

OPINION
59-17

April 28, 1959 (OPINION)

AGRICULTURE

RE: State Seed Department - Certified Seed; Labeling

This is in reply to your letter of March 31, 1959, in which you enclosed a tag from a seed being sold in North Dakota. You state that your department objected to this tag on the grounds that it bears the word "Registered" in a rather prominent place. Your basis for this objection was section 4-0917 of the North Dakota Revised Code of 1943 which reads as follows:

CERTIFIED SEED; REGULATIONS GOVERNING LABELING AND REPRESENTING. No seed grown in North Dakota, or grown elsewhere and transported into this state, which is sold, offered or exposed for sale, stored, transported, or distributed, or held with intent to sell or plant the same, shall be represented, advertised, labeled, or characterized in any way, either orally or in writing, with or by the use of the term "registered", "certified", "pedigreed", "elite", "fountain seed", or "inspected seed", or any term or terms conveying a meaning substantially equivalent to the meaning of any of said terms, without the approval and authorization of the commissioner, who may make such rules and regulations as he finds necessary for the proper regulation and protection of the pure seed growing and marketing industry."

You wish to know if your department can, under the present law, prohibit the use of this tag whether it would be necessary for the Seed Commissioner to put into effect a regulation prohibiting the use of the word "Registered" on an unauthorized tag.

The wording of the statute prohibits the use of such words as "registered" without the consent or authorization of the Seed Commissioner. The statute provides that the commissioner may make rules and regulations he finds necessary for the regulation and protection of the seed growing and marketing industry. Therefore, the statute itself prohibits the use of such words as "registered" without the authorization of the Seed Commissioner. While he may desire to make further rules and regulations concerning this subject, he may, under the existing statute, forbid the use of the word "registered" on a tag or label attached to the seed.

You also state that according to the company the trademark which is used on its seed analysis tag enclosed in your letter was patented with the United States Patent Office in July of 1939.

Statutes which prohibit the use of false, fraudulent or misleading advertising are within the police powers of the state. See 87 C.J.S. Sec. 238. In Bankers Life and Casualty Co. v. Alexander, 45 N.W.2d. 258 (Iowa, 1950), the court said, on page 267, "Further, a registered trademark, may not be used in advertising material to deceive or

mislead the public, in violation of law."

One of the several cases cited in support of this statement by the Iowa Court was Federal Trade Commission v. Kay, 35 F.2d. 160 (Seventh Cir.) in which the court, on page 162, held that the registration of a trademark in the Patent Office was no protection against proceedings under the Federal Trade Commission Act, where such trademark was in fact used falsely and as a part of an unfair method of competition.

While the instant situation does not involve a prosecution for unfair trade practices, it is our opinion that section 4-0917 of the North Dakota Revised Code of 1943 as quoted above was an exercise of the police powers of the state for the protection of the public and the fact that the forbidden term is a part of a registered trademark does not alter the circumstances in view of the above cited cases.

We are returning the tag as requested.

LESLIE R. BURGUM

Attorney General