

2006 DEC 29 PM 1 40

CLERK

IN THE COMMON PLEAS COURT OF DARKE COUNTY, OHIO

CAROL SCHMITMEYER	:	CASE NO. 06-CV-63277
	:	
Appellant,	:	
	:	
vs.	:	JONATHAN P. HEIN, Judge
	:	
OHIO DEPARTMENT OF AGRICULTURE	:	
	:	DECISION AND
Appellee.	:	<u>JUDGMENT ENTRY</u>

This matter came before the Court pursuant to the Notice of Appeal filed by Appellant from the decision of the Director of the Ohio Department of Agriculture as dated the 28th day of September, 2006. The Appellant is represented by David G. Cox, Esq. The Appellee is represented by James R. Patterson, Assistant Attorney General.

The Record on Review

By agreement of counsel, the parties were to submit all pleadings and matters of record by December 17, 2006. Further, since facts and legal arguments by counsel have been raised in several cases, and since this is a single judge court, counsel agreed that the Court could consider all matters of record in the following cases: Case No. 06-CV-63277 and Case No. 06-CV-63231 (including the hearing on a motion to quash administrative subpoenas as heard by the Court on September 6, 2006). These pleadings and arguments, along with the Exhibits and transcript from the administrative hearing conducted in the Department of Agriculture on September 8 and 14, 2006, are considered by this Court.

Case Facts

This matter involves the proposed revocation of the Appellant's Grade A milk producers license by the Ohio Department of Agriculture. This revocation was ordered by the Director of the Department following an administrative hearing conducted on September 8 and 14, 2006. The revocation was stayed by this Court following the filing of a notice of appeal herein.

The facts of this case were capably set forth by the administrative hearing officer in his Findings of Fact, Conclusions of Law and Recommendations dated September 19, 2006:

"Respondent and her husband operate a dairy farm in Ohio and own and maintain a herd of approximately 100 dairy cows. At all times relevant to this proceeding, Respondent possessed a Grade A milk producer license issued by the ODA but did not have a dairy processor license. For some period of time prior to and including October 2005, Respondent and her husband sold 3-10% of their dairy herd to other owners in an arrangement commonly known as a "herd-share" agreement. As many as 340 shares of Respondent's herd were sold pursuant to her herd-share agreement.

"To participate in Respondent's herd-share agreement an owner paid a flat fee of \$50.00 per share, paid an additional \$6.00 per share per week as a "boarding fee," and executed a bill of sale and boarding agreement. The \$6.00 "boarding fee" was not derived from or related to the actual cost to board Respondent's cows. The bill-of-sale used by Respondent for her herd-share agreement was a one page document that did not identify how shares were valued or redeemed, did not identify what, if anything, owners were entitled to receive for their investment, and in it Mr. and Ms. Schmitmeyer warranted that they had full legal and equitable ownership of the herd, and the herd was not subject to any liens or security interests (recorded or unrecorded) of any lender or third-party. The warranty made by Mr. and Ms. Schmitmeyer was inaccurate since all of their livestock were subject to recorded UUC [sic] Financing Statements to Greenville National Bank at the time of the herd-share agreement.

"Testimony at the hearing established that it was common knowledge among the herd-share owners that one share of Respondent's herd-share agreement represented one gallon of raw milk per week at \$6.00 per gallon. The milk provided to owners pursuant to the herd-share agreement was raw milk that had not been processed. The milk was bottled from a tap in Respondent's bulk milk tank and capped by hand. The jugs of raw milk were then distributed to owners without being labeled. Distribution of the raw milk generally occurred through delivery by an employee/designee of Respondent to an agreed location. The employee/designee of Respondent responsible for delivery also collected the weekly \$6.00 "boarding fee." Of each \$6.00 "boarding fee" collected, \$4.00 was paid to Respondent and \$2.00 was kept by the employee/designee.

