

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-24

Date Issued: August 11, 1998

Requested by: Jim Abbott, Executive Director, North Dakota State Board of Accountancy

- QUESTIONS PRESENTED -

I.

Whether it is a violation of N.D.C.C. ch. 43-02.2 for an individual or business not licensed by the North Dakota State Board of Accountancy to use the term "accounting" in a business name.

II.

Whether the North Dakota State Board of Accountancy may take action if an unlicensed individual or firm uses the term "accounting" in a business name.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that a person or business violates N.D.C.C. § 43-02.2-12(9) if the person or business uses the title or designation "accounting" in a business name and does not hold a permit issued under N.D.C.C. §§ 43-02.2-05 or 43-02.2-06.

II.

When the Board of Accountancy's investigation causes it to believe that an unlicensed person or business has engaged, or is about to engage, in acts or practices which constitute or will constitute a violation of N.D.C.C. ch. 43-02.2, the Board has discretion to seek injunctive relief pursuant to N.D.C.C. § 43-02.2-13. If the Board's investigation causes it to believe that an unlicensed person or firm has engaged in acts or practices which constitute a violation of N.D.C.C. ch. 43-02, the Board has discretion to bring the information to the attention of the appropriate law enforcement officer.

- ANALYSES -

I.

N.D.C.C. ch. 43-02.2 creates the North Dakota State Board of Accountancy for the purpose of licensing and regulating the practice of public accountancy, including the use of titles which are likely to mislead the public regarding a person's competence in the area of public accountancy. N.D.C.C. § 43-02.2-01. N.D.C.C. § 43-02.2-12 makes certain acts unlawful. Subsection 9 of that section provides in pertinent part:

A person or firm not holding a valid permit issued under section 43-02.2-05 or 43-02.2-06 may not assume or use any title or designation that includes the words "accountant", "auditor", or "accounting", or other terms in any manner that implies such person or firm holds such a permit or has special competence as an accountant or auditor.

The above language plainly prohibits a person or firm not holding a permit issued under sections 43-02.2-05 or 43-02.2-06¹ from using a title or designation that includes the word "accounting." The North Dakota Legislative Assembly has apparently determined that the use of the term "accounting" in a business or firm name could mislead the public to believe that the firm holds a permit to practice public accountancy. It is my opinion that a person or business violates N.D.C.C. § 43-02.2-12(9) if the person or business uses the title or designation "accounting" in a business name and does not hold a permit issued under N.D.C.C. §§ 43-02.2-05 or 43-02.2-06.

II.

N.D.C.C. §§ 43-02.2-13 and 43-02.2-14 address the powers and duties of the Board if a person or firm is involved in unlawful acts. The powers and authority granted under N.D.C.C. §§ 43-02.2-13 and 43-02.2-14 apply regardless of whether the person or firm holds a permit issued by the Board.²

¹ N.D.C.C. § 43-02.2-05 addresses the issuance of permits to practice public accountancy to individuals; N.D.C.C. § 43-02.2-06 addresses the issuance of permits to practice public accountancy to firms.

² If the individual or firm is licensed, the Board may also revoke the individual's or firm's certificate or permit pursuant to N.D.C.C. § 43-02.2-09.

Pursuant to N.D.C.C. § 43-02.2-13, if an investigation of the Board causes the Board to believe "that any person or firm has engaged, or is about to engage, in any acts or practices which constitute or will constitute a violation of this chapter, the board may make application to the appropriate court for an order enjoining such acts or practices." If the Board demonstrates that the person or firm has engaged, or is about to engage, in any acts or practices which constitute a violation of chapter 43-02.2, "an injunction, restraining order, or other appropriate order must be granted by the court." N.D.C.C. § 43-02.2-13. This section specifically grants the Board authority to apply to the court for an order enjoining violations of N.D.C.C. ch. 43-02.2.

In addition to the power to seek an injunction, if the Board's investigation gives the Board "reason to believe that any person or firm has knowingly engaged in acts or practices that constitute a violation of [chapter 43-02.2], the board may bring its information to the attention of a state's attorney or the attorney general or other appropriate law enforcement officer who may cause appropriate criminal proceedings to be brought." N.D.C.C. § 43-02.2-14. A knowing violation of N.D.C.C. § 43-02.2-12, including the unlawful use of the title or designation "accounting", constitutes a Class A Misdemeanor. N.D.C.C. § 43-02.2-14(2).

The Board's authority to seek an injunction or provide information to a state's attorney is discretionary. The Board "may" apply to the appropriate court for an order enjoining violations of N.D.C.C. ch. 43-02.2, or it "may" bring information of such a violation to the attention of a state's attorney or the attorney general. The use of the term "may" indicates that what action the Board takes, if any, is discretionary. Hieb v. Hieb, 568 N.W.2d 598, 602 (N.D. 1997); Blanchard v. North Dakota Workers Compensation Bureau, 565 N.W.2d 485, 489 (N.D. 1997); North Dakota Comm'n on Medical Competency v. Racek, 527 N.W.2d 262, 268 (N.D. 1995). The Board has discretion to seek an injunction to prohibit unlawful acts, provide information to the appropriate state's attorney regarding criminal acts, do both, or do neither.

Where an officer has been charged with a legal duty involving the exercise of his or her judgment and discretion, the exercise of such judgment and discretion will not be controlled by mandamus or otherwise directed by the courts regarding the manner in which that discretion should be exercised. First Am. Bank and Trust Co. v. Ellwein, 198 N.W.2d 84, 106 (N.D. 1972). Where a matter has been left to the discretion of government officials, the court will not

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interfere in the absence of fraud, improper influence, or an abuse of discretion. Ophaug v. Hildre, 42 N.W.2d 438, 442 (N.D. 1950). An abuse of discretion in an administrative agency may be found where the administrative agency acts unreasonably. State v. Pub. Serv. Comm'n, 82 N.W.2d 597, 602 (N.D. 1957). Accordingly, in the absence of fraud or improper influence, the Board has discretion to reasonably determine what action, if any, is warranted when its investigation causes it to believe that a person or firm has engaged, or is about to engage, in acts or practices which constitute or will constitute a violation of N.D.C.C. ch. 43-02.2.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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