

N.D.A.G. Letter to Olson (May 2, 1988)

May 2, 1988

Mr. Lonnie Olson
Assistant City Attorney
Galloway Building
P.O. Box 76
Devils Lake, ND 58301

Dear Mr. Olson:

Thank you for your letter of April 7, 1988, inquiring as to the ability of a single grocery store in Devils Lake to separate its various store sections into individual "compartments." As we understand your inquiry, the intent of the owner of this grocery store is to treat each compartment as separate grocery store. Using this scenario, the number of employees working in each compartment would be six or less although the grocery store itself would employ more than six employees on a Sunday.

You inquire whether the "compartment" concept is permissible in view of the Sunday closing law. Violations of the Sunday closing are classified as criminal offenses. N.D.C.C. § 12.1-30-01(1). This office has refrained from issuing opinions on matters involving criminal offenses because of the presence of factual questions. Whether a criminal violation has occurred cannot be determined without a review of the specific facts involved in each case. As this office issues opinions only on questions of law rather than questions of fact, I am unable to provide you with an opinion on this issue. Instead, I must defer to the state's attorney's judgment in applying the facts of each case to the applicable law.

However, I do want to provide you with some observations on this issue which may be of some help to you. These are informal comments which should not be considered an Attorney General's opinion.

N.D.C.C. § 12.1-30-03(30) allows food stores to be open on a Sunday where the food store is operated by an owner or manager in addition to not more than six employees working in the store at one time on a Sunday. The term "food stores" is not defined by the statute. Terms which are not defined by statute are to be understood in their ordinary and common sense meaning. N.D.C.C. § 1-02-02. An available common and ordinary sense meaning of the term "food stores" is a business establishment where usually diversified goods are kept for retail sale. Webster's New Collegiate Dictionary (1975) at 1147.

In the factual situation outlined in your letter, it appears there is one business establishment despite the compartmentalization of that store. We assume that the individual compartments remain within the same grocery store at the same physical location. Based upon this assumption of facts and the common meaning of the term "food

stores," it is my conclusion that the division of a single business establishment food store into individual compartments does not allow each individual compartment to employ as many as six employees on a Sunday at one time. Instead, the six employee limitation applies to the entire food establishment as a whole without regard to the manner in which the store has been divided.

This conclusion is further supported by a decision of the North Dakota Supreme Court. In 1981, the court had the occasion to review the maximum employee limitation for grocery stores operating on a Sunday (at the time of the decision, the maximum number permitted was three rather than six employees). Rothe v. S-N-Go Stores, Inc., 308 N.W.2d 872 (N.D. 1981). In Rothe, the court addressed a situation involving separate grocery stores all owned and carrying the same name of a parent corporation. The issue was whether the maximum employee limitation applied to each separate store individually or to all the stores collectively. The court concluded that an examination of the number of employees at each particular store must occur and that the total number of employees employed at all of the grocery stores was not relevant. Thus, the court concluded that the maximum employee limitation had to be applied on a grocery store-by-grocery store review of the facts.

The issue of compartmentalization of a grocery store was not addressed nor raised in Rothe. However, the court's approach in implementing the Sunday closing law to multiple grocery stores is relevant to this inquiry. The court concluded that the Sunday closing law applied to a grocery store as a separate entity or establishment without regard to other forms of organization which may have been Present.

Based upon North Dakota's law on grocery store operations on a Sunday, the manner in which that law has been interpreted by the North Dakota Supreme Court, and the legislative history with respect to the continuing controversy over grocery stores operating on Sundays, I conclude that a grocery may not successfully avoid the maximum number of employee limitation for Sunday operation through compartmentalization or by division of the store into individual departments so long as a single food establishment exists.

Sincerely,

Nicholas J. Spaeth

cv