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COURT 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

