

## Opinion No. 56-6446

May 24, 1956

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Dallas Rierson, Director, Division of Plant Industry, New Mexico College of Agriculture and Mechanic Arts, P. O. Box 728, State College, New Mexico

We have your letter of April 18 in which you request an opinion as to the construction of § 45-19-5, N.M.S.A., 1953. You ask the following questions:

1. Does the term "agent" mean a person selling under the control of a nurseryman, dealer or agent, or does it mean a person selling nursery stock, which stock is under the partial or complete control of a nurseryman, dealer or agent?
2. If the act means that the agent must be under the control of the nurseryman, how many facts and what are they that must be found to constitute partial or complete control?
3. Are persons who take orders for nurseries located within the State of New Mexico required to pay the fees for a salesman's certificate?

Section 45-19-5 reads as follows:

"Every person, firm, (or) corporation soliciting or taking orders for nursery stock, importing into the state, or offering for sale, nursery stock imported into the state, storing, or selling nursery stock shall annually between July 1 and October 1 of each year, and before engaging in the business of soliciting, taking orders, selling, storing, or delivering nursery stock, apply to the regents of the Agricultural College of New Mexico, their agents or deputies, for a nursery salesman's certificate. Application for such certificate shall designate the place of business of the person applying for such dealer's certificate, shall specify the name of the nursery or nurseries, whether within the state or outside of the state of New Mexico, from which nursery stock is to be ordered, shipped, or transported, and further agreeing that the person so applying for the certificate will comply strictly with all the provisions of this act. Such application shall be accompanied by a certificate fee of \$ 25.00. Upon proper application and fee, the regents of the Agricultural College shall issue such certificate providing that certificate so issued shall be for one (1) fiscal year only. That is, from July 1 to June 30 of the fiscal year during which the certificate is issued, and Provided further that if the person or firm so certificated shall have been found to have violated any of the provisions of this act, then the certificate may be revoked, and in the discretion of the regents of the Agricultural College of New Mexico, such person or firm may be refused a certificate in the state. Provided further that no certificate for the selling of nursery stock within the state shall be issued to any person, dealer, firm, or corporation until the nursery from which such agent, dealer, firm, or corporation expects to order nursery stock shall have been

properly registered and certificated to sell or ship nursery stock into the state of New Mexico, and Provided further that nothing in this act shall be construed to require the owner, manager, or operator of a nursery located within the state of New Mexico, if said nursery has been properly certificated, to register for and pay an additional fee for an agent's or dealer's license."

It is apparent from reading the statute that every person, firm or corporation soliciting or taking orders for the sale of nursery stock is required to secure the nursery salesman's certificate unless they come within the proviso contained in the last portion of the above quoted statute and which we will discuss later. So, actually it is not a question of agency in this particular section of the statute.

It seems that the term "agent" has been used to cover persons who work for nurseries not located within the State of New Mexico. As to all such persons who are working for out-of state nurseries, either as agents, dealers or salesmen, and who hold themselves out as selling out-of-state nursery products, such persons must secure a nursery salesman's certificate under this particular section. Therefore, the question of control is not involved as to these persons.

We are further of the opinion that the question of agency only arises where persons work and sell products exclusively from New Mexico nurseries. If such persons are actual agents of the New Mexico nursery, such persons would come within the proviso which reads as follows:

"Provided further that nothing in this act shall be construed to require the owner, manager, or operator of a nursery located within the state of New Mexico, if said nursery has been properly certificated, to register for and pay an additional fee for an agent's or dealer's license."

We arrive at this conclusion on the basis of Opinion No. 4126, dated July 23, 1943, which held that a state nursery or dealer operating more than one place of business is not required to pay an inspection fee for each place. A copy of this opinion is enclosed herewith.

It is our opinion that a necessary corollary from this above mentioned opinion is that a New Mexico state nursery could have actual agents under its complete control and such agents would not be required to secure a salesman's certificate under this proviso. The amount of control necessary to make a party an agent would be as follows:

- (a) The principal would have to control the price to be charged.
- (b) The principal would control the territory wherein the agent operated.
- (c) The agent would take orders in the name of the principal and hold himself out as a representative of such principal.

These, generally, would be some of the factors which would determine whether the person was an agent of such New Mexico state nursery.

You further point out in your request that there are persons in various small towns who take orders for nursery products and secure such nursery products from nurseries in larger towns. It appears from your letter that this is actually the real problem under § 45-19-5, namely, do these persons have to secure a nursery salesman's certificate.

We are of the opinion that such persons would have to secure such certificate if the orders were taken in their own name, and they hold themselves out as dealers in nursery products. If they are only agents of larger dealers located in the State of New Mexico, they would not come within the proviso and not have to have a license.

This presents a question of fact and each case would have to be determined upon its peculiar facts, and we would be unable to express an opinion on any particular case. It would depend, as heretofore pointed out, upon the amount of control exercised by the nursery which sells the product.

Trusting we have answered your questions, we remain

By Paul L. Billhymer

Assistant Attorney General