

MAINE STATE LEGISLATURE

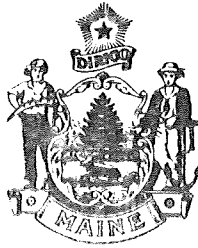
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JAMES E. TIERNEY
ATTORNEY GENERAL



STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

December 10, 1981

Honorable Michael E. Carpenter
56 Parsons Road
Portland, Maine 04103

Re: Potato Licensing Statute, 7 M.R.S.A. § 1011, et seq.

Dear Senator Carpenter:

In your letter of September 4, 1981 you raised a number of questions regarding the potato licensing statute. Because these questions are quite wide-ranging, I have taken the liberty of grouping them generally according to the aspects of the licensing law which are involved. Given the complexity of the licensing law, moreover, my responses must necessarily be somewhat lengthy. Finally, those answers which deal with the rights and obligations of contracting parties can only be addressed in general terms; the ultimate resolution of a particular dispute may be affected by the specific circumstances surrounding that dispute, a fact which should be kept in mind by those who may rely on this opinion in conducting their business.

QUESTIONS PRESENTED

1. Under 7 M.R.S.A. § 1012, is a buyer or dealer also considered an agent?
2. Does the "complaint" referred to in 7 M.R.S.A. § 1017, in regard to action in Administrative Court for suspension or revocation of a license, mean a "verified complaint" as defined in 7 M.R.S.A. § 1012(12)?
3. Under 7 M.R.S.A. § 1022, is a buyer/dealer required to maintain a copy of all records of transactions?

4. Under 7 M.R.S.A. § 1022(3), if no written agreement is recorded between the producer and the buyer prior to the arrival of the load of potatoes at its final destination, has the buyer accepted the potatoes from the seller with no guarantee as to grade, weight, size or other specifications?

5. Under 7 M.R.S.A. § 1022(2), if a federal-state inspection is done on the load as it is being packed, does this satisfy the producer's guarantee of grade, weight, size and other specifications?

6. If an inspection is subsequently made at the point of final destination, does it allow the buyer/dealer to reduce the price originally agreed to with the producer?

7. Under 7 M.R.S.A. § 1022, if no record of the transaction is made or if the record is not mailed to the producer by the time the load reaches its final destination, has the buyer/dealer waived his rights under the guarantee sections?

8. May the dealer negotiate a sale on an agreed price and then deduct charges and fees from the purchase price before paying the producer or must the dealer tender the agreed price and bill the producer the fees and charges agreed upon?

I. THE LICENSE REQUIREMENT (Question 1)

The heart of the potato licensing law is Title 7 M.R.S.A. § 1014, which provides, in pertinent part,

"No person shall act as a dealer, processor, broker, agent or retailer unless duly licensed as provided in this Article. Every person, before acting as a dealer, processor, broker, agent or retailer, shall file an application with the commissioner [of Agriculture] for a license to transact the business of a dealer, processor, broker, agent or retailer and such application shall be accompanied by the license fee provided in this Article."

In effect, any person who participates in the purchase or sale of potatoes in any of the capacities specified in § 1014 must be licensed.^{1/} Each licensee may be categorized according to the role the individual plays in the marketing transaction: dealer, processor, broker, agent or retailer.

^{1/} Section 1014 requires that retailers be licensed. However, P.L. 1971, c. 600 amended the exemptions section to exclude retailers from the Article. 7 M.R.S.A. § 1024(3).

With respect to your question as to whether a dealer is also considered an agent under this licensing scheme, it is our opinion that he is not.^{2/} Although an individual may be licensed to act in more than one capacity,^{3/} at any given point in a transaction he is engaged in discrete activities which characterize a particular marketing role as defined in the law. A dealer is one "engaged in the business of buying or selling potatoes in wholesale or jobbing quantities in commerce. . . ." 7 M.R.S.A. § 1012(5). That language suggests that in buying or selling potatoes a dealer acts for his own concern in the transaction. An agent, on the other hand, is "any person who sells or distributes potatoes in commerce for or on behalf of producers or others and whose operations may include the planting, cultivating, harvesting, grading, packing and furnishing containers, supplies or other services." 7 M.R.S.A. § 1012(1). An agent's actions, therefore, are within a principal-agent relationship with the attendant problems of authority and liability.^{4/} Although both a dealer and an agent may, for instance, sell potatoes in jobbing quantities in commerce, they may be distinguished on the basis of for whom they act; the dealer acts on his own behalf, the agent on behalf of others. They are two distinct roles.

