gone through an approval process, if the business does not heed any specifications prescribed by the commissioner, or if it is advertising the commissioner wishes to stop, the commissioner is authorized, and in fact required, to hold a hearing to determine whether there have been any violations of N.D.C.C. Ch. 4-09, before prosecution is instituted. If, at a hearing, the commissioner

determines there have been violations, the commissioner can seek to have the attorney general or a state's attorney prosecute the matter.

Alternatively, the state seed commissioner could adopt specific administrative rules pursuant to Ch. 28-32 in an attempt to more adequately define what use of figures and symbols similar to the state seed commission seal is allowable and what is clearly a violation of Ch. 4-09.

In regard to the use of a seed tag that is a counterfeit or a look-alike certified seed tag to the one used by the state seed department, it is my opinion that when a counterfeit or look-alike seed tag is used to sell seed in North Dakota or to advertise seed for sale in North Dakota, violations of N.D.C.C. §§ 4-08-14(1) and 4-09-14(2) may have occurred. Again, the same options would be available as for look-alike seals, or an administrative rule could be adopted to specifically define the prohibited use of counterfeit or look-alike certified seed tags.

Sincerely,

Nicholas J. Spaeth

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