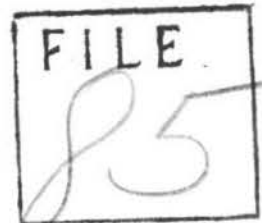


BOARD OF HEALTH: Legality of rules and regulations construed.

May 7, 1942

James Stewart, M. D.
State Health Commissioner
Jefferson City, Missouri



Dear Dr. Stewart:

Your letter of May 6, 1942, enclosing a list of "rules and regulations" of the State Board of Health governing construction and operation of canneries, has been referred to me for an opinion. The letter reads as follows:

"We are enclosing herewith tentative regulations prepared for adoption by the State Board of Health, which are designed to govern the construction and operation of canneries in accordance with general powers granted under Chapter 58, Articles 1, 2, and 3, Revised Statutes of Missouri, 1939, and specifically as provided in Sections 9857, 9863, 9871, 9888, 9889, and 9898, R. S. of Missouri, 1939.

"As State Health Commissioner, I wish to be advised whether or not, in your opinion, the enclosed regulations constitute a legal means of governing and regulating the construction and operation of these establishments as based upon statutory powers of this Board.

"Inasmuch as the State Board of Health desires to act upon these regulations at its May 21st meeting, we would appreciate your opinion in this matter at your earliest convenience."

Powers conferred upon boards of health to enable them effectually to perform their important functions in safe-guarding the public health should receive a liberal construction. See 29 C. J., Sec. 30, p. 248.

In the case of State ex rel. Horton v. Clark et al., 9 S. W. (2d) 635, l. c. 638, it is held, "While boards of this character (health) can not act arbitrarily, or without substantial evidence, yet, when any act, requiring the exercise of judgment and the employment of discretion, is within the scope of the exercise of a reasonable discretion, it will not be interfered with."

As to the items and rules which you have submitted, it will be necessary for me to take these up in numerical order:

Item I. Floors -

"The floors of all rooms, platforms receiving sheds, except those rooms used for storage of cans and canned goods, shall be constructed of concrete or other equally impervious material, and shall be smooth, graded to drain, provided with trapped drains, and kept clean at all times."

This item is in conformity with Sections 9888 and 9890, R. S. Mo. 1939, and constitutes a legal regulation.

Item II. Walls and Ceilings -

"The walls and ceilings of rooms in which the preparing and canning of fruits and vegetables are done, shall be smooth and washable, free from dirt accumulations and shall be kept clean and in good repair during the entire canning season."

"Ceilings" are covered in Section 9890, R. S. Mo. 1939, but the regulation as to "walls" does not come under the statute. However, on the rule of construction cited above, we feel it is a legal regulation.

Item III. Screening -

"All openings to the outer air shall be effectively screened. Doors shall open outward and be self closing unless other effective means are used to prevent the entrance of flies. Tables used for peeling and packing shall be further protected by fans where needed."

The reference to "screening" is covered in Section 9891, R. S. Mo. 1939. As to the tables used for "peeling and packing," this would be a reasonable regulation.

Item IV. Lighting and Ventilation -

"All rooms in which fruit and vegetables are prepared or processed shall be well lighted and ventilated."

This rule comes directly under Section 9888, R. S. Mo. 1939, and is a legal regulation.

Item V. Protection from Contamination and Flies -

"The various canning operations shall be so located and conducted as to prevent any contamination from one to the other. All means necessary for the elimination of flies shall be used."

The authority for such a rule comes from Sections 9889 and 9891, R. S. Mo. 1939.

Item VI. Toilet Facilities -

"Every cannery shall be provided with toilet facilities conforming with the regulations of the State Board of Health. Toilet rooms shall not open directly into any room used for the processing or canning of fruit and vegetables. The doors of all toilet rooms shall be self-closing. Toilet rooms shall be kept clean, be properly ventilated and contain hand-

washing signs. In case privies are used they shall be constructed and maintained in conformity with State Board of Health Regulations."

Regulation of toilet facilities is granted to the Board of Health under Section 9892, R. S. Mo. 1939, and we feel is a reasonable regulation.

Item VIII. Lavatory Facilities -

"Handwashing facilities, including warm running water, liquid or powdered soap, and approved sanitary towels shall be provided. The use of a common towel is prohibited."

This rule is authorized under Section 9892, R. S. Mo. 1939.

Item XI. Cleaning of Containers and Equipment -

"All containers and equipment with which the food product comes in contact shall be thoroughly cleaned after each usage."

Section 9889, R. S. Mo. 1939, is the authority for the legality of this rule.

Item XV. Use of Spoiled Fruits and Vegetables -

"No spoiled, decomposed, or worm infected fruit or vegetables shall be used. Special attention shall be given to the sorting of all food products that are to be used for canning and preserving purposes."

