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STATE OF NEBRASKA
OFFICIAL
APR 19 1994
DEPT. OF JUSTICE

DATE: April 19, 1994

SUBJECT: Interpretation of Nebraska Statutes Concerning Regulation of Retail Food Stores

REQUESTED BY: Larry E. Sitzman, Director
Nebraska Department of Agriculture

WRITTEN BY: Don Stenberg, Attorney General
Lynn A. Melson, Assistant Attorney General

You have requested an Attorney General's Opinion on several questions involving interpretation of the Nebraska Pure Food Act, Neb. Rev. Stat. §§ 81-2,239 to 81-2,292 (Cum. Supp. 1992, Supp. 1993). Your specific questions are as follows:

I.

Does the Department have statutory authority under the Nebraska Pure Food Act to license and inspect establishments which offer for sale only food which is in hermetically sealed containers?

The Nebraska Pure Food Act (the "Act") includes certain federal codes which the legislature has adopted by reference. One of these codes is the Retail Food Code statutorily defined as the Retail Food Store Sanitation Code as it existed on June 8, 1985, with the exception of certain listed sections of that code. Neb. Rev. Stat. § 81-2,253 (Cum. Supp. 1992). For purposes of the Act, the statutory definitions as well as the definitions found in the codes adopted by reference are applicable. § 81-2,240. If there is an inconsistency between the statutory sections and any of the

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codes adopted by reference, the statutory provisions control. § 81-2,263.

There are several definitions which are relevant in our analysis of your first question. "Food establishments" in Nebraska must be licensed and inspected by the Department of Agriculture. § 81-2,270. Such food establishments must meet requirements concerning toilet facilities, sinks and faucets, and storage of poisonous or toxic materials and must also submit construction and remodeling plans to the Department of Agriculture for approval. §§ 81-2,264 through 81-2,269. The Legislature has defined "food establishment" to include retail food stores as defined in the Retail Food Code. § 81-2,245.

Turning to the Retail Food Code, the term "retail food store" is defined as follows:

> Any establishment or section of an establishment where food and food products are offered to the consumer and intended for off-premise consumption. The term includes delicatessens that offer prepared food in bulk quantities only. The term does not include establishments which handle only prepackaged, non-potentially hazardous foods; road side markets that offer only fresh fruits and vegetables for sale; food service establishments; or food and beverage vending machines.

Retail Food Code § 1-102(q). Therefore, if a business handles only prepackaged, non-potentially hazardous foods, it is not a retail food store and, therefore,not a food establishment which may be licensed or inspected by the Department of Agriculture pursuant to Neb. Rev. Stat. § 81-2,270.

Unfortunately, the phrase "prepackaged, non-potentially hazardous foods" is not defined or explained in either the Retail Food Code or the Pure Food Act. To the extent that this language may be considered ambiguous, we have examined the legislative history of the Pure Food Act and found no discussion which would shed light on the interpretation of this language. Agency rules and regulations are sometimes helpful in interpreting statutory language and a court may give considerable weight to an agency's interpretation. ***Monahan v. School Dist. No. 1***, 229 Neb. 139, 425 N.W.2d 624 (1988). Although the Department is authorized to adopt and promulgate rules and regulations to aid in the administration of the Nebraska Pure Food Act, it has not done so. § 81-2,288.

In connection with your opinion request, you have advised us that the Ombudsman's office has taken an interest in this question

after receiving a complaint from a drugstore owner. That office has expressed the view that businesses which sell only foods in hermetically sealed containers are exempt from licensure and inspection under the Act. The Ombudsman's office relies on the following definition of "potentially hazardous food" found at Neb. Rev. Stat. § 81-2,251.01:

> ***Potentially hazardous food, defined.*** Potentially hazardous food shall mean any food that consists, in whole or in part, of milk or milk products, eggs, meat, poultry, fish, shellfish, edible crustacea, or other ingredients, including synthetic ingredients, and which is in a form capable of supporting rapid and progressive growth of infectious or toxigenic microorganisms. Potentially hazardous food shall not include foods that have a pH level of four and six-tenths or below or a water activity value of eighty-five hundredths or less under standard conditions or food products in hermetically sealed containers processed to prevent spoilage.

(Emphasis added). The Ombudsman's office then concludes that all food products in hermetically sealed containers fit within the term "prepackaged, non-potentially hazardous foods."

You have also advised us as to the Department's interpretation of the relevant statutes. As we understand your position, you believe that one cannot simply refer to the statutory definition of potentially hazardous food (§ 81-2,251.01) in order to determine the meaning of the term prepackaged, non-potentially hazardous foods as used in the definition of retail food store. You point out that the term potentially hazardous food is used in the sections of the Retail Food Code which govern the required temperature, preparation and display of certain food products. You believe it is not relevant in interpreting the definition of retail food store. It is our understanding that the Department instead interprets the term prepackaged, non-potentially hazardous food to mean processed, nonperishable foods such as packaged crackers, focusing on the type of food rather than the type of container in which it is sold.

You have presented a very close question. Valid arguments can be advanced both to support and refute the Department's position. In our opinion, the better answer is that businesses selling only food in hermetically sealed containers should not be required to obtain a permit pursuant to the Pure Food Act.

