

HEALTH; DIVISION OF:
REGULATIONS; EFFECT OF:

State Milk Regulations of Division of Health promulgated under authority of Sections 196.045 and 196.050 RSMo 1949, of food and drug laws, and coming within narrow limits of subject matter and scope of operation, and have the force and effect of statutory laws.



February 17, 1953

Honorable James R. Amos, M.D.
Director
Division of Health
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads as follows:

"St. Louis County Health Department has for the past few years been operating under our State Milk Regulations, a copy of which is attached.

"These regulations were adopted by the Division of Health and duly filed with the Secretary of State in accordance with the powers granted the Division of Health for the promulgation of rules and regulations governing the health and welfare of the people of the State.

"St. Louis County Health Department has asked the St. Louis Prosecuting Attorney's office to assist them in enforcing these regulations, and have been advised that the only statutory authority on milk authorizes the Commissioner of Agriculture to enforce certain requirements.

"The Prosecuting Attorney's office for St. Louis County has requested that we obtain an official opinion from your office concerning the legality of the said Milk Regulations, and whether such

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regulations have the full force and effect of statutory law.

"We would be pleased to have such an opinion from you at your earliest convenience."

It is the duty and responsibility of the division of health to safeguard the health of the people of the state under the provisions of Chapter 192, RSMo 1949, entitled "Division of Health." Among the various duties prescribed by this chapter to be performed by the division of health is the administration of the laws relating to foods and drugs, as provided by Section 192.080, which reads as follows:

"All powers and duties pertaining to administration of laws relating to food and drugs shall be exercised by the division of health. The director of health may appoint a deputy who, under the director, shall be chiefly responsible for administration of laws pertaining to food and drugs, and particularly to enforce all laws that now exist or that may hereafter be enacted regarding the production, manufacture or sale of any food products, or any ingredients that are used in the preparation of foodstuffs, or the misbranding of the same; and personally, or by his assistants, inspect any article of food or drug made or offered for sale in this state which he may, through himself or his assistants, suspect or have reason to believe is impure, unhealthful, adulterated or misbranded, and shall have power to cause to be arrested and prosecuted, any person or persons engaged in the manufacture or sale of foods or drugs or any food ingredients contrary to the laws of this state. The director shall make orders and findings for carrying out the provisions of this chapter and such orders and findings shall conform as nearly as practicable to the orders and findings at present established or which may hereafter be established for the enforcement of the act of congress, approved and known as 'The Food and Drug Act,' together with any amendments thereto."

Sections 196.045 and 196.050, RSMo 1949, authorizes the division of health to promulgate regulations for the efficient enforcement of the food and drug laws.

Section 196.045, RSMo 1949, reads as follows:

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"1. The authority to promulgate regulations for the efficient enforcement of sections 196.010 to 196.120 is hereby vested in the division of health. The division shall make the regulations promulgated under said sections conform, insofar as practicable, with those promulgated under the federal act.

"2. Hearings authorized or required by sections 196.010 to 196.120 shall be conducted by the division of health or such officer, agent, or employee as the division may designate for the purpose.

"3. Before promulgating any regulations contemplated by sections 196.050, 196.075 (10), 196.080, 196.085, 196.100 (4), (6), (7), (8), the division shall give appropriate notice of the proposal and of the time and place for a hearing. The regulation so promulgated shall become effective on a date fixed by the division which date shall not be prior to sixty days after its promulgation. Such regulation may be amended or repealed in the same manner as is provided for its adoption, except that in the case of a regulation amending or repealing any such regulation the division, to such an extent as it deems necessary in order to prevent undue hardship, may disregard the foregoing provision regarding notice, hearing, or effective date.

Section 196.050, RSMo 1949, reads as follows:

"In no event shall the said division of health prescribe or promulgate any regulation fixing or establishing any definitions or standards which are more rigid or more stringent than those prescribed by the federal act applying to any commodity covered by sections 196.010 to 196.120 and if any product or commodity covered by said sections shall comply with the definitions and standards prescribed by the federal act for such product or commodity, such product or commodity shall be deemed in all respects to comply with sections 196.010 to 196.120."