Following issuance of the Recommendations by the hearing officer, the Appellant provided additional written evidence which explained how the Appellant valued the interests in the herd that she sold on a per share basis. The Director adopted the hearing officer's recommendations and gave notice of the revocation of Appellant's license.

Legal Issues

As required by R.C. 119.12, the Department of Agriculture has filed with the Court the record of the administrative hearing. The record contains 44 items, including Record #1 and Record #2, which are the transcript of the administrative hearing. The purpose of the transcript is to allow this Court to determine whether the decision to suspend the Appellant's Grade A milk producer's license was based upon "reliable, probative and substantial evidence and is in accordance with law." See R.C. 119.12; Sell v. Adams Twp. Board of Zoning Appeals (December 22, 2000), Darke App. No. 1518. If so, the determination of the agency should be affirmed. If the administrative decision is not based upon reliable, probative and substantial evidence, or is not in accordance with law, then the Court may reverse, vacate, or modify the order, or make such other rulings as are supported by reliable, probative and substantial evidence and are in accordance with law. R.C. 119.12.

Generally, a Court should give deference to the factual findings of the administrative hearing officer, but the findings of the hearing officer are by no means conclusive. *Univ of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108 at 111.

An independent review is performed by the Court when the decision of the hearing officer is based upon an interpretation of a constitutional principal, state or federal statute, or case law. ["An agency adjudication is like a trial, and while the reviewing court must defer to the lower tribunal's findings of fact, it must construe the law on its own. To the extent that an agency's

decision is based on construction of the state or federal Constitution, a statute, or case law, the common pleas court must undertake its R.C. 119.12 reviewing task completely independently." *Ohio Historical Society v. State Employee Relations Board* (1993), 66 Ohio St.3d 466.]

Since the issues herein are a matter of first impression in this state, the following definitions are supplied to assist in understanding the law and to comprehend the Court's decision:

R.C. 917.01 Definitions:

(F) "Milk" means the lacteal secretion, substantially free from colostrum, obtained by the complete milking of one or more healthy cows, goats, sheep, or other animals and intended for either of the following purposes:

- (1) To be sold for human consumption or for use in dairy products;
- (2) To be used for human consumption or for use in dairy products on the premises of a governmental agency or institution.

(G) "Grade A milk" means milk produced by a person holding a valid producer license of the grade A milk category issued pursuant to section 917.09 of the Revised Code.

(J) "Grade A milk producer" means a person located in this state who sells or offers for sale grade A milk obtained from a cow, goat, sheep, or other animal that the person owns or controls.

(K) "Manufacture milk producer" means a person located in this state who sells or offers for sale manufacture milk obtained from a cow, goat, sheep, or other animal that the person owns or controls.

(N) "Dairy products" means milk, raw milk for sale to the ultimate consumer, grade A milk products, and manufactured milk products.

(S) "Raw milk for sale to the ultimate consumer" means the raw milk sold or offered for sale by a raw milk retailer.

(T) "Raw milk retailer" means a person who, prior to October 31, 1965, was engaged continuously in the business of selling or offering for sale raw milk directly to ultimate consumers.

R.C. 917.04 Sales of and labeling for raw milk.

No raw milk retailer shall sell, offer for sale, or expose for sale raw milk to the ultimate consumer except a raw milk retailer who, prior to October 31, 1965, was engaged continuously in the business of selling or offering for sale raw milk directly to ultimate consumers, holds a valid raw milk retailer license issued under section 917.09 of the

Revised Code, and is subject to the rules regulating the sale of raw milk adopted under this chapter.

No person shall fail to label, in accordance with rules adopted by the director of agriculture under section 917.02 of the Revised Code, all final delivery containers used for the sale of raw milk to ultimate consumers with the words "this product has not been pasteurized and may contain disease-producing organisms."

R.C. 917.05 Prohibited acts.

