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NO.
STATE OF NEBRASKA
OFFICIAL
JUN 25 1992
DEPT. OF JUSTICE

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SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

DATE: June 18, 1992

SUBJECT: Regulation of Labels

REQUESTED BY: Forrest D. Chapman, Executive Director, Nebraska Liquor Control Commission

WRITTEN BY: Marie C. Pawol
Assistant Attorney General

You have inquired whether the Nebraska Liquor Control Commission has any statutory or rule-making authority to prohibit the use of certain labels on original packages of alcoholic liquor. In your inquiry, specific reference is made to the label "Crazy Horse Malt Liquor" which the Commission believes is derogatory, insulting and does not promote temperance [Resolution of the Nebraska Liquor Control Commission dated May, 1992].

We first note that administrative bodies, such as the Nebraska Liquor Control Commission, have only that authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act. Nape v. Game & Parks Comm., 220 Neb. 883, 374 N.W.2d 46 (1985); In re Application A - 16642, 236 Neb. 671, 463 N.W.2d 591 (1990).

Provisions of the Nebraska Liquor Control Act relating to the content of labels are set forth in Neb.Rev.Stat. §§53-117(3) and 53-172 (1991 Supp.). Section 53-117(3) states, in pertinent part, that the Commission shall

> fix by rules and regulations the standards of manufacture of alcoholic liquor not inconsistent with federal laws in order to insure the use of proper ingredients and methods in the manufacture and distribution thereof and to adopt and promulgate rules and regulations not inconsistent with federal laws for the proper labeling of containers, barrels, casks, other bulk containers, or bottles of alcoholic liquor manufactured or sold in this state. It is intended by the grant of power to adopt and promulgate rules and regulations that the Commission shall be

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clothed with broad discretionary powers to govern the traffic in alcoholic liquor and to enforce strictly all the provisions of the act in the interest of sanitation, purity of products, truthful representations, and honest dealings in such manner as generally will promote the public health and welfare.

Section 53-172, in its entirety, states:

> **53-172. Original packages; labels; seals; requirements.** No manufacturer or wholesaler shall sell or deliver any original package containing alcoholic liquor, except beer and wine, manufactured or distributed by him or her unless the package has affixed thereto a clear and legible label containing the name and address of the manufacturer, the kind of alcoholic liquor contained in the package, and, in the case of alcoholic liquor other than beer, the date when manufactured. No original package of alcoholic liquor shall be delivered by any manufacturer or wholesaler unless the package is securely sealed so that the contents cannot be removed without breaking the seal placed thereon by such manufacturer, and no other licensee shall sell, have in his or her possession, or use any original package which does not comply with this section and section 53-174 or which does not bear evidence that such original package, when delivered to him or her, complied with this section.

Although the foregoing provisions mandate that labels contain specific identifying information and constitute "truthful representation," the statutes do not otherwise restrict the content of labels on packages of alcoholic liquor. Pursuant to such statutes, the Commission has promulgated Rule LCC-237-5.001.02 which further provides that:

> **001 Labels**
>
> **001.01** Labels attached to all original containers or packages of alcoholic liquors offered for sale in this state shall set forth in plain and legible print in the English language:
>
> **001.01A** The quality of such liquors in such original containers;
>
> **001.01B** The grade and quality of such liquors together with their alcoholic contents (except beer);

> **001.01C** The age of such liquor (except beer and wine) if required by federal regulations;
> **001.01D** If the liquor be a blended product, the labels shall include the other ingredients contained in such blended product.
> **001.02** The labels shall not contain any false or misleading statements or representations. The label of every container of beer shall set forth the name and address of the brewer.

[Emphasis added]. The foregoing rule does not address or govern the content of labels considered to be offensive or insulting, nor in our view, can §§53-117(3) and 53-172, or the concept of "temperance," be construed so broadly as to encompass such concerns. Although the Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute, that agency may not employ its rule-making power to modify, alter, or enlarge provisions of a statute which it is charged with administering. State ex rel. Spire v. Stodola, 228 Neb. 107, 421 N.W.2d 436 (1988). We conclude, therefore, that under the current Nebraska statutes the Commission does not possess authority to ban the label "Crazy Horse Malt Liquor."

The federal Bureau of Alcohol, Tobacco and Firearms faced similar constraints when it reviewed the "Crazy Horse" label pursuant to Sections 7.40 et seq., Title 27 of the United States Code of Federal Regulations. The foregoing provisions require persons packaging malt beverages to make application for and receive a federal certificate of label approval. The code also sets forth mandatory labeling requirements for malt beverages. 27 CFR 7.20-29 (1991). Section 7.29, in particular, prohibits any misleading, false, obscene or indecent statements on labels for malt beverages. However, these provisions for censorship do not extend to labels, or statements therein, which may be viewed as offensive or insulting. The manufacturer of "Crazy Horse Malt Liquor" received federal label approval on February 19, 1992.

Similarly, the Nebraska Liquor Control Commission is constrained in its statutory authority over the regulation of liquor labels. The resolution enacted by the Commission regarding

the "Crazy Horse" label appears to be the appropriate method by which the Commission can express its views regarding a label thought to be offensive and insulting.

Sincerely,

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Approved By:

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23-13-5.1