From the provisions of the preceding sections, the powers of the division of health to make regulations appears to be limited in

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scope to regulations of definitions and those establishing standards of quality of foods and drugs covered by Sections 196.010 to 196.120. The standards thus set cannot be more stringent than those prescribed by the federal food and drug statutes for any commodities covered by above statutes.

While various sections of the Missouri food and drug statutes provide that the violation of certain sections are offenses for which the violator may be criminally prosecuted and punished, it appears that the violations of any regulations of the division of health made under authority of Sections 196.045 and 196.050, supra, are not criminal offenses. This does not mean that any person who violates any such regulations cannot be punished, since the violation is not a crime, but rather that the violator must be proceeded against in a method other than a criminal prosecution.

When regulations defining food products or those establishing standards of quality for same, have been violated, in either instance the statute provides that such food products may be seized under condemnation proceedings and held by the officers pending the further orders of the court in which said proceedings were instituted.

In the event food products have been found to be adulterated, misbranded, or contain poisonous or deleterious substances in excess of specified quantities, within the meaning of Section 196.070, 196.075 and 196.085, respectively, they may also be seized under condemnation proceedings.

Under such conditions, it shall be the duty of the prosecuting attorney of any county or city, when called upon to render legal assistance to the division of health in the enforcement of the food and drug statutes, or any regulations made by said division of health as provided by Section 196.035. Said section reads as follows:

"It shall be the duty of the prosecuting attorney in any county or city in the state, when called upon by the division of health, or any of its assistants, to render any legal assistance in his power to execute the laws and to prosecute cases arising under the provision of sections 196.010 to 196.120. Before any violation of sections 196.010 to 196.120 is reported to any such attorney for the institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views before the division of health or its designated agent, either orally or in writing, in person, or by attorney, with regard to such contemplated proceeding. The court at any time after seizure up to a reasonable time before trial,

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shall, by order allow any party to a condemnation proceeding, his attorney or agent, to obtain a representative sample of the article seized, and as regards fresh fruit or vegetables, a true copy of the analysis on which the proceeding is based and the identifying marks or numbers, if any, of the packages from which the samples analyses were obtained."

The general rule prevailing in most jurisdictions is that the police power of the state may be exercised within a limited scope if such activities are to be in conformity with the constitution and statutes of the state in which the police power is exercised, and that any act done thereby must be essential to the safety, health, peace or morals of the people of the state.

It is believed that the general rule in this respect has been briefly stated in Vol. 11, Am. Jur., page 1006, as follows:

"Although constitutional guaranties cannot be transgressed, it is settled that the possession and enjoyment of all rights are subject to the police power which includes such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Consequently, both persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, welfare, and prosperity of the people of the state, everything contrary to public policy or inimical to the public interest is the subject of the exercise of the power. * * *"

(Underscoring ours.)

It appears that the power to make regulations delegated to a board or department of government by the legislative department, for the purpose of protecting the public safety, health, peace or good morals, is not an unconstitutional delegation of power by the legislative department.

In the case of United States v. Grimaud, 220 U.S. 506, 55 L. Ed. 563, it was held that the legislative power of congress was not unconstitutionally delegated to the Secretary of Agriculture by the provisions of the forest reserve act of June 4, 1897, and February 1, 1905, which made violations of the Secretary of Agriculture's regulations, promulgated under authority of the acts criminal offenses. At 55 L. Ed., l. c. 569, the court said:

"That 'Congress cannot delegate legislative power is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.' * * * But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense.

