

**OPINION
68-20**

August 29, 1968 (OPINION)

Mr. C. R. Krogstad

Dairy Commissioner

RE: Agriculture - Sale of Milk on Farm - Regulation

This is in reply to your request for an opinion of this office with regard to the practice of selling milk directly from the dairy farm.

You inform us that:

"The practice of selling milk on dairy farms directly to consumers is fast becoming a widespread operation and at times is creating a problem within the Dairy Department due to unsanitary conditions created by filling milk into many types of containers without proper equipment. This is being done in the milk house where air is not filtered and sanitary conditions are below the standards required by North Dakota statutes on milk sanitation and handling."

Your first question calls our attention to the provision of Section 4-30-02 of the 1967 Supplement to the North Dakota Century Code that:

"Every producer-processor, peddler, distributor, and every person purchasing milk or milk products for processing or manufacturing, or owning, operating, or leasing a creamery, cheese factory, condensery, drying plant, ice cream plant, ice milk plant, cream station, milk plant, and every other business engaged in the processing or manufacturing of milk or milk products and doing business within this state shall obtain the license required by this section for each such place of business. * * *"

You also call our attention to that provision of this statute providing that:

"* * * If a licensee wishes to conduct operations other than those so listed, he may request that the commissioner approve them, and if the commissioner finds that the proposals are in conformance with North Dakota laws and the rules and regulations of the dairy department, he shall approve them.* * *"

You ask whether in our opinion this means that a producer must have a license to sell milk wholesale or retail at any establishment including a producer owning a dairy farm.

We would assume the type of business to which you refer would be what is considered a "milk producer" or "dairy or dairy farm" as those terms are defined by subsections 17 and 18 of Section 4-30-01 of the 1967 Supplement to the North Dakota Century Code. We do note that the above quoted section 4-30-02 of the 1967 Supplement to the North Dakota Century Code does not in terms require a license for "milk

producers" or "dairy or dairy farms."

While there is a requirement in said section 4-30-02 that a "producer-processor" must obtain the license, there is not requirement that a "producer" must have a license whether or not he owns a dairy farm. "Producer-processor" or "producer-distributor" is defined by subsection 19 of section 4-30-01 of the 1967 Supplement to the North Dakota Century Code to mean: "* * * a producer who is also a processor or distributor." "Distributor" is defined by subsection 9 of Section 4-30-01 of the 1967 Supplement to "* * * mean a person who purchases milk or milk products and transports them to a retail dealer or a consumer." Obviously the type of business to which you here make reference is not included in this definition of "distributor." "Processor" is itself not further defined in said section 4-30-01 of the 1967 Supplement to the North Dakota Century Code, though the term "processing or manufacturing" is defined by subsection 68 thereof as meaning: "* * * the treatment of milk or milk products by pasteurizing, bottling, churning, adding flavors to, freezing, dehydrating, packaging, coagulating, or treating in any manner which changes the natural, physical or chemical properties of the original product."

Where only milk is sold by a "milk producer" such business would not be a "producer-processor" within the meaning of said section 4-30-02. Where packages of milk are the object sold under the definitions considered above it would appear appropriate to consider the "producer" who packages his own milk a "producer-processor" who would be required to obtain the license.

Your next question relates to the provisions of section 4-30-28 of the 1967 Supplement to the North Dakota Century Code which provides:

"FARM CERTIFICATION. The dairy commissioner may promulgate rules and regulations concerning farm certification."

You ask:

"Does this mean we can promulgate rules for certifying a producer to sell milk at wholesale or retail to the consuming public or refuse this permission unless our requirements are complied with?"

The Dairy Commissioner is basically an administrative agency. As such, where appropriate, an administrative agency can adopt rules and regulations to carry out the expressed standards in the statutory law. The above quoted section 4-30-28 obviously does not contain in itself any standards. The Legislature cannot delegate its power to legislate. If the statute is to be given effect to authorize the promulgation of rules, it must be on the basis of the standards contained in chapter 4-30 of the North Dakota Century Code as amended to date. Noting that said chapter 4-30 does define the term "milk producer" but except in such statutes as 4-30-27 of the 1967 Supplement to the North Dakota Century Code does not further elaborate as to his functions, it is our opinion that no standards are set up whereby the dairy commissioner could promulgate rules and regulations establishing a certificating process whereby it could in effect license or refuse to license such a "milk producer" to sell milk at wholesale or retail in any circumstances. It would further

be our opinion that under the standards set in such statutes as 4-30-27 "milk producers" could be certified as meeting standards there set and for the purposes necessarily included in said section. In instances under such regulations where the "milk producer" failed to comply with the statutory standards obviously the dairy commissioner could refuse to issue the certificate.

