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(1) GIFT OF WEINER SANDWICHES AT A PLACE OF BUSINESS NOT A RESTAURANT, ETC., FOR A PERIOD OF THREE CONSECUTIVE DAYS FOR BUSINESS INDUCEMENT IS SUFFICIENT "CONSIDERATION" TO CONSTITUTE PRACTICE OF "FOOD SERVICE OPERATION".

(2) PROPRIETOR OF ABOVE ESTABLISHMENT HAS "KEPT OR MAINTAINED" A PLACE FOR PURPOSE OF SERVING LUNCHESES, ETC.

(3) PRIVATE HOME WHICH SERVES A GUEST A MEAL FOR THE PURPOSE OF PROMOTIONAL SCHEME IS NOT A PLACE THAT IS "KEPT OR MAINTAINED" FOR SERVING MEALS—§3732.01, R.C.

SYLLABUS:

1. The gift or sale of weiner sandwiches at a place of business for a period of three consecutive days for the purpose of inducing persons to patronize said place of business is sufficient "consideration" to designate such a practice a "food service operation" within the meaning of Section 3732.01, Revised Code, even though the primary purpose of the business is not the providing of food.

2. A proprietor who gives away or sells weiner sandwiches at a reduced price for three consecutive days to induce persons to enter such a place of business has "kept or maintained" a place for the purpose of preparing or serving meals or lunches within the meaning of Section 3732.01 (A), Revised Code.

3. A private home used on but one occasion to serve a meal to an invited guest for the purpose of a promotional scheme is not a place that is "kept or maintained" for serving meals or lunches within the meaning of Section 3732.01, Revised Code.

Columbus, Ohio, November 20, 1961

Hon. Thomas R. Spellerberg, Prosecuting Attorney
Seneca County, Tiffin, Ohio

Dear Sir:

I have before me your request for my opinion concerning questions contained in a letter from the city solicitor of Tiffin, Ohio, to you, which letter reads as follows:

"During the course of my duties as police prosecutor for the Tiffin Municipal Court, the question has arisen with respect to

the applicability of Section 3732.03 to various types of food service operations.

“The specific question is based on the following set of facts: a retail establishment within the city of Tiffin did on three consecutive days as a part of a promotional plan prepare and serve to the public certain food, specifically weiner sandwiches. On one day of this period, the sandwiches so prepared and served were sold at a nominal price. On the other two days, the sandwiches were given away.

“Our question arises by applying Section 3732.03 to the above set of facts, and is specifically does such an operation constitute a violation of the statute for which prosecution may be had in Tiffin Municipal Court. The general question is broader in scope and would involve the applicability of the section to other forms of promotional advertising wherein firms, corporations and other business entities prepare and serve to the public food items without having first obtained a food service license. The applicability of the section is questioned on several grounds. First of all, whether the attractiveness of such a promotional scheme to the public at large is sufficient consideration. Secondly, whether or not an isolated instance during a promotional scheme comes within the purview of the meaning of ‘kept and maintained’; and, if a food demonstration is by invitation only, and is not ostensibly open to the public, whether or not that comes within the definitive section of Section 3732.01 as being classified as ‘non paying guests.’

“In order that we might advise the proper enforcement officers as to their duties and obligations under the statute, we would appreciate your requesting an opinion of the Attorney General of the State of Ohio with respect to the applicability and meaning of the statutes in question. Your cooperation in this regard will be appreciated by the Tiffin Board of Health, the Tiffin Police Department and the office of the police prosecutor.”

Section 3732.01, Revised Code, provides in part:

“As used in sections 3732.02 to 3732.08, inclusive, of the Revised Code:

“(A) A ‘food service operation’ means:

“(1) Any place which is kept or maintained for the purpose of preparing or serving meals or lunches *for a consideration excepts:*

“(a) Homes containing what is commonly known as the family unit and their non-paying guests:

“(b) Operations serving a meal or a lunch to five or less persons;

“(c) Churches, school, fraternal, or veterans’ organizations serving meals or lunches on their premises; provided said meals or lunches are served on no more than seven consecutive days or on no more than fifty-two separate days in any one calendar year;

“(d) Dining or sleeping cars:

“(c) Food-processing and food-manufacturing establishments.

“* * *

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(Emphasis added)

Chapter 3732., Revised Code, provides for the regulation and licensing of food service operations and further provides criminal penalties for violation of Sections 3732.02 to 3732.07, inclusive, Revised Code. Thus, it appears that Section 3732.01, Revised Code, is a penal provision and must be strictly construed against the state. 15 Ohio Jurisprudence 2d, 254, Criminal Law, Section 20. Coming then to your first question, we must determine whether there is adequate consideration to constitute a business a “food service operation” within the meaning of Section 3732.01, Revised Code, where the proprietor either gives away or charges a nominal sum for sandwiches on three consecutive days as an inducement to the public to enter his place of business.

The word “consideration” is generally defined in Black’s Law Dictionary, 4th Edition, page 379, as:

“Any act of the plaintiff (or the promisee) from which the defendant (the promisor) or a stranger derives a benefit or advantage, or any labor, detriment, or inconvenience sustained by the plaintiff, however small, if such act is performed or inconvenience suffered by the plaintiff by the consent, express or implied, of the defendant.”

