

N.D.A.G. Letter to Wentz (Feb. 16, 1990)

February 16, 1990

Robert M. Wentz, M.D.
State Health Officer
Department of Health and
Consolidated Laboratories
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Dr. Wentz:

Thank you for your February 5, 1990, letter regarding whether the State Department of Health and Consolidated Laboratories (Department) has authority to go on site and evaluate the operation of unlicensed facilities and medical hospitals to determine whether a license is required to operate those facilities.

N.D.C.C. § 23-09.3-01 provides in pertinent part:

Basic care facility -- Defined. As used in this chapter, the term "basic care facility" means any place, not licensed by the department of health and consolidated laboratories, hereinafter referred to as the department, under chapter 26-16, operated by any person, institution, organization, or private or public corporation, in which five or more individuals not related by blood or marriage to the owner or manager of the place, are received, kept, and provided with food, shelter, and care for hire or compensation. . . . Any place that assists its residents with walking, dressing, or toilet usage, or which promotes supervision of person, or which employs any staff to aid residents in addition to cooks or maids for cleaning, is considered to be a basic care facility subject to regulation by the department.

N.D.C.C. § 23-09.3-01 (emphasis supplied).

N.D.C.C. § 23-09.3-04 states that it is the duty of the Department to inspect all basic care facilities. That statute provides:

23-09.3-04. Department to establish standards -- Licensing -- Inspection -- Prosecute violations. It is the duty of the department to establish standards for basic care facilities. The department shall inspect all places and grant annual licenses to basic care facilities as conform to the standards established and comply with the rules prescribed, as provided in this chapter. The department shall prosecute all violations of this chapter. Upon request of the department, the state fire marshal shall inspect any place for

which a license is applied or issued and shall report these findings to the department.

N.D.C.C. § 23-09.3-04 (emphasis supplied.)

The operator of a basic care facility must have a valid license issued by the Department. N.D.C.C. § 23-09.3-05. The Department has the authority to prosecute all violations of N.D.C.C. ch. § 23-09.3. N.D.C.C. § 23-09.3-04. Thus, the Department may prosecute an individual for operating a basic care facility without a license.

In order for the Department to determine the applicability of the license requirement to a particular facility, the Department must go on site and evaluate the nature of the operation. N.D.C.C. § 23-09.3-04 authorizes the Department to inspect "all places." Thus, the Department has authority to inspect any place to determine if it is operating as a basic care facility. Therefore, it is my opinion that the Department has the authority to go on site to evaluate the nature of an unlicensed operation and determine whether the operator is subject to the licensure requirements established in N.D.C.C. ch. 23-09.3.

Your second question is whether the Department has the authority to go on site to determine whether an operator is providing services subject to the requirements of N.D.C.C. ch. 23-16.

N.D.C.C. § 23-16-01 provides that all medical hospitals must obtain a license before commencing operations. The Department has the authority to issue licenses to hospitals complying with the provisions of N.D.C.C. ch. 23-16. N.D.C.C. § 23-16-06. The Department also has the authority adopt rules to inspect hospitals to determine whether the hospital is providing adequate care. N.D.C.C. § 23-16-05. Necessarily effective inspections would have to be conducted on site. Thus, the Department could adopt a rule to go on site to determine whether the operator is complying with the license provision of N.D.C.C. ch. 23-16 by providing adequate hospital care.

Sincerely,

Nicholas J. Spaeth

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