As previously stated, the meaning of the language prepackaged, non-potentially hazardous food is crucial in determining whether a business fits within the definition of a retail food store so as to be subject to the licensing and inspection provisions. This term is not defined in either the statutory provisions or the Retail Food Code. We found no relevant legislative history. Because the legislative history does not reveal the intent of the language at issue, it is necessary to look at the Act as a whole in order to determine such intent. ***Coleman v. Chadron State College***, 237 Neb. 491, 466 N.W.2d 526 (1991). In addition, since no regulations have been promulgated to define or explain the language in question, we can only refer to the Act itself.

Turning to the statutory provisions and the Retail Food Code, we can only explain the term prepackaged, non-potentially hazardous foods, as that term is used in the definition of retail food store (Retail Food Code § 1-102(q)), by referring to Neb. Rev. Stat. § 81-2,251.01, the definition of potentially hazardous food. That statute expressly provides that the term does not include foods with a certain pH level, foods with a certain water activity value or "food products in hermetically sealed containers processed to prevent spoilage." It appears that, in defining potentially hazardous food, the Legislature has considered whether that food is in a form "capable of supporting rapid and progressive growth of infectious or toxigenic microorganisms." § 81-2,251.01. Arguably, as a hermetically sealed container is designed "to be secure against the entry of microorganisms and to maintain the commercial sterility of its contents after processing" (Retail Food Code § 1-102(i)), food in a hermetically sealed container is not in a form that is potentially hazardous and is, in fact, non-potentially hazardous. We note that, in order to be exempt from the licensing requirements of a retail food store, the food must also be prepackaged. Retail Food Code § 1-102(q). While the term prepackaged is not specifically defined, "packaged" is defined to mean "bottled, canned, cartoned, bagged, or securely wrapped." Retail Food Code § 1-102(k). With these definitions in mind, it is our opinion that food in a hermetically sealed container would also be considered prepackaged.

In conclusion, based on the analysis above, it is our opinion that a business which offers for sale only food in hermetically sealed containers should not be subject to licensing and inspection requirements as a retail food store under the Act. In the absence of any other explanation or definition, a business owner or a member of the general public has no notice as to whether a retail food store permit must be obtained without reference to the statutory definition of potentially hazardous food.

II.

What legal ramifications follow from a letter from the office of a committee chairman to an agency regarding the agency's long-standing interpretation of a statute where there has been no change to the statute?

You may wish to give some deference to the opinion expressed by Senator Dierks in his letter. However, the letter of a state legislator in which he expresses his opinion of your interpretation has no legal effect.

III.

If the Department changes its policy (regarding the licensing of establishments which sell only food in hermetically sealed containers),

Would the Department be liable for failing to license these establishments and inspect food in hermetically sealed containers if someone were to be injured by such uninspected food?

Would the Department have to refund money to establishments selling only food in hermetically sealed containers, and, if so, for how many years of previous licensing? Would this apply to permit fees, inspections fees, or both?

Would other retail food establishments have a claim against the Department for unequal treatment, if the Department continued to inspect food in hermetically sealed containers at those establishments?

If the Department changed its policy and determined that it had no statutory authority to license and inspect those establishments which sell only food in hermetically sealed containers, we do not think it likely that the Department would incur the tort liability to which you refer. It is impossible to analyze what causes of action may exist against the Department of Agriculture in any given factual situation. However, the injured person would first need to establish that the Department's failure to inspect was the proximate cause of his or her injury. In addition, most claims involving a failure to make an inspection to determine whether the inspected property violates the law or constitutes a public hazard are exempted from the State Tort Claims Act. Neb. Rev. Stat. § 81-8,219(7) (Supp. 1993). The State Tort

Claims Act also does not apply to claims based upon an act or omission of a state employee, exercising due care, in the execution of a statute or regulation or based upon the exercise of a discretionary function. Neb. Rev. Stat. § 81-8,219(1). We think it likely that a state employee acting in reliance on a formal legal opinion would be found to have exercised due care.

If the Department were to change its policy regarding licensing of these establishments, we cannot think of any theory of recovery or authority which would authorize refunds of permit or inspection fees paid in the past.

Finally, we do not think it likely that retail food stores would have a claim against the Department for unequal treatment if the Department continues to inspect food sold in hermetically sealed containers in those stores. The Eighth Circuit Court of Appeals discussed the governing standard for determining whether a state statutory classification violates the Equal Protection clause of the federal Constitution in ***Norwest Bank v. W.R. Grace & Co.***, 960 F.2d 754 (8th Cir. 1992). In that case, the plaintiff challenged the constitutionality of a Nebraska statute of limitations for product liability actions which distinguished between manufacturers and sellers of products and other entities such as repairmen. The Court explained that a state statutory classification that does not create a suspect class will be upheld if it is rationally related to a legitimate state interest. The Court of Appeals also quoted the United States Supreme Court which has held that a statutory classification does not violate the Constitution because the classification "is not made with mathematical nicety or because in practice it results in some inequality." ***Lindsley v. Natural Carbonic Gas Co.***, 220 U.S. 61, 78 (1911). "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." ***McGowan v. Maryland***, 366 U.S. 420 (1961). In our view, it is more likely that statutes providing for inspection of all food products in retail food stores would be upheld.

Sincerely,

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APPROVED BY:

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9-156-6.21