Also to be considered is the definition accepted and made a part of the regulations of the Public Health Council concerning food service operations, Food Service Regulation 300, which provides:

“Consideration as used in Section 3732.01 of the Revised Code, means anything of value or of benefit to the operator.”

The very nature of an advertising scheme such as presented by the facts in this case reveal the elements of consideration. The proprietor or individual who gives away or sells sandwiches at a reduced price does so for a specific purpose. He expends funds to induce the public to come to

his place of business. This expenditure results in a benefit to the individual and the expenditure of time and effort on the part of the person receiving the sandwich results in a detriment.

The Court of Appeals of Miami County in *Troy Amusement Co. v. Attenweiler*, 64 Ohio App., 105, considered the question of "consideration" in regard to a scheme of chance and stated at page 121 of the opinion:

"The element of advertisement and increased patronage is sufficient consideration flowing to the operator to bring the transaction within the condemnation of promoting and advertising a scheme of chance."

Although the *Troy Amusement Co.* case dealt with gambling, not food laws, the interpretation of "consideration" would appear to be equally applicable to the instant question.

The purpose of Chapter 3732.01, Revised Code, is to protect the public health by compelling persons who handle food for public consumption to meet a minimum set of requirements. Thus it would appear that the legislature intended to include all operations where "consideration" is an element, no matter how insignificant it may be.

I am constrained to conclude, therefore, that where an individual is induced to enter a place of business by virtue of the offer of a sandwich at a reduced price, or free of charge, the proprietor by virtue of the person coming to his place of business has received a benefit and the patron has suffered a detriment by the expenditure of the time and energy necessary to obtain the sandwich; and the element of consideration is present.

Turning now to your second question concerning whether the gift or sale of weiner sandwiches on three consecutive days states facts which sufficiently warrant a finding that the place was "kept or maintained for the purpose of preparing or serving meals or lunches," first to consider is whether a weiner sandwich is a "meal or lunch." In this respect one of my predecessors in Informal Opinion No. 440, Informal Opinions of the Attorney General for 1955, ruled that the sale of "hotdogs" from a "hotdog cooking machine" constitutes a "meal or lunch" within the meaning of Section 3732.01, Revised Code. I am aware that Section 3732.01, Revised Code, has been amended since the 1955 opinion; however, the language in question remains the same and thus this ruling is still applicable. The question remains, however, whether the gift or sale of such sandwiches

over a period of three days is sufficient to warrant the conclusion that the place is "kept or maintained" for the purposes of preparing or serving meals or lunches.

Webster's New International Dictionary, Third Edition, defines "kept" as "to possess for certain services or advantages" and "maintain" as "to preserve it, carry on, keep up." The individual in question quite obviously obtains the necessary provisions for serving weiner sandwiches to the public, whether he cooks them on the premises or not, and from the facts as given he has carried on such practice over a period of time. It is interesting to note that the legislature in Section 3732.01 (A), (1) (C), Revised Code, found it necessary to exempt churches, schools, fraternal and veteran organization serving meals on no more than seven consecutive days and no more than 52 separate days in any calendar year. Thus it would appear that if it is necessary to except such practice, the intention was to include all such operations when they occur with any degree of regularity; and it would appear that where a business serves weiner sandwiches, either free of charge, or at a nominal charge, on three consecutive days, the place is "kept or maintained" for the preparing or serving of meals or lunches within the meaning of Section 3732.01, Revised Code.

Your third question asks if a promotional scheme where food is served in a private home by invitation on one separate occasion comes within the exception set forth in Section 3732.01 (A), (1), (a), Revised Code.

It would seem, without further statement of fact, that a private home utilized on but one occasion for such a commercial venture is not "kept or maintained" for the preparation and serving of meals or lunches. The phrase, "kept or maintained" as indicated by the definitions heretofore referred to, point out that a place must be utilized on more than one occasion. It would further appear that it is necessary that the service be open to the public. There is, of course, no requirement that the practice be carried on for an extended period of time or on consecutive days, but it is readily apparent that the statute does not encompass one isolated instance such as this.

It is my opinion, therefore, and you are accordingly advised:

1. The gift or sale of weiner sandwiches at a place of business for a period of three consecutive days for the purpose of inducing persons to patronize said place of business is sufficient "consideration" to designate such a practice a "food service operation" within the meaning of Section

3732.01, Revised Code, even though the primary purpose of the business is not the providing of food.

2. A proprietor who gives away or sells weiner sandwiches at a reduced price for three consecutive days to induce persons to enter such a place of business has “kept or maintained” a place for the purpose of preparing or serving meals or lunches within the meaning of Section 3732.01 (A), Revised Code.

3. A private home used on but one occasion to serve a meal to an invited guest for the purpose of a promotional scheme is not a place that is “kept or maintained” for serving meals or lunches within the meaning of Section 3732.01, Revised Code.

Respectfully,

MARK MCELROY

Attorney General