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BOARD OF HEALTH—SECTIONS 3707.33, 3707.34, AND 3707.36 R. C.—POWER TO INSPECT DAIRIES AND FACILITIES INCIDENTAL TO PRODUCTION, PREPARATION, HANDLING AND SALE OF MILK—CHARGE REASONABLE FEE FOR SUCH INSPECTION.

SYLLABUS:

Under the provisions of Sections 3707.33, 3707.34 and 3707.36, Revised Code, the board of health of a general health district may inspect dairies, including the cows and all facilities incidental to the production, preparation, handling and sale of milk, and the places where it is kept for sale and may in addition to the semi-annual fee of fifty-cents for permits to sell milk as provided in Section 3707.34, Revised Code, charge a reasonable fee to cover the cost of such inspection, and that such fees may be charged both to the producers and distributors.

Columbus, Ohio, November 20, 1956

Hon. Myron A. Rosentreter, Prosecuting Attorney
Ottawa County, Port Clinton, Ohio

Dear Sir:

I have before me your letter requesting my opinion, and reading as follows:

"Herein you will find the statement of facts and questions of law which I am herewith submitting with the request for a written informal opinion. This question has become important in view of the Board of Health's decision that milk inspection is necessary and in view of the expense to the county of providing inspection of milk producers and distributors.

"STATEMENT OF FACT

"The Ottawa County Board of Health is about to adopt a milk inspection regulation. Because of the expense that will be incurred by providing milk inspection due to the necessity of employing added personnel on a part time basis, and laboratory fees, it is proposed that the distributors and producers be required to pay an inspection fee in an amount sufficient to reimburse the county for this added expense. The producers and distributors in question are within Ottawa County.

"REFERENCES

"Section 3707.34 of the Revised Code permits the charge of fifty cents every six months for a license to vend milk.

"Section 3707.36, Revised Code, authorizes the Board of Health to inspect producers and distributors but makes no mention of inspection fees.

"Brunner Meat Packing v. Rhodes, 95 O. App. 259, 53 O. O. 193, which would not allow inspecting fees in addition to the fifty cents semi-annually for meat inspection.

"QUESTIONS

"1. Can the Ottawa County Board of Health establish in their proposed milk inspection regulation an inspection charge for each distributor, sufficient to defray the cost of inspection?

"2. Can the Ottawa County Board of Health establish in their proposed milk inspection regulation an inspection charge for each producer, sufficient to defray the cost of inspection?"

Section 3707.34, Revised Code, reads as follows:

"The board of health of a city or general health district shall keep for public inspection a record of the names, residences, and places of business *of all persons engaged in the sale of milk or meat, and may require permits, after inspection,* to vend either milk or meat to be renewed semiannually, for which a charge of not more than fifty cents may be made. If, upon inspection, the cows or milk are found to be kept in an unsanitary condition, the board may refuse to grant such permit or may revoke one already given. The board may require a certificate from a licensed veterinarian that the cows furnishing milk brought for sale within its jurisdiction are free from tuberculosis or other dangerous disease." (Emphasis added)

Section 3707.36, Revised Code, reads as follows:

"*All dairies, including the cows, cow stables, milk houses, and milk vessels,* the owners of which offer for sale within the limits of a city or general health district any milk or butter manufactured by them, and any manufactory of butter or cheese or place where such substances, or either of them, are sold *shall be subject to inspection by the inspectors appointed under section 3707.33* of the Revised Code. Such inspector may enter *any place where milk is sold or kept for sale* and any vehicles used for the conveyance of milk within the district. They may also enter any manufactory or place where butter or cheese, or substances having the semblance of butter or cheese, are manufactured, or any place where such substances are sold or kept for sale within the district." (Emphasis added)

The purity of milk, including the sources and conditions surrounding its production and preparation for sale are manifestly of such vital importance to the public health, that the reasons for the statutory provisions above quoted become very apparent. Furthermore, it seems quite evident that such inspection as is plainly contemplated must involve a large expense on the part of the board of health. If this expense may be covered in whole or in large part by the levy of inspection fees, that cost will ultimately be borne by those who consume the milk; if the law does not permit the levy of such fees, then the expense must fall on the taxpayers, many of whom use no milk.