No person shall do any of the following or cause any of the following to be done:

(E) Manufacture, sell, or deliver, hold, or offer for sale a dairy product that is not labeled or represented in accordance with the "Nutrition Labeling and Education Act of 1990," 104 Stat. 2353, 21 U.S.C.A. 343, as amended, and regulations adopted under it, and with this chapter and Chapter 3715. of the Revised Code and rules adopted under those chapters;

R.C. 917.09 License types and categories.

(A) The director of agriculture may issue the following types of licenses:

- (1) Producer;
- (2) Processor;
- (3) Milk dealer;
- (4) Raw milk retailer;
- (5) Weigher, sampler, or tester;
- (6) Milk hauler.

(B) The director may adopt rules establishing categories for each type of license that are based on the grade or type of dairy product with which the licensee is involved.

(C) Except as provided in section 917.091 of the Revised Code and division (J) of this section, no person shall act as or hold the person's self out as a producer; processor; milk dealer; raw milk retailer; weigher, sampler, or tester; or milk hauler unless the person holds a valid license issued by the director under this section.

(H) Suspension and revocation of licenses shall comply with section 917.22 of the Revised Code and rules adopted under section 917.02 of the Revised Code.

R.C. 917.22 Denial, suspension or revocation of license.

(A)(1) The director of agriculture may deny, suspend, or revoke a license issued under this chapter for a violation of this chapter or the rules adopted under it. Except as provided in division (A)(2) of this section, the denial, suspension, or revocation of a license is not effective until the licensee is given written notice of the violation, a reasonable amount of time to correct the violation, and an opportunity for a hearing.

Case Analysis

The Court finds that the facts as determined by the hearing officer are supported by substantial, reliable and probative evidence. The summary set forth above is a succinct explanation of the facts involved herein. Indeed, the parties often agree about the facts, while vehemently disagreeing about the conclusions which are reached when the facts are applied to the applicable statutes.

However, the Court further finds that the hearing officer's decision was not in conformance with the law based upon various deficiencies in R.C. 917 which are fundamental to a correct interpretation of the law. Therefore, the decision of the Director of the Department of Agriculture was similarly deficient. These deficiencies are described as follows.

I.

First, the Court concludes that the hearing officer erred when preventing the Appellant from eliciting testimony from representatives of the Department about the scope and extent of circumstances when raw milk consumption is permitted by the Department. From numerous portions of the Record, and arguments by counsel, it is undisputed that there is no enforcement of laws involving raw milk consumption when the herd owner and family members consume raw milk at the farm. However, in the absence of testimony by a representative of the Department of Agriculture, the basis for this exception to the law cannot be examined. Also, the scope and extent to which this enforcement exception is permitted also cannot be examined.

For example, is this exception to the law permitted by the Department because of the location of the consumption, i.e. at the site of the milk production? Or is the exception permitted because consumption is by the licensee and/or the herd owner? Also, what is the extent to which this exception is applied? Does the Department allow herd owners and their children /

family members to consume raw milk? Or must the children / family members reside in the farm household? Or must the children / family members also be active participants in the milking operation in order to “legally” consume raw milk?

How does the Department apply this exception when other forms of ownership are involved? For example, if the cows are owned by a partnership, can all partners consume raw milk? Or must the partners be family members? Or must the partners consuming the raw milk reside on the farm? And if the cows are owned by a corporation, the same troubling questions apply with even more shareholders being involved in the equation.

From the pleadings, it is clear that counsel for the Appellant wished to inquire into these circumstances for various reasons, including (1) the interpretation by the Department of the terms “sale” and “sold” as they are used in Chapter 917, and (2) the enforcement practices of the Department *vis a vis* statutory violations. In the absence of such testimony, the Court cannot find the conclusions of the hearing officer were in conformance with applicable laws. The hearing officer’s exclusion of this testimony caused material prejudice to the Appellant’s ability to defend against the allegations raised during the hearing.

II.