This regulation has legality conferred upon it by Section 9868, R. S. Mo. 1939.

Item XVII. Personnel Health -

"In conformity with Section 9895, R. S. of Missouri, 1939, which forbids the employment of persons affected with any venereal or other infectious or contagious disease, in any industry which has to do with the production or distribution of food, all persons

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so employed shall have a health certificate signed by a reputable physician, which shall declare such employees free from infectious or contagious disease."

This requirement is a reasonable and legal requirement whose authority is Section 9895, R. S. Mo. 1939.

Item XVIII. Cleanliness of Employees -

"All persons employed in the preparation of food for canning and processing shall wear clean outer garments and shall keep their hands clean at all times while thus engaged. All employees who prepare food for processing shall wear clean washable caps."

This item likewise can be traced to Section 9895, supra.

This department is of the opinion that the above numbered items which are taken from your "rules and regulations" concerning the operation and construction of canneries, have statutes which give legality to such rules and regulations, and we are of the opinion that they are valid requirements.

However, the following items which we will set out, do not have any definite statutory provisions to which they can be traced. These items are:

Item VII. Water Supply -

"The water supply shall be easily accessible to all rooms where processing and canning is done, shall be adequate and of a safe sanitary quality."

Item IX. Construction of Equipment -

"All equipment with which the uncanned food product comes in contact shall be constructed of non-corrodible material and shall be kept in such a state of repair that it can be easily cleaned."

Item XII. Bactericidal Treatment -

"After cleaning and immediately before

the days run, all equipment with which the food products come in contact shall be given an approved bactericidal treatment. A bactericidal treatment is the application of any method or substance for the destruction of bacteria which, in the opinion of the State Board of Health, does not adversely affect the equipment or food product or the health of the consumer, and which is effective."

Item XIII. Storage and Handling of Equipment -

"After cleaning and bactericidal treatment, all pans, pails, and other multi-use equipment shall be stored on racks above the floor protected from splash, dust, and flies. Between bactericidal treatment and usage, and during usage, containers and equipment shall not be handled in a manner that will permit contamination. Storage of new cans, bottles and other enclosures shall be in a place protected from dust, flies and other contamination."

Item XIV. Processing and Cooking -

"All products must meet specific requirements as to exhaust, initial temperature, cooking time and cooking temperature, as determined for each product. All apparatus used in the processing and cooking operations must be properly designed and equipped."

Item XVI. Sorting of Canned Goods -

"At the time of labeling, crating, or other handling of canned goods, all cans showing abnormal exterior shall be discarded."

Item XIX. Miscellaneous Requirements and Waste Disposal -

"The surroundings of all canneries shall be kept neat and clean and free of all rubbish. None of the operations connected with the cannery shall be conducted in rooms used for domestic purposes. No cats, dogs, fowls, or

other animals shall be allowed in the cannery. Waste products from the plant shall be disposed of in conformity with the requirements of the State Board of Health."

Although the seven sections cited above are not given specific basis by any statute, it is our opinion that Section 9857, R. S. Mo. 1939, is authority for the promulgation of these rules. Said section is as follows:

"It shall be the duty of the food and drug commissioner 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 arrest and prosecute, or 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. Said commissioner shall make rules and regulations for carrying out the provisions of this article, and such rules and regulations shall conform as nearly as practicable to the rules and regulations at present established and which may hereafter be established for the enforcement of the act of congress, approved June 30, 1906, and known as the food and drug act."

The only regulation which we have not taken up is Item X. Such rule provides as follows:

Item X. Cans, Bottles and Jars -
"Only new unused cans, bottles or jars

shall be used as containers for canning or processing food products. Enameled or other approved metal pans or pails shall be used for carrying peeled stock."

Section 9889, R. S. Mo. 1939, provides in part as follows:

"Contents of Places and Utensils Used Must be Protected.--* * * * *
The use of second hand bottles for vinegar or other liquids, used as food or drink, is forbidden unless the same are first sterilized with live steam.
* * *"

As can be seen from a reading of the above Item X and Section 9889, R. S. Mo. 1939, the two provisions conflict in that Item X prohibits the use of "any used cans, bottles or jars." On the other hand, Section 9889, R. S. Mo. 1939, provides that bottles for "vinegar or other liquids" shall not be used unless treated with live steam. The law will not permit rules or regulations set up by a board of health or other board of like description to overrule statutes passed by the legislature. See 29 Corpus Juris 249, which provides as follows:

"Health authorities cannot, by the operation of their rules and regulations, enlarge or vary the powers conferred upon them by the law creating them and defining 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."

Therefore, it is the opinion of this department that Item X is antagonistic to the statute and is invalid.

All the other rules and regulations, we feel are legal and in compliance with the Statutes of Missouri.

Respectfully submitted,

APPROVED:

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