It is a generally recognized rule of law that the right to impose regulations on a business carries with it the implied right to impose a fee to cover the cost of enforcing such regulations. In 28 American Jurisprudence, page 854, it is said:

> "The method of defraying the cost of administering inspection laws is usually prescribed in the statute providing for such inspection. The right of the public authority to exact or impose a reasonable fee or charge for such purpose exists as an incident of the right to enact and enforce such law."

To like effect, see 44 Corpus Juris Secundum, page 403. McQuillin on Municipal Corporations, Section 10.12, carries this principle of implied power to municipal corporations which are authorized by statute to enact inspection regulations, saying:

> "It has been held that express authority conferred on a municipality to enact inspection ordinances includes, as an incident thereto, the power to charge a fee for the inspection."

Citing Salt Lake City v. Gas Co., 80 Utah 530; 10 P. 2d, 648.

That such right to exact a fee for permit or inspection is an incident of the exercise of the police power, was asserted in Cincinnati v. Criterion Advertising Co., 32 Ohio App., 472. To like effect, Cincinnati v. Morton, 58 Ohio App., 485.

In Realty Co. v. Youngstown, 118 Ohio St., 204, the same ruling was applied to the imposition of fees by a city planning commission. It was held:

> "2. A city ordinance which provides for payment of fees to the planning commission of such city for examining and checking plats of lands within such city or within three miles of the corporate limits of such city is valid so far as amount of fees is concerned, if the fees permitted to be charged by the provisions of such ordinance are reasonable and designed to cover the cost and expense of maintaining the planning commission."

Commenting on the fact that the statute defining the powers of the planning commission did not confer any express power to charge a fee, the court said:

> "It is not necessary that the statute should specifically give to the municipality power to charge and collect a fee to cover the cost of inspection and regulation. Where the authority is lodged in the municipality to inspect and regulate, the further *authority to charge a reasonable fee to cover the cost of inspection and regulation will be implied.* The fee charged must not, however, be grossly out of proportion to the cost of inspection and regulation; otherwise it will operate as an excise tax, which is clearly beyond the power of a municipality to impose." (Emphasis added.)
> The court further stated:

"Inspection and regulation accompanied by a license fee constitute an exercise of the police power."

The doctrine of this case was applied by the Court of Common Pleas of Summit County to a board of health, in the case of McGowen v. Shaffer, 65 Ohio Law Abs., 138. In that case the district board of health had adopted a sanitary code, including the regulation of plumbing. In an action for a declaratory judgment as to the validity of the code and the right to charge inspection fees, the Court held:

"5. Where authority is given the board of health of a general health district to regulate plumbing, it follows that to regulate they must inspect, and impliedly, the right to inspect gives the board the right to charge for that inspection."

Accordingly, unless we find in the statutes relating to milk inspection some provision which limits the power of the board of health in the exaction of fees for inspection, it would seem clear that it would have the right to charge such fee within the bounds stated by the supreme court in the Youngstown case. The case of Brunner v. Rhodes, 95 Ohio App., 259, to which you call attention might appear, at first glance, to furnish such limitations. There the statutes which I have quoted were under consideration, and it was held as shown by paragraphs nine and eleven of the head notes:

"9. That portion of Section 4459, General Code, RC 3707.34, which provides that a city board of health 'may require permits, after inspection, to vend * * * meat to be renewed semi-annually, for which a charge of not more than fifty cents may be made,' provides for a permit fee and is not intended to include inspection fees.

"11. A city board of health is without authority to prescribe a regulation requiring the payment of inspection fees by meat packers."