Second, in the absence of inquiry into current enforcement practices (as explained in the preceding paragraphs), the Court cannot determine whether the Department is involved in arbitrary enforcement of its regulatory duties under Chapter 917. If there is arbitrary enforcement on the part of the Department, such conduct would necessarily be an abuse of the Department’s discretion and, therefore, subject to reversal on appeal to this Court. See *Balsey v. Clennin* (1964), 3 Ohio App.2d 1; *State ex rel. Shelly Materials v. Clark Cty Bd. of Commrs.*, 2005-Ohio-6682 (Second Appellate District). While regularity of enforcement proceedings may be presumed, *Balsey, supra.*, in the absence of testimony about the practices of the Department regarding

consumption of raw milk by some owners under unknown circumstances, such regularity will not be presumed by this Court.

III.

Third, Chapter 917 is the regulatory statute under which the Ohio Department of Agriculture derives its authority to regulate the sale of raw milk. However, nowhere in Chapter 917 are there definitions of the frequently used terms “sale” or “sold.” In his Recommendation, the hearing officer did not provide a definition of these key terms, in his Order, the Director of the Department did not define these terms. Given their importance in determining the outcome of this case, the Court cannot give deference to the conclusion that Appellant violated R.C. 917.04 (prohibiting the sale of raw milk to the ultimate consumer), R.C. 917.05 (labeling requirements), and R.C. 917.09 (milk processor licensing requirements).

Generally, a plain meaning can be applied to terms included in a statute. *State v. Anderson* (1991), 57 Ohio St. 3d 168. However, for the reasons described herein, this Court cannot assume that a common usage definition was applied. Further, this Court declines to apply the Uniform Commercial Code (UCC) definition since UCC definitions are limited in their application to provisions of Chapter 13. See R.C. 1301.01, introductory paragraph, and R.C. 1302.01(A). While the Holmes County Court of Common Pleas applied the UCC definition in a similar case, this Court chooses to not apply the UCC to a Chapter 917 regulatory proceeding since doing so would stretch the application of the UCC beyond its commercial purposes and would result in subjective interpretation by this Court.

The Department argues that a plain reading of R.C. 917.22, when coupled with application of the ordinary meaning of the terms “sale” and “sold,” will result in a finding that the Appellant sold raw milk to the ultimate consumer. This conclusion would be accurate but for the

Department's practice of allowing raw milk to be consumed by some consumers – but under circumstances not defined by the Department. In view of this undefined practice, an ordinary meaning of “sale” and “sold” cannot be used.

The Department also argues that the “herd share agreement” is a transparent attempt to circumvent the law. [Appellee's brief at p.13.] If the herd share agreement is a circumvention of the law, so is the Department's inexact practice of allowing owners and their families, etc. to consume raw milk. Again, an objective and enforceable definition of “sale” is necessary.

Without a proper definition, too much subjectivity results, including subjective interpretations by the courts. This subjectivity is a result of the Department's practice of allowing some as yet undefined persons (owners, family members, etc.) to consume raw milk at as yet undefined locations (on farm, etc.). Hypothetically, without a clear definition, this Court could define a “sale” in a way which would allow delivery of raw milk to all persons who have any small or remote ownership interest in dairy cow. This definition would probably allow delivery of raw milk to herd share owners, but would exclude delivery to family members of the dairy farmer – especially minors – unless they are also herd share owners. Under another hypothetical, the Court could define a “sale” in a way which would allow delivery of raw milk to all persons who have a small or remote ownership interest in a dairy cow, provided the owner consumes the raw milk on the farm. This definition might allow delivery to herd share owners but only if the raw milk is consumed on the farm. Numerous other examples could be propounded depending on the practices allowed by the Department.

For this Court to develop its own definition of the terms “sale” and “sold,” the Court would be required to determine the public goals and purposes to be served by regulating the

consumption of raw milk. Various public purposes would be weighed, such as protection of the food supply and furthering the rights in a free society for individuals to consume foods of their choice. Determining the public goals and purposes to be served by regulatory legislation is a function traditionally reserved for the Legislature. Counsel have suggested that the Ohio Legislature define these terms, and this suggestion is recommended by this Court. Indeed, there are several legislative proposals pending to provide a solution to the dilemma described in this case. For examples of other state statutes which include specific definitions in their milk regulations, see Record #11, p.1; Record # 12, p. 3; Record # 13, p.9. [For an Ohio example of a public health and safety regulatory statute, see the definition of "sale" as found in R.C. 3719.01(AA) , which is used in the enforcement of laws pertaining to controlled substances.]