- 2/ You also asked whether a "buyer" is considered an agent. However, a "buyer" is not one of the specific roles requiring licensing under § 1014. Instead, it is a broad term meaning "any person other than a consumer who purchases or contracts to purchase potatoes." 7 M.R.S.A. § 1012(4).
- 3/ An applicant is issued only one license despite the number of different roles he may play in buying and selling potatoes. However, when applying for a license, applicants must indicate all the roles for which they need to be licensed.
- 4/ This conclusion is further supported by the second paragraph of § 1014 which requires individuals who buy, solicit or negotiate sales of potatoes as representatives of dealers, processors, brokers, or retailers to file written authorization from a licensee to act on his behalf. Although the term "agent" is not used, it is interesting to note the heading of the section: "Licensing; agents."

II. THE VERIFIED COMPLAINT PROCEDURE (Question 2)

Section 1017 of Title 7 provides, in part, that the Administrative Court may suspend or revoke a license issued pursuant to the potato licensing statute upon finding any of twelve enumerated violations "within 2 years of the date of the filing of a complaint."^{5/} This complaint in Administrative Court is not the "verified complaint" referred to in § 1016. A verified complaint is

"a writing signed by a person, who, under oath, swears that he has reason to believe that a person required to be licensed under this Article has violated one or more of the provisions of this Article or of the rules and regulations promulgated thereunder, setting forth a short and plain statement of the allegations which are the basis for such belief."

7 M.R.S.A. § 1012(12). Under § 1016, the filing of a verified complaint may prompt the Commissioner to investigate the conduct of an applicant or licensee.^{6/} The verified complaint process is essentially a departmental tool to gather information and referee disputes; this is in contrast to the judicial procedure to revoke or suspend a license under § 1017(1) which is instituted by filing a complaint with the Administrative Court.^{7/}

^{5/} Sections 1017(1)(A) through (L) set forth one general and eleven specific "violations," ranging from fraudulent charges or returns to refusal to permit investigations authorized by statute. The violations also provide a basis for refusal by the Commissioner to grant a license.

^{6/} The investigation may include an examination of pertinent books and papers and the taking of testimony under oath. See also 7 M.R.S.A. § 1018, authorizing the Commissioner to conduct adjudicatory hearings pursuant to the Administrative Procedure Act, 5 M.R.S.A. § 9051.

^{7/} The complaint must be filed in the court within two years of the alleged violation. Although no time limitation so restricts the filing of a verified complaint with the Commissioner under § 1016, there is a practical limitation since the Commissioner could not bring an action against a license in Administrative Court based upon his investigation of the charges in the verified complaint unless he could satisfy the two-year requirement.

III. RECORDS OF TRANSACTIONS AND CONFIRMATION OF SALE
(Questions 3-8)

The potato licensing law contains various provisions designed to govern the actual purchase and sale of potatoes. At least one such section of the law extends not only to those actually licensed but to all those who should be licensed. Section 1022 provides, in part, that

"Every person required to be licensed under this Article, upon having negotiated a sale of potatoes for others or upon having purchased potatoes from the producer, shall cause a record of such transaction to be made, and deliver promptly to the seller a copy thereof. . . "

The section sets forth in some detail the matters which are to be included in the record regarding the handling, sale and storage of the potatoes. The language of the section is mandatory: the record shall be made.^{8/}

Failure to properly make and maintain the record required by section 1022 may affect the rights and obligations of the parties. Where the sale of potatoes is by a producer and the Article requires that a record of the transaction be made, the producer will be deemed to have made no guarantees as to potato specifications^{9/} if any of the following circumstances exist:

- 1) No record of the transaction is made;
- 2) The name and address of the buyer are not set forth in the record; or
- 3) A copy of the record is not delivered, by depositing it in the mail, to the producer prior to delivery of the load at final destination.

