continue receiving said annuity while teaching handicapped children under the provisions of Chapter 276 of the Acts of 1947.

OFFICIAL OPINION NO. 75

December 22, 1948.

Mr. F. W. Quackenbush,
State Chemist,
Purdue University Agricultural Experiment Station,
Lafayette, Indiana.

Dear Sir:

Your letter of December 16, 1948, has been received requesting an official opinion on the following questions:

"1. Under the Indiana Fertilizer Law (Acts of 1881, p. 511, or Revised Statutes, Sections 4894-4899; Acts of 1899, Ch. 33, p. 49; Acts of 1901, Ch. 184, p. 413), can the State Chemist by rule or regulation require a distributor of commercial fertilizer to include in his guarantee an element other than nitrogen, phosphoric acid, and potassium oxide when the distributor adds such an element and sells the mixture to a consumer?

"2. If the State Chemist cannot require such a guarantee, can he rule that a distributor will be permitted to include such an additional element in the guarantee when it is to be included in the fertilizer?"

Following your questions you give the following supplemental information which is deemed pertinent to a full understanding of the problem presented:

"The reason for this request is that certain Indiana soils are now known to require fertilizer elements other than nitrogen, phosphoric acid, and potassium oxide, as was thought to be the case when the Law was written. Some of the muck soils of the state require copper salts, and some of the upland soils require manganese salts for the production of suitable crop
yields. Some crops require large amounts of certain of these 'minor' elements, for example, boron should be added to many Indiana soils for the best results in growing alfalfa.

"Manufacturers are now adding these elements to fertilizers which they distribute in certain areas and have been doing so for several years. It is felt that since these fertilizer elements are required by the soils and are being included in the commercial products, that the purchaser should have the protection for these elements which he enjoys for nitrogen, phosphoric acid, and potassium oxide in the form of a guarantee by the manufacturer and inspection analysis of the State Chemist."

Section 15-1001, Burns 1933, same being Section 1, Chapter 51, Acts of 1881 (Spec. Sess.), as amended by Section 1, Chapter 184, Acts of 1901, provides as follows:

"Before any commercial fertilizer is sold, or offered for sale, in the state of Indiana, the manufacturer, dealer, importer, agent or party who causes it to be sold or offered for sale, by sample or otherwise, within the state of Indiana, shall file with the state chemist of Indiana a statement that he desires to offer for sale in Indiana material for manurial purposes, and also a certificate, for registration, stating the name of the manufacturer, the location of the principal office of the manufacturer, the name under which the fertilizer will be sold, the names of the towns in Indiana in which it will be offered for sale, and the minimum percentage of nitrogen, of potassium oxide (K₂O), soluble in water, or phosphoric acid (P₂O₅), and, in the case of acidulated goods, the minimum percentage of water, soluble and reverted phosphoric acid, and of insoluble phosphoric acid which the manufacturer or party offering the fertilizer for sale guarantees the fertilizer to contain."

Section 15-1002, Burns 1933, same being Section 2, Chapter 51, Acts of 1881 (Spec. Sess.), as amended by Section 2, Chapter 184, Acts of 1901, provides in part as follows:
"It shall be the duty of the state chemist to register the certificate provided for in section one (Section 15-1001) of this act and to print the facts set forth in the certificate in the form of a label. Such label shall be plainly printed in the English language and shall set forth the name of the manufacturer, the name of the fertilizer, and the minimum percentage of nitrogen, of potassium oxide, (K₂O) soluble in water, or phosphoric acid (P₂O₅), or in the case of acidulated goods, of soluble and reverted phosphoric acid and of insoluble phosphoric acid which the manufactured guarantees the fertilizer to contain. The state chemist shall furnish such labels to manufacturers or agents desiring to sell, or to offer or expose to sale, the fertilizer so registered and in such numbers as such manufacturers or agents may desire: * * *

Section 15-1003, Burns 1933, same being Section 3 of each of the foregoing statutes, requires such label of the State Chemist to be affixed to every package or sample of such fertilizer that shall be in the possession of, or offered for sale or sold by, any person. Section 15-1004, Burns 1933, same being Section 4 of each of said statutes, supra, prescribes that any such person shall be guilty of a misdemeanor and subject to a fine for having in his possession for his own use or the use of another, or offers for sale or exposes for sale, any such fertilizer which does not have affixed thereto a label, or which is found by the State Chemist's analysis to contain a smaller percentage of any other ingredient mentioned in Section 2 of the Act as shown by said State Chemist's label, or which shall be labeled with a false or inaccurate guarantee, or who shall use the name or the title of the State Chemist on a label not furnished by the State Chemist.

Section 15-1005, Burns 1933, same being Section 5, Chapter 51, Acts of 1881 (Spec. Sess.), as amended by Section 1, Chapter 33, Acts of 1899, authorizes the State Chemist to prescribe and enforce such rules and regulations relating to fertilizers as he may deem necessary to carry into effect the full intent and meaning of said Act.
Where an office is created by statute, public officers may exercise only such powers as are expressly authorized by statute.

Blue v. Beach (1900), 155 Ind. 121, 131;
Department of Insurance v. Church Members Relief Assn. (1940), 217 Ind. 58, 60;
Chicago, etc. R. R. Co. v. Public Service Commission (1943), 221 Ind. 592, 594.

An exception to the above general rule is recognized where certain incidental powers are implied when necessary for the purpose of carrying out the express powers given a public officer.

43 Am. Jur., Public Officers, Section 25;
State ex rel. v. Goldthait (1909), 172 Ind. 210, 216.

When your question No. 1 is considered in connection with a reading of the foregoing statutes and is tested by the foregoing legal principles, it is apparent said acts intend only to legislate regarding labels on fertilizer as to its contents for nitrogen, phosphoric acid, and potassium oxide. Under said statutes the labels are prepared from an analysis made by the State Chemist, and such fertilizer being held for use or for sale by any person, which does not meet the guarantee shown by such label as to such prescribed contents, aforesaid, subjects such person to a prosecution and fine under the criminal laws of this State for a misdemeanor.

While possibly no great harm could be occasioned, and probably much benefit would result, from such labels including the additional elements you seek to include in the guarantee of the manufacturer as contained in the State Chemist's label, I do not believe said statutes, even under the rule making power referred to, are sufficient to authorize the State Chemist or the manufacturer to cause analysis to be made for such other elements and such facts carried out by way of guarantee through the use of such labels. This would possibly subject some manufacturers to liability for prosecution for a misdemeanor if the fertilizer failed to come up to the standards specified in the label as to those elements not required to be
stated in such label under Section 2 of said Act. While a coverage of all the elements mentioned in the labels might be desirable, I think it can be reached only by further legislation.

Your second question has in fact been answered by the answer to your question No. 1, for I find no authority in said statute for any such permissive practice to be carried on which might eventually lead to prosecution under the criminal laws of the state for offense not provided for within the purview of said law.

I see no reason why the manufacturer could not place on such product a separate guarantee as to other elements it contains. This would be a matter of contract between the manufacturer and the buyer. However, I am of the opinion no criminal action could be filed under the above statute in the event of an inaccuracy existing as to the contents as shown by the separate label of the manufacturer. None of the additional elements shown by the separate label, aforesaid, could be made a part of the official label of the State Chemist.