

**OPINION
75-98**

July 7, 1975 (OPINION)

Mr. Robert P. Bennett
Assistant State's Attorney
Burleigh County Courthouse

Bismarck, ND 58501

Dear Mr. Bennett:

This is in response to your letter of June 18, 1975, wherein you request an opinion of this office relative to Chapter 12-21.1 of the North Dakota Century Code, as amended, concerning Sunday closing laws. You submit the following facts and questions in your letter:

"This office requests an opinion as to the application of the Sunday closing laws of the State found in Chapter 12-21.1 of the North Dakota Century Code as such laws relate to the operation of gasoline stations which also sell groceries on Sunday.

"Section 12-21.1-01 of the North Dakota Century Code states as follows:

"It shall be unlawful on Sunday for any person, firm, or corporation:

1. To engage in or conduct business or labor for profit in the usual manner and location, or to operate a place of business open to the public; or
2. To cause, direct, or authorize any employee or agent to engage in or conduct business or labor for profit in the usual manner and location, or to operate a place of business open to the public.

"Section 12-21.1-03 of the North Dakota Century Code states, in part:

"Notwithstanding any other provisions of this chapter, the sale of any of the following items of personal property shall be allowed during any and all hours on Sundays:

4. Gasoline, fuel additives, lubricants, and antifreeze.
5. Tires.
6. Repair or replacement parts and equipment necessary to, and safety devices intended for, safe and efficient operation of land vehicles, boats, and aircraft.

"Section 12-21.1-04 of the North Dakota Century Code states, in part:

"Notwithstanding any other provisions of this chapter, the operation of any of the following businesses shall be allowed on Sundays:

. . .

7. Distribution of gas, oil, and other fuels.

. . .

0. Automobile service stations.

. . .

8. Grocery stores operated by the owner-manager who regularly employs not more than three employees for the operation of said store.

"We have three questions relating to the propriety under the provisions of Chapter 12-21.1 of the North Dakota Century Code of permitting a gas station which has dual (sic) business as a grocery store to remain open for business on Sunday. These questions are:

1. Must the sale of grocery items be a substantial portion of a gasoline station's business to render it, in effect, a grocery store rather than a gas station for purposes of Chapter 12-21.1 of the North Dakota Century Code;
2. If the gasoline station is considered a grocery store, does the owner-manager provision of Section 12-21.1-04, subsection 28, of the North Dakota Century Code, which limits the number of employees for exempt status, apply to all employees of the gasoline station or only to those solely engaged in the sale of grocery items;
3. If the grocery sales of a gasoline station are a significant portion of the station's business, can the station remain open on Sunday if the grocery section is not open for sale to the public."

We will consider your questions in the order set forth in your letter of inquiry.

With reference to your first question, we do not find that the statute sets any specific proportion of business as determinative of the type or classification of such business. In fact, while the businesses exempt are set forth in Section 12-21.1-04 of the North Dakota Century Code, as amended, we note also that Section 12-21.1-03 exempts certain personal property. For this reason we are compelled to the conclusion that if any business establishment sells those items of personal property classified as groceries, the same not being an exempt item of personal property set forth under Section 12-21.1-03, it must and can only legally be sold under the exemption found in Section 12-21.1-04(28), which relates to "Grocery stores operated by the owner-manager who regularly employs not more than

three employees for the operation of said store." We find no other exemption for the sale of groceries. Accordingly if a gasoline station also sells groceries and does not come under the exemption found in Section 12-21.1-04(28), N.D.C.C., we are of the opinion that sales by such establishment of such grocery item would be in violation of the statute prohibiting Sunday sales. If, on the other hand, a grocery store which qualifies under the exemption of Section 12-21.1-04(28) sells gasoline, oil and other fuels, such sales would not be in violation since such petroleum products are exempt under the personal property exemption and also such businesses are exempt under the specified businesses, set forth under Section 12-21.1-04(7) and (20) of the North Dakota Century Code, as amended.

With regard to your second question, we would note that Section 12-21.1-04 specifies "businesses exempt." With particular regard to subsection 28, which sets forth the grocery store exemption and qualifications for such exemption, we note that the same refer to and relate to one business. For this reason we are compelled to the conclusion that such an establishment as described in your second question would be construed to be one business and the qualification of the same being operated by the owner-manager who regularly employs not more than three employees for the operation of said store would apply. We are of the opinion that the limitations and qualifications set forth in Section 12-21.1-04(28) limiting the number of employees for exempt status apply to all employees of the business and not only to those employees solely engaged in the sale of grocery items.

With regard to your third question, we would note that the dual type of business described in your letter of inquiry would be permitted to remain open for the purposes of sales of gas, oil and other fuels since such items are exempt under the personal property exemption; however since grocery items are not exempt under the personal property exemption, sales of such items would not be in compliance with the statute. We are of the opinion that a gasoline station or service station can remain open on Sunday if the grocery section is not open for sale to the public for the purpose of selling gas, oil and other fuels as specified under Section 12-21.1-04(7) of the North Dakota Century Code, as amended, or for the sale of items specified under Section 12-21.1-03(4), (5) or for the rendering of services specified under subsection (6), relating to repair or replacement parts and equipment.

We trust that the foregoing expressions and comments will adequately set forth the thinking of this office upon the matters submitted for our opinion.

Sincerely,

ALLEN I. OLSON

Attorney General