"It is true that there is no act of Congress which, in express terms, declares that it shall be unlawful to graze sheep on a forest reserve. But the statutes from which we have quoted declare that the privilege of using reserves for 'all proper and lawful purposes' is subject to the proviso that the person so using them shall comply 'with the rules and regulations covering said forest reservation.' The same act makes it an offense to violate those regulations; that is, to use them otherwise than in accordance with the rules established by the Secretary. Thus the implied license under which the United States had suffered its public domain to be used as a pasture for sheep and cattle, * * * was curtailed and qualified by Congress, to the extent that such privilege should not be exercised in contravention of the rules and regulations. * * *"

Again, in discussing the legality of a statute of Vermont, in the case of *State v. Peet*, 68 Atl. 661, the court said at l.c. 663:

"It is argued that the state has power to prohibit the exportation to another state of anything which is not an article of commerce, as, in this case, the flesh of calves which were less than four weeks old, or which weighed less than 50 pounds, dressed weight, when killed, because unwholesome for human food. The question then arises whether such meat, for the purpose named, is an article of interstate commerce, and whether it is within the power of a state Legislature to declare it otherwise. On July 25, 1906, for the purpose of preventing the use in interstate or foreign commerce of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food, under the authority conferred upon him by Act Cong. June 30, 1906, c. 3913, 34 Stat. 674, the Secretary of Agriculture issued regulations 'for the inspection, reinspection, examination, supervision, disposition, and method and manner of handling of live cattle, sheep, swine, and goats,

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and the carcasses and meat food products of cattle, sheep, swine, and goats * * *.' Under regulation 15 it is provided '(X) Carcasses of animals too immature to produce wholesome meat, all unborn and stillborn animals, also carcasses of calves, pigs, kids, and lambs, under three weeks of age, shall be condemned.' Since these regulations were prescribed by the Secretary of Agriculture under authority of the act of Congress before referred to, and are not inconsistent with the provisions of that act, they have the force of law. Nye v. Daniels, 75 Vt. 81, 53 Atl. 150."

(Underscoring ours.)

In the typical Missouri decision of City of St. Louis v. Grafe-mand Dairy Co., 190 Mo. 492, regarding the exercise of police power by a city, the court upheld the legality of an ordinance for inspection and sale of milk within the corporate lines, and at l. c. 506, said:

"* * *Section 26, article 3, of the charter of St. Louis, expressly provides: 'That the Mayor and Assembly shall have power within the city, by ordinance not inconsistent with the Constitution or any law of this State, or of this charter, to make provision for the inspection of butter, cheese, milk, lard and other provisions, and to license, tax and regulate occupations and secure the general health.' No more definite and adequate provision and authority could have well been given to the city to enable it to provide all reasonable regulations for the inspection of milk, and to exact a reasonable inspection fee therefor, and we have already ruled that, as to the inspection fee in this case, it is not a tax within the meaning of that term as understood in our Constitution and general statute. That the State, and this city under this specific grant of power, may make any business requiring police legislation pay the expense of regulating and controlling it, and that this may be done by exacting inspection fees from those engaged in the business, is no longer an open question in this country. * * *"

(Underscoring ours.)

In view of the holding in the above mentioned decisions, it is our thought that the power to promulgate regulations for the efficient

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enforcement of the food and drug laws, as provided by Sections 196.045 and 196.050, supra, granted to the division of health by the legislature, was not an unauthorized delegation of legislative authority in violation of the Constitution or any Missouri statutes, but that said statutes, along with other sections of said food and drug laws, were police measures enacted for the purpose of protecting the public health and preventing the perpetration of fraud upon the public by unscrupulous manufacturers and vendors of commodities covered by the act. Consequently, the promulgation of the State Milk Regulations and their enforcement by the division of health under authority of said statutes, were valid and proper exercises of the police power which has been delegated to that department of the state government.

Since said regulations are limited to the subject matter and scope provided by Sections 196.045 and 196.050, supra, they have the same force and effect as if they had been enacted into statutory laws.

CONCLUSION

It is therefore the opinion of this department that the State Milk Regulations promulgated by the division of health under the authority granted to said department by Sections 196.045 and 196.050, RSMo 1949, are within the narrow limits as to subject matter and scope of operation provided by said sections, and have the force and effect of statutory law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

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