In spite of the Department's claims that it possesses no statutory authority to permit the sale of raw milk under any circumstances to the ultimate consumer (except a raw milk retailer in business prior to 10/31/65), the Court opines that the Department possesses administrative authority to adopt rules and definitions, within the scope of the law, to interpret and to uniformly enforce the provisions of Chapter 917. Eg, see R.C. 917.02(A)(1), especially subsection (g), and 917.09(B).

In the absence of necessary definitions by either the Department or the Legislature, and in view of the Department of Agriculture's policy or practice which permits the use and consumption of raw milk by some undefined class of persons at unspecified locations, the Court is unable to conclude as a matter of law whether or not the Appellant is a raw milk retailer within the context of Chapter 917. Further, the Court is unable to conclude as a matter of law whether the herd share agreement is "a thinly veiled attempt" to avoid regulation under Chapter 917 as concluded the hearing officer and the Director of the Department. The Court finds that the

decision of the Director of the Department of Agriculture to revoke the Appellant's Grade A milk producer license is not supported by substantial, reliable and probative evidence, and that the decision was not in accordance with law.

IV.

Fourth, the Court finds that the hearing officer failed to consider the mandates of R.C. 917.22 which require the Director of the Department of Agriculture to provide a "reasonable amount of time to correct" any violations that may lead to revocation of a license. There is no mention in the record of the Director or any designees responding to inquiries by the Applicant for an explanation of the circumstances, if any, under which a "herd share agreement" would be lawful. [See Record # 10; Record #20; Transcript at 136 - 139; see transcript of Lewis Jones.] Providing a meaningful definition of "sale" and "sold" within the context of the current practice of allowing some raw milk production would have fulfilled this requirement.

This Court does not consider the Department's notice of its intent to revoke the Appellant's license as compliance with its duty to allow time to correct potential problems under a herd share agreement. Indeed, the Department avoided its duty to the Appellant by not engaging in discussion with her (and other herd share owners) regarding the issues now before this Court. Due to the failure of the Department to articulate specific problems with the herd share agreement, the Department thereby failed to comply with provisions of R.C. 917.22.

The Department argues that no time must be given to correct violations since the sales are irrevocable and, therefore, uncorrectable. While the argument is logical, R.C. 917.22 does not differentiate between revocable and irrevocable violations, nor between violations which the Department claims are correctable or uncorrectable. The statute makes no differentiation and this Court will not make such an interpretation.

R.C. 917.22 provides that “the denial, suspension or revocation of a license is not effective until the licensee is given * * * a reasonable amount of time to correct the violation...” Due to the failure of the Department to give such time, no regulatory action can now be taken. [The record does not provide any facts for the Court to conclude that there was an emergency which presented a clear and present danger to the public’s health which would have warranted an immediate suspension, per R.C. 917.22(A)(2).]

Other Issues

The Appellant has raised other issues in her brief. These issues have been argued by opposing counsel. For purposes of a more thorough conclusion to this matter, and to allow further analysis if an appeal is pursued, the Court hereby issues the following decisions.

Regarding the alleged vagueness of the license revocation letter sent by the Department to the Appellant [Record #4], the Court finds that the hearing conducted in Case No. 06-CV-63231 provided further clarification of the issues and alleged violations considered at the administrative hearing. Under the facts of this case, there was no vagueness in the wording of the letter which caused any prejudice to the Appellant.

Regarding revocation of the Appellant’s license by the Department without a court determination that the Appellant violated any laws, the Court finds that the Appellants argument is not well founded. The Court adopts the arguments and citations of authority as presented by the Department in its brief at pages 22 and 23.

