

**OPINION
76-170**

April 27, 1976 (OPINION)

The Honorable George Longmire
State Senator, 18th District
24 North Fourth Street
Grand Forks, ND 58201

Dear Senator Longmire:

This is in reply to your letter of April 19, 1976, relative to Chapter 12.1-30 of the N.D.C.C., the Sunday Closing Law. You state the following facts and questions:

"Several questions have arisen in Grand Forks regarding the interpretation of Section 12.1-30-03 which provides that the operation of the following business, among others, shall be allowed on Sundays: Grocery stores operated by the owner-manager who regularly employs not more than three employees for the operation of said store.

I am enclosing herewith a copy of a January, 1976, decision of the Honorable Halvor L. Halvorson, Judge of the Ward County Court in Minot, and also a copy of a newspaper article which appeared in the Grand Forks Herald just last week quoting Grand Forks States Attorney Thomas B. Jelliff.

My first question, and the main question, is whether 'Sunday is the only day to be affected by the statute and that the manner of operating on Sunday exclusive of other days of the week should be used as the proper time in determining whether or not a grocery business is operating within the limits set out by the statute.' This was the opinion of Judge Halvorson.

Secondly, please let me know if your opinion agrees with Judge Halvorson's opinion that in the case of a corporation having only two or possibly three substantial stockholders, and/or where the stockholders all are members of the same family, the active managers who also are stockholders and officers of the corporation can qualify as owner-managers under the statute.

Third, are you in agreement with Judge Halvorson's decision that if the employed personnel on Sundays work a total of only 24 hours between them it is the equivalent of three employees and therefore complies with the statute and is allowable.

Fourth, and finally, I have one other question of considerable importance which was not taken up or mentioned in either Judge Halvorson's decision or in the enclosed newspaper article quoting Mr. Jelliff, and that is if one corporation owns several stores in the City of Grand Forks, each one of which stores employs only three employees but the total number of

employees of the corporation working on Sunday in all of its several stores is well over the limit of three employees, however that number may be figured, either by the actual number of employees who work any hours on Sunday or if the total hours of all such employees in all such stores is well over 24 hours, is this a violation of the statute. In other words, should each individual store be considered and treated separately under the statute, or should the business of the corporation as a whole, including all of its several stores within the city, be the proper unit for consideration and in applying the statute.

Your opinions on these various questions will be very much appreciated, as a number of grocers in Grand Forks are vitally interested in these things. We seem to have a situation in Grand Forks now where some stores are staying open on Sunday in spite of questions as to whether or not they are in violation of the statute, while others are staying closed rather than risk being charged with a violation of the statute. Therefore, I would very much like to have the benefit of your opinions on the various questions hereinbefore mentioned, and I shall appreciate and look forward to receiving your early advice with regard to same.

Are there any amendments which you feel should be made to our present statute? If so, I wish you would let me know so that your proposal can be considered and perhaps a bill prepared for introduction at the next session of the Legislature."

While enclosed in your letter was a copy of the January 19, 1976 decision of the Ward County Court with Increased Jurisdiction, we note there is a subsequent decision issued by the Burleigh County Court with Increased Jurisdiction on February 20, 1976. A copy of that decision in State v. Saveway Super Fair, Inc. is enclosed herewith. Neither of these decisions are binding outside of the jurisdiction of the court, although certainly both decisions would be considered by other courts in arriving at a conclusion on the matter. We also realize that the decisions of the courts are binding in their respective counties, any opinions of this office notwithstanding. Your questions are, however, directed to Grand Forks County in which no court decision has apparently yet been rendered, and we will therefore respond to your questions as to applying to those jurisdictions in which no decision has been issued.

With respect to your first question, we adhere to the reasoning of the Burleigh County Court with Increased Jurisdiction and conclude that the number of employees employed by a store during the week is decisive, and not the number of employees which are employed on Sunday. Thus Section 12.1-30-03(28) of the N.D.C.C. provides:

"The operation of any of the following businesses shall be allowed on Sundays:

* * *

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

said store.

* * *"

As stated by the Burleigh County Court in its decision:

"Whether a grocery store comes within the statutory exemption must, of necessity, be resolved by determining how many employees were regularly employed during the business week. That is the only way that any meaning can be ascribed to the word 'regularly'. If it was the intention to permit grocery stores to operate on Sunday, provided no more than three employees were on duty or employed during Sunday, it would have been a simple matter so to state."

The past construction of this office is similar to that of the Burleigh County Court, and we therefore conclude that the number of employees regularly employed during the week is the criteria for determining whether a business is exempt under the provisions of Section 12.1-30-03(28) of the N.D.C.C.

With respect to your second question, this office on September 22, 1975, issued an opinion to Mr. Robert P. Bennett, Assistant States Attorney, Burleigh County, in which we concluded that if a store is incorporated the business would not be eligible for the exemption. A copy of that opinion is enclosed herewith. The decision of the Burleigh County Court appears to agree with our construction of the statute in this regard, but questions the constitutional justification for the distinction between grocery stores operated by an individual and a similar store in corporate form.

This office does not, of course, have the judicial authority to declare legislative enactments unconstitutional. We also note the Burleigh County Court recommended legislative attention to this matter.

Insofar as your third question is concerned, it apparently becomes moot in view of our response to your first question. We believe it is interesting to note, however, that the Burleigh County Court indicates that while the exemption is to be determined according to the number of employees regularly employed during the week it does not affect the number of employees working on Sunday. Thus the Court states:

"The most striking feature of the exception which allows certain grocery stores to operate on Sunday is that it does not limit the number of employees who may work in that store on Sunday. The exception says, in effect, that if you operate a small grocery store during the week, you may stay open on Sunday regardless of how many employees there is on duty on Sunday. Conversely, if the store operates with more than three regular employees during the week, it cannot stay open for business on Sunday, even though it might limit the number of employees on duty to not more than three. This means, as a practical matter, that the legislature has fashioned legislation which permits the smaller operator to operate one day a week free from competition of his larger brethren."

With respect to your fourth question, it too appears moot in view of our response to the second question raised herein.

Concerning proposed amendments to the current act, this office has no particular philosophical proposals insofar as the act is concerned. However, if the act is to retain its present philosophical form, we believe there are certain changes which should be considered. The first, of course, is the problem raised by Judge Glaser in his opinion with respect to the distinction between grocery stores under individual ownership and stores of similar size under corporate ownership and the constitutional validity of such a distinction. We have no particular recommendation as to what form the amendment should take, but we believe it is a matter which should be considered. We believe it is possible that corporations are not entitled to all the privileges of individuals.

Secondly, there is a difference of opinion between the Ward County Court and the Burleigh County Court concerning the interpretation of Section 12.1-30-03(28). While we adhere to the opinion of the Burleigh County Court, it might be well if the statute was made more specific insofar as whether the language relative to three regular employees is meant to apply to those employees employed during the week and, if so, whether it is the intention of the legislation to also limit the number of employees on Sunday or to permit a greater number of persons to be employed on Sunday.

Sincerely,

ALLEN I. OLSON

Attorney General