HEALTH: Division of Health cannot examine records of manufacturers, wholesalers or distributors of carbonic gas to aid in collection of inspection fee on fountain syrups, flavors or extracts.

September 22, 1949

FILED
1

C. F. Adams, M. D.
Acting Director
Division of Health
Jefferson City, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department which reads:

> "This Division would like to have an official opinion on the following:
>
> "1. Under the Beverage Inspection Act, Section 3, last two sentences.
>
> "(a). This Section indicates that an inspection fee be paid equal to three cents per pound of carbonic gas used in the manufacture or concoction of such beverages or drinks. It is our desire to set up a system of collecting this tax by mail and in order to simplify this procedure it will be necessary to obtain from the distributor, in most cases, and in some cases the manufacturer, a list of the establishments to which he has sold or distributed gas drums together with the size of the container and the number supplied. May we legally under Section 6 or Section 9, or any other section, have the authority to examine the records of the distributor or wholesaler of carbonic gas to determine the name of the consignor and consignee, date, place received, number of containers and size of containers supplied?"

The section to which you refer providing for the payment of an inspection fee based on the amount of carbonic gas used in the manufacture or concoction of beverages or drinks is Section 3, Laws of Missouri, 1943, page 586, Section 9980.3, Mo. R.S.A., which provides:

> "A license fee of one dollar ($1.00) shall be paid by each manufacturer of soft drinks or beverages required to be licensed under the provisions of this Act; and in addition thereto an inspection fee shall be paid by wholesale manufacturers of soft drinks or beverages of three tenths cent for each gallon of such beverage manufactured or sold in this state, but the fees for inspection shall not exceed four cents per month per case of twenty-four bottles of such manufacturer's bottling capacity, as determined by the rated capacity of the machines therein for an eight hour day as rated by the manufacturer of such machines; and for inspection of all fountain syrups, flavors or extracts used in the manufacture or concoction of beverages for retail sales, not otherwise inspected, an inspection fee shall be paid equal to three cents per pound of carbonic gas used in the manufacture or concoction of such beverages or drinks. All fees received shall be paid into the state treasury."
>
> (Underscoring ours.)

The first part of the statute provides for the payment of an inspection fee by the wholesale manufacturer of soft drinks or beverages on the manufactured or finished product. However, the portion of the statute underscored above provides for an inspection fee to be paid for the inspection of certain ingredients used in the manufacture or concoction of beverages for retail sales, i.e., fountain syrups, flavors and extracts. The fee to be paid is computed on the basis of three cents per pound of carbonic gas used in the manufacture of the beverage or drink.

We are aware that the Division of Health would be aided in the collection of the inspection fee in the latter instance if it could examine the records of the manufacturers, distributors or wholesalers of carbonic gas and obtain the information set out in your letter.

You inquire if Sections 6 or 9 (9980.6 and 9980.9, Mo. R.S.A.), of the Beverage Inspection Act or any other section of the Act would permit you to examine the records of the manufacturers, distributors or wholesalers of carbonic gas in order to obtain the designated information.

At this time we wish to point out that in the various sections of the Beverage Inspection Act where the term "state board of health" is used, the term "division of health" shall be read in its place. Thus, Section 9759.13, Mo. R.S.A., provides that "in all laws of Missouri, and orders and findings issued thereunder, wherever the term state board of health is used, the term division of health shall hereafter be substituted and understood."

Section 9980.6, Mo. R.S.A., requires railroads, express or transportation companies to furnish to the Division of Health a duplicate bill of lading covering the shipments of "soft drinks or beverages, syrups, extracts or flavors." Thus, the statute provides:

> "Every railroad, express or transportation company shall, when requested, furnish to the State Board of Health of Missouri a duplicate bill of lading or receipt showing the name of the consignor and consignee, date, place received, destination and quantity of soft drinks or beverages, syrups, extracts or flavors received by them for shipment to any point within this state. Upon failure to comply with the provisions therein, said railroad, express or transportation company shall pay to the State of Missouri the sum of fifty dollars ($50.00) for each and every failure, to be recovered in any court of competent jurisdiction. The State Board of Health is hereby authorized and empowered to sue in its name at the relation and to the use of the state and any sums thus collected shall be paid into the state treasury."

We believe it is apparent that there is nothing in the above quoted statute authorizing the examination of records of manufacturers, distributors or wholesalers of carbonic gas or nothing which would require them to furnish the desired information.

Section 9980.9, Mo. R.S.A., provides:

> "All manufacturers, wholesalers and dealers in bottling soft drinks, beverages, syrups, flavors or extracts shall from and after the passage of this Act keep an accurate

> account of their sales and make a report under oath at the end of each month to the State Board of Health with a remittance to cover all sales for the month, unless such manufacturer or bottler pays the maximum inspection fee based on the bottling capacity of such manufacturer's or bottler's plant pursuant to Section 3 of this Act. The books of such manufacturers, bottlers, wholesalers or dealers shall at all times be open to examination and inspection by the State Board of Health and its officers and agents."

Again there is nothing in the above statute which is directed at the manufacturers, wholesalers and dealers in bottling soft drinks, beverages, syrups, flavors or extracts which would authorize the examination of records of manufacturers, wholesalers or distributors of carbonic gas.

The only other section of the act to be considered which might afford a means for the Division of Health to obtain the desired information is Section 9980.16, Mo. R. S.A., which provides:

> "The State Board of Health of Missouri may make suitable rules and regulations for the carrying out of the provisions of this Act."

In other words, under the authority of the above section could the Division of Health, in carrying out the provisions of the act, make a rule or regulation that would compel the manufacturers, wholesalers or distributors of carbonic gas to submit their records for examination so that the desired information could be acquired.

The scope and extent of the power of administrative authorities to enact rules and regulations under such a statute as above quoted is not unlimited.