It will be observed that in each of these statements, reference is made to a city board of health. An examination of the opinion, and the ground on which it rests will show that it could have no bearing on district boards of health. The court in the course of the opinion referred to Section 4458, General Code, 3707.33, Revised Code, which authorizes all boards of health to "appoint such inspectors of dairies * * * and such other persons as is necessary to carry out the provisions of this chapter." The court then said:

"Were there no other provision of the Code than that to which we have just referred it might with some plausibility be urged that *the board, having been given the power to name inspectors of slaughter houses and of meat, would have the implied authority to implement these powers by a regulation which would finance such services.* But the same act which includes Section 4458, General Code (RC 3707.33), also includes Section 4451, General Code (RC 3707.28), which provides:

" 'When expenses are incurred by the board of health *under the provisions of this chapter,* upon application and *certificate* from such board, *the council* shall pass the necessary appropriation ordinances to pay the expenses so incurred and certified. * * *.' (Emphasis ours.)"

Proceeding further, the court said:

"There clearly runs through all of this health legislation an intendment that the expenses incurred by *boards of health of cities* in carrying out their delegated duties shall be met by action of the council. This specific obligation being enjoined upon the council, it follows that the board of health has no implied power to raise such funds by collection of permit fees."

(Emphasis added.)

We find no provision in the statutes relating to general health districts, corresponding to Section 3707.28, supra. While that section does not expressly limit its scope to *city boards* of health, yet it is obvious that it is concerned with such boards exclusively, by reason of its provision that the appropriation for such expense is to come from the *"council"*, which can only mean the council of a city. The court, in the language quoted, clearly recognized that fact.

The distinction between the city and general districts as to their means of support is shown by reference to Section 3709.28, Revised Code, which provides that the current expenses of a general district are to be provided by a levy apportioned by the auditor among the various townships and municipalities composing it. Pertinent portions of that section are as follows:

"The board of health of a general health district shall, annually, on or before the first Monday of April, estimate in itemized form the amounts needed for the current expenses of such district for the fiscal year beginning on the first day of January next ensuing. Such estimate shall be certified to the county auditor and by him submitted to the county budget commission which may reduce any item in such estimate but may not increase any item or the aggregate of all items.

"The aggregate amount as fixed by the commission shall be apportioned by the auditor among the townships and municipal corporations composing the health district on the basis of taxable valuations in such townships and municipal corporations. * * * The auditor, when making his semiannual apportionment of funds, shall retain at each semiannual apportionment one half of the amount apportioned to each township and municipal corporation. Such moneys shall be placed in *a separate fund* to be known as the *'district health fund.'* * * * Each auditor shall withhold from the semiannual apportionment to each such township or municipal corporation the amount certified, and shall pay the amounts withheld to the custodian of the funds of the health district concerned, to be credited to the district health fund." * * *." (Emphasis added.)

It will be observed that the subdivisions comprising the general health district have no part in determining or producing their share of the revenues of the district. These revenues withheld from the subdivisions are to be placed in a "separate fund", for the use of the general health district and in effect, as I view the fund so apportioned, may be deemed as appropriated to the functions of the district.

Section 3707.29, Revised Code, throws further light on the financing of a general health district. It is there provided that when the estimated amount necessary for the expenses of such district "will not be forthcoming" because of the ten-mill limitation, the county commissioners shall submit to the electors of the district the proposition of an additional tax, not exceeding five-tenths of a mill.

All of the foregoing procedure is in contrast to the process whereby a city provides the funds necessary for all of its offices and departments, including the health department which it is required by law to establish and support by appropriations, *including the specific appropriation required by Section 3707.28 supra.*

There is, therefore, nothing in the case of Brunner v. Rhodes, supra, which can apply to a district board of health or take it out of the general rule as to the right to charge a fee to defray the costs of inspection.

It is accordingly my opinion that under the provisions of Sections 3707.33, 3707.34 and 3707.36, Revised Code, the board of health of a general health district may inspect dairies, including the cows and all facilities incidental to the production, preparation, handling and sale of milk, and the places where it is kept for sale, and may in addition to the

semiannual fee of fifty cents for permits to sell milk as provided in Section 3707.34, Revised Code, charge a reasonable fee to cover the cost of such inspection, and that such fees may be charged both to the producers and distributors.

Respectfully,
C. WILLIAM O'NEILL
Attorney General