Regarding Appellant’s challenge to the use of evidence obtained pursuant to a Chapter 901 subpoena, this Court in Case No. 06-CV-63231 held that “the non-disclosure provisions of R.C. 901.27 do not apply to administrative proceedings under Chapter 119...” The Court again adopts this conclusion, based on the merits of the case and principles of res judicata.

Regarding the decision of the hearing officer to quash the subpoena for James Patterson, the Court finds that the hearing officer's decision was in accordance with the law.

Regarding the decision of the hearing officer to quash the subpoena for William Hopper, this Court can make no determination whether attorney-client privilege would bar the testimony. An in camera hearing should have been conducted by the hearing officer. If not privileged, the testimony might have further explained the Department's practice to not enforce R.C. 917.04 against some owners, family members, etc. However, in view of the Court's decision herein, any error was not prejudicial to the Appellant.

Decision

For the above stated reasons, the Court determines that the decision of the administrative hearing officer, and the decision of the Director of the Department of Agriculture, were not supported by substantial, reliable and probative evidence, and were not in accordance with law.

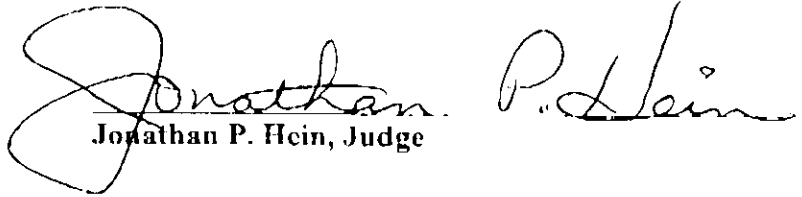
The Court further determines that the Director of the Department of Agriculture erred when he issued his order to revoke Grade A milk producer license of Carol Schmitmeyer. The Court accordingly finds that the order by the Director should be vacated. Further, based upon the deficiencies stated herein, the Department of Agriculture should be enjoined from similar regulatory action against the Appellant.

IT IS THEREFORE ORDERED AND DECREED that the appeal by Carol Schmitmeyer is granted and the order to revoke Appellant's Grade A milk producer license as issued by the Director of the Department of Agriculture on September 28, 2006 is vacated.

IT IS FURTHER ORDERED AND DECREED that the Department of Agriculture is enjoined from regulatory action against the Appellant in her performance of the herd share agreements.

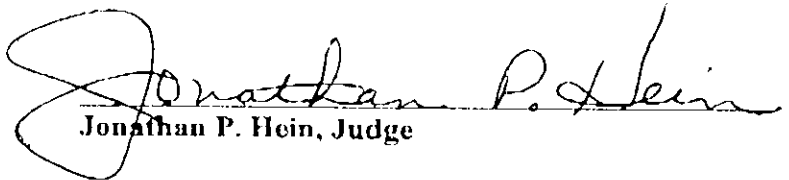
IT IS FURTHER ORDERED AND DECREED, pursuant to R.C. 119.12, that the Court's prior order dated October 4, 2006, which stayed revocation of the Appellant's license and required the Appellant to refrain from providing milk to persons under the herd share agreement, shall remain in effect until either (1) the matter is finally adjudicated by an appellate court, or (2) thirty days hereafter if no appeal is pursued.

FINAL APPEALABLE ORDER. Costs to the Appellee.


Jonathan P. Hein, Judge

Certificate

Pursuant to R.C. 119.12, the Court hereby certifies that a copy of this Decision and Judgment Entry was sent to counsel of record by facsimile transmission on the date of filing and that a certified copy was forwarded to the Ohio Department of Agriculture, 8995 East Main Street, Reynoldsburg, OH 43068 via ordinary U.S. Mail on the date of filing.


Jonathan P. Hein, Judge

cc: David G. Cox, Attorney for Appellant (via fax)
James Patterson, Attorney for Appellee (via fax)
h:\data\judge\research\admin\appeal-rw milk