Your third question relates to the proper interpretation of section 4-30-41 of the 1967 Supplement to the North Dakota Century Code. That statute provides:

(4-30-41)

"SALE OF MILK OR MILK PRODUCTS IN VIOLATION OF THIS CHAPTER PROHIBITED. No person may sell, or offer for sale, any milk or milk product, their imitations or substitutes, which is produced, processed, manufactured, transported, or stored, in violation of the laws of this state or the rules and regulations of the dairy department, or which do not subscribe to its definition as stated in this chapter or hereafter defined by the dairy commissioner."

Your question is stated as:

"Do the words 'No person' include a dairy farmer selling milk from his dairy direct to consumers?"

"Person" is defined by subsection 76 of section 4-30-01 of the 1967 Supplement to the North Dakota Century Code as:

"'Person' shall mean individuals, firms, partnerships, associations, trusts, estates, corporations, and any and all other business units, devices or arrangements."

Under this definition we would assume that most dairy farmers would constitute persons and that the terminology "no person" contained in the above quoted section 4-30-41 of the 1967 Supplement to the North Dakota Century Code would also exclude dairy farmers.

Your fourth question relates to the provisions of section 4-30-55 of the 1967 Supplement to the North Dakota Century Code. This statute provides:

"SALE OF RAW MILK OR RAW MILK PRODUCTS RESTRICTED. After the effective date of this chapter, no person may begin selling or offering for sale at wholesale any milk or milk products which are not pasteurized unless specific approval is granted by the dairy commissioner or the local health officer."

You inform us that:

"This sections states, inpart, 'offering milk at wholesale.' We feel and know that the only reason people buy milk from these producers is because this milk is all sold at wholesale prices or less, according to the price charged by regular dairies. Because we have not issued any dairy farms the approval to sell raw milk do we have the right to order this practice discontinued?"

Subsection 12 of Section 4-30-01 of the 1967 Supplement to the North Dakota Century Code defines the term "wholesale" as follows:

"'Wholesale' shall mean the sale of milk or milk products to a retail dealer for purposes of resale."

We are willing to recognize that under some definitions of the term "wholesale" the concept does include something in the way of a price lower than retail. However, the term as defined for purposes of this statute is not defined on the basis of price charged. Proof of violation of said section 4-30-55 would therefore necessarily require a showing (among other matters) that the offering was made to retail dealers for purposes of resale. Assuming in any given case that you were prepared to prove each element specified in said section 4-30-55 including the element of such sale being to a retail dealer for purposes of resale, you could order the practice discontinued.

In considering the construction of this provision, you might consider the provisions of section 41 of Senate Bill 168, 1963, Xerox copy of which is enclosed.

We hope the within and foregoing will be of assistance to you. We might also mention the case of State vs. Flemming, 24 N.D. 593 holding in effect that transient merchant's law then in effect required that to be a transient merchant the individual must both buy and sell, and the conclusion of the court that it was not intended to prevent the producers of this state from marketing the products on their farms in villages and cities without paying the license fees required under that act. The factual situation undoubtedly has changed since 1913 when that decision was rendered; however, we do note with interest the commend made by our Supreme Court at page 600 of 24 N.D. as follows:

In addition to the definitions and authorities to which reference has been made, our conclusion is verified by a consideration of certain results which would necessarily follow if this defendant were held to be a transient merchant within the meaning of chapter 201, supra. These results are such that it can hardly have been within the intent of the legislative assembly to have enlarged the definition so as to include defendant within its meaning. If he is included, it means that every farmer living outside the limits of any village or city in this state, selling and delivering to an inhabitant of the city or village a load of potatoes or of wood, a basket of eggs, or any other of the products on his farm, would be required to pay not only a license of \$75, but such additional fee as might be prescribed by the local village or city authorities, not exceeding \$25 for every day when he sold any such commodity. It would practically deny to the farmer or producer the right to market either his dressed or live pork in any village or city within the state. It would close local markets to his butter and milk. It would likewise prevent the disposition of farm products to the wholesale buyer. In fact, it would so limit the right to exercise the power to sell that the occupation of farming would, in a large measure, be destroyed, and the residents of villages and cities rendered

almost entirely dependent upon shipments of food, fuel, and different forms of merchandise. It is clear that not such results were contemplated or intended. We may add that it is conceded by counsel that if the terms of this statute are applicable to the defendant, they are universally applicable, and apply as well to growers of fruit and other products of the farms of the state as to those produced and shipped in from other states or counties, and we see no reason to question the correctness of this admission."

Recognizing that marketing conditions have indubitably changed since that decision was handed down, and further recognizing that the measures you are considering relate to health and sanitation rather than to revenue, we would nevertheless suggest that if it is intended that the statutory provisions to which you have called our attention are to be applied to "milk producers" as defined in subsection 17 of section 4-30-01 of the 1967 Supplement to the North Dakota Century Code, that that term rather than "producer-processors" be included in the terminology of the regulatory statutes.

HELGI JOHANNESON

Attorney General