Thus, in Volume 42, Am. Jur., Section 53 at pages 358-359, the limitation or restriction on the power of administrative authorities to enact rules and regulations is stated as follows:

> " * * * Since the power to make regulations is administrative in nature, legislation may not be enacted under the guise of its

> exercise by issuing a 'regulation' which is out of harmony with, or which alters, extends, or limits, the statute being administered, or which is inconsistent with the expression of the lawmakers' intent in other statutes. The administrative officer's power must be exercised within the framework of the provision bestowing regulatory powers on him and the policy of the statute which he administers. * * * "

Under the above pronouncement of law, an administrative officer or body cannot make a rule or regulation that alters, enlarges, extends or limits a legislative enactment.

Regarding the question of the power to make laws, we point out that the organic law of this state (Article III, Section 1, Constitution of Missouri, 1945) vests the legislative power or the power to enact laws in the General Assembly, and it is a settled maxim in constitutional law that the power conferred upon the Legislature to make laws cannot be delegated by that branch of government to any other body or authority. It has been so held by our Supreme Court in Ex parte Cavanaugh vs. Gerk, 313 Mo. 375, State ex rel. Field vs. Smith, 49 S.W. (2d) 74, 329 Mo. 1019. In the latter case, the court at Mo. l.c. 1026-1027, said:

> "'One of the settled maxims in constitutional law is, that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws may be made until the Constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.' (1 Cooley on Cons. Limitations, 224.)
>
> "'The Legislature may not delegate the power to enact a law, or to declare what the law

> shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law complete in itself designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations, to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.' * *"

Referring again to the rule-making power of administrative bodies, and particularly the authority of boards of health to make rules and regulations, the following appears in Vol. 39, C.J.S., at pages 823-824:

> "Boards of health have no inherent legislative power, they cannot, by their rules and regulations enlarge or vary their powers, and any rule or regulation which is inconsistent with such law or which is antagonistic to the general law of the state, is invalid. * * * "

In the case of Bloemer vs. Turner, 281 Ky. 832, 137 S.W. (2d) 387, a dog food manufacturer sought injunctive relief against the Director of the Kentucky Agriculture Experiment Station who had made a regulation regarding the labeling of canned dog food. The labeling statute required the labels on the containers of such food to bear some five different things, such as the net weight, name and trademark, the ingredients from which the food was compounded, etc. Under another statute giving the Director authority to make rules and regulations in carrying out the provisions of the act, a regulation was made requiring the manufacturers of canned dog food to put on the label that the can contained 74% water. Objection was made to this on the ground that it would be misleading to the public. It was argued that the statute giving the Director authority to make regulations did not give him the power he sought to exercise in that he would be extending the labeling statute in its requirements and that such would be an invalid delegation of legislative power. In holding that the regulation was invalid, the court, at S.W. (2d) l.c. 391, 392, said:

> "Reading the section in isolation, appellees are met with the absence of any sort of standard or guide. No one could claim such vast and unrestricted governmental power as that would import. Reading the section in connection with other parts of

> the statute, as must be done, the appellees are met with the specific statement of the legislature that the percentages of only the qualities of fat and protein of the products are to be put on the labels. * * *
>
> "The General Assembly deemed it to be legislation to prescribe the contents of the label. It did so itself. We suppose no one would contend that the Director of the Agriculture Experiment Station, or any other agency, could detract from the stipulated provisions, e. g., rule that the net weight of the contents of the package need not be printed on the label. If he may not by regulation subtract, then he may not by regulation add. To construe the act as appellees contend would be to hold that it was the intent of the General Assembly to delegate an attribute of sovereignty to the individual director by authorizing him to alter or amend a law at will."

A careful reading of the Beverage Inspection Act, Sections 9980.1 to 9980.17, and also the title of the Act, shows that its purpose is to provide for the licensing and regulating of the manufacture and bottling of beverages and soft drinks, except malt beverages, and to provide for the inspection of said beverages or soft drinks manufactured or sold within the state. There is nothing in the Act purporting to regulate or to exercise any degree of control over the carbonic gas industry.

In Section 9980.6 of the Act, the Legislature has required railroads, express or transportation companies to furnish the Division of Health certain information by submitting duplicate bills of lading or receipts.

Section 9980.9 of the Act requires all manufacturers, wholesalers and dealers in bottling soft drinks, beverages, syrups, flavors or extracts to furnish monthly reports to the Division of Health, and further provides that their books shall at all times be open to examination and inspection by the Division of Health, its officers and agents.

However, no provision of the Act requires similar reports to be made by the manufacturers, wholesalers or distributors of carbonic gas or requires their books to be open for examination and inspection; nor is such a legislative intent manifested in the Act.

Consequently, we believe that should the Division of Health make a regulatory rule to be imposed on the manufacturers, wholesalers or distributors of carbonic gas to require them to present reports and submit their books to examination and inspection so that the desired information could be obtained, it would be extending the provisions and the scope of the Act. To do so would constitute an unauthorized exercise of legislative power not delegated to the Division of Health. It was not the intent of the Legislature, nor could it have done so in giving the Division of Health authority to make rules and regulations to delegate to it any attribute of sovereignty reserved to the Legislature.

CONCLUSION

It is, therefore, the opinion of this office that the Division of Health, in collecting the inspection fee on fountain syrups, flavors or extracts used in the manufacture or concoction of beverages for retail sales, as provided in Section 9980.3, Mo. R.S.A., would not be authorized under any provision of the Beverage Inspection Act to compel manufacturers, wholesalers or distributors of carbonic gas to submit their records for examination so that the Division of Health could obtain desired information relating to the shipment of carbonic gas.

Respectfully submitted,

RICHARD F. THOMPSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RFT:VLM