Any of these failures by the broker, buyer or agent constitutes a waiver of any claim against the producer for breach of warranty. Guarantees made by the producer in the contract in regard to potato specifications would be unenforceable.

^{8/} Section 1017 states that a licensee's failure or refusal to "keep and maintain the records as required by this Article" is a basis upon which to refuse a license or seek action against the licensee in Administrative Court. 7 M.R.S.A. § 1017(K)

^{9/} Potato specifications include the grade, size, weight and amount of potatoes to be delivered. These specifications are often used as price determinants in the contract with price variation tied to the grade as determined at destination.

The manner of satisfying guarantees as to potato specifications is addressed in § 1022(2). That section applies in transactions in which the buyer is a person who is required to be licensed and who has a place of business in Maine. In those instances, producer guarantees as to potato specifications made in the record are deemed satisfied if the load meets or exceeds those guarantees at the time the potatoes are loaded for transit. That determination must be made by a licensed federal-state potato inspector or seed potato inspector at the time the potatoes have been or are being loaded. The producer has the option of satisfying his guarantees by this process. Any agreement between the producer and buyer in the record which attempts to foreclose this option or which conflicts with § 1022(2) is null and void.

However, a producer shall be deemed to have waived this protection when the record contains two additional pieces of information.^{10/} If that additional information is in the record, the producer cannot raise the protection afforded by subsection 2 if the potatoes meet specifications at loading but not at the point of final destination.^{11/}

Assuming a producer has not waived his protection under § 1022(2), a determination that the guarantees were satisfied at the time of loading would render a subsequent inspection at the point of final destination of no effect. The results of that later inspection could not be used by the buyer or dealer to reduce the original contract price.

^{10/} The additional information required by § 1022(2) is

"A. Name and address of the person to whom the dealer resold the potatoes and any other person to whom the producer is obligated, directly or indirectly, by making any guarantees with regard to grade, size, weight or other specifications.

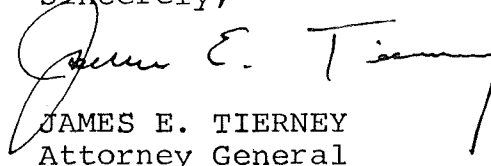
"B. Point of final destination for said shipment of potatoes."

^{11/} In addition, the producer may decline to exercise his option to satisfy specifications at loading time by failing to obtain the pre-shipment inspection.

Although the question of payment is addressed several times in the licensing law,^{12/} there is no provision regarding the manner in which dealers may demand payment from producers for fees or shipment charges. Rather, it appears that this is specifically left to the bargaining process. Thus, § 1022 provides that one of the pieces of information to be included in the record of agreement is the notation of "any deductions to be made from the proceeds for expenses to be borne by the seller or handler." 7 M.R.S.A. § 1022(1)(O). That language suggests that the dealer may contractually provide for the deduction of fees and charges from the proceeds; it seems equally clear that the record may call for payment in full to be made to the producer and charges then billed to his account. The intent of the record requirement seems to be to ensure that certain aspects of the transaction be agreed to and reduced to writing. The purpose is to allow the contracting parties flexibility in their structuring of shipment, storage and payment obligations. Once that structure is created by the parties, however, the department has tools available to ensure that it is honored.

I hope that the answers set out above are of assistance to you. Please feel free to contact me if you have any further questions.

Sincerely,


JAMES E. TIERNEY
Attorney General

JET/ec

^{12/} Licensees are required to post bonds conditioned on full and prompt payment for potatoes received or purchased. 7 M.R.S.A. § 1015. The failure or refusal to render a true account of sales or to pay for potatoes purchased within 20 days of acceptance violates 7 M.R.S.A. § 1017(1)(B). The payment of brokerage or agents' fees is outlined in 7 M.R.S.A. § 1023.