

OPINION NO. 75-056

Syllabus:

1. R.C. 3715.69 (part of the Ohio Pure Food and Drug Law) does not provide the Public Health Council with authority to prescribe sanitation standards for food establishments.

2. The Food Establishment Regulations of the Ohio Sanitary Code (HE-22-01 to HE-22-14), proposed by the Director of Agriculture and adopted by the Public Health Council, are invalid, because there is no statutory authority for the Public Health Council to promulgate rules governing general sanitation standards for food processing and manufacturing establishments.

3. Under R.C. 925.01, 913.41, and 913.42, only the Director of Agriculture has authority to prescribe sanitary regulations for food establishments, other than those regulated under R.C. 3707.371 to 3707.376 (concerning milk handlers) and R.C. Chapter 3732. (concerning food service operations).

To: John M. Stackhouse, Director, Dept. of Agriculture, Columbus, Ohio
By: William J. Brown, Attorney General, August 21, 1975

I have before me the request from Director Abercrombie for my opinion, which reads as follows:

"On February 15, 1974, the Ohio Food Establishment Regulations HE-22-01 to HE-22-14, inclusive, became effective. These regulations were adopted by the Public Health Council under the authority granted them by section 3715.69 of the Ohio Revised Code which reads in pertinent part as follows:

'The authority to adopt regulations for the enforcement of sections 3715.01 and 3715.52 to

3715.72, inclusive, of the Revised Code, excluding section 3715.58, divisions (E), (G), (H), and (I) of section 3715.60, division (A)(2) of section 3715.64, and section 3715.67 of the Revised Code, is vested in the public health council, provided that such regulations are first proposed for adoption by the director or the board of pharmacy.

"Since the adoption and implementation of these regulations promulgated by the Public Health Council, some questions have arisen in my mind as to the legality and validity of the regulations. I am attaching a copy of the regulations as adopted to this letter.

"I am concerned about properly discharging my duties as set forth in chapter 3715 and other specific sections of the Ohio Revised Code granting the Director of Agriculture and this department specific statutory authority relative to sanitation requirements in certain food establishments. Therefore, I am hereby formally requesting an opinion from your office on the following questions:

"(1) Does section 3715.69 of the Ohio Revised Code permit the Public Health Council to consider regulations dealing with general sanitation requirements for the State of Ohio for all food establishments?

"(2) Must regulations adopted under section 3715.69 of the Revised Code by the Public Health Council deal primarily with adulterated and misbranded food or may they also deal with general sanitation requirements in food establishments?

"(3) Was there proper authority for the Director of Agriculture to recommend the adoption of these regulations to the Public Health Council?

"(4) If the regulations have been properly adopted within the authority granted the Public Health Council, how broad in scope is the regulatory power granted to a 'certified' local health district as the regulating agency?

"(5) Specific authority is granted the Director of Agriculture by section 925.01 relative to sanitation requirements; how broad in scope is this specific authority as it relates to the regulations in question?

"(6) Section 913.42 specifically refers to a sanitary code adopted by the Department of Agriculture; can the Department of Agriculture be specifically excluded from inspecting any food establishment as set out in section 913.41 of the Revised Code for sanitation requirements by any other regulations adopted by any other state agencies?

"(7) Is there a conflict of authority in the Ohio Revised Code relative to sanitation inspections of specific food establishments between the Ohio Department of Health and the Ohio Department of Agriculture?

"(8) Since the Ohio Department of Agriculture has been granted specific statutory authority for the adoption of sanitary regulations for certain food establishments and other facilities which are regulated, licensed, or

registered by this department, can any other state agency adopt and enforce sanitary regulations which are in conflict with the jurisdiction of the Ohio Department of Agriculture?

"(9) Can regulations adopted by the Public Health Council and enforced by the Ohio Department of Health usurp the specific statutory duties of the Director of Agriculture and delegate them to local health districts which are certified as the regulating agency?"

The issues presented me for an opinion involve jurisdictional questions, as well as questions concerning the legislative authority for the adoption of food establishment regulations by the Public Health Council, delegation of statutory duties of the Director of Agriculture to local health departments, the implication of the Sanitary Code as it relates to the sanitary requirements in food processing establishments, and other specific questions. To resolve these questions, a review of the pertinent statutory sections is in order. R.C. 925.01 reads in part as follows:

"The director of agriculture shall establish standards of quality, purity, and strength for foods, when such standards are not otherwise established by any law of this state. Such standards shall conform to the standards for foods adopted by the United States Department of Agriculture. The director shall make such uniform rules and regulations as may be necessary for the enforcement of the food, drug, dairy, and sanitary laws of this state, provided that he shall not make such rules and regulations for the enforcement of the dairy and sanitary laws where such rules and regulations are otherwise provided for by section 3707.371 to 3707.376, inclusive, of the Revised Code. Such rules and regulations shall, where applicable, conform to and be the same as the rules and regulations adopted for the enforcement of sections one to fifteen, inclusive, of Chapter one of Title twenty-one of the United States Code Annotated, entitled "adulterated or misbranded foods or drugs."

(Emphasis added.)

R.C. 3707.371 to 3707.376, which are specifically exempted from the regulatory authority of the Director of Agriculture, deal with milk handlers, which are separately regulated by the Director of Health and approved health districts, pursuant to R.C. 3707.373.

A second area exempted from R.C. 925.01 and the regulations adopted thereunder is R.C. Chapter 3732 known as the Food Service Operations. R.C. 3732.01 entitled "Definitions" provides in part as follows:

"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 except

". . . .

(e) Food-processing and food-manufacturing establishments. (Emphasis added.)

Section 3732.02 entitled "Regulations of Public Health Council" provides:

"The public health council subject to sections 119.01 to 119.13, inclusive, of the Revised Code, shall make regulations of general application throughout the state governing food service operations and providing uniform sanitation standards, approval of plans, equipment, including refrigerated bulk milk dispensers, and supplies by the department or city or general health districts; except that such regulations and standards shall be limited to that portion of the premises utilized for the food service operation."

(Emphasis added.)

A reviewing of the language in the above Sections indicates that the Legislature has clearly limited the Public Health Council to the making and adopting of regulations for uniform sanitation standards in food service operations as defined in R.C. 3732.01. This right does not extend to food-processing and food-manufacturing establishments which are exempted from the definition of a food-service operation by R.C. 3732.01(A)(1)(e). The legislature established the specific areas of responsibility of the Public Health Council and differentiated between those areas in an establishment which are used for food-service operations from those areas used for food-processing and food-manufacturing operations in the same establishment. For example, a commercial bakery which also has a coffee counter that serves meals for six or more persons is a food-service operation area while that part of the bakery which is preparing baked goods for distribution to retail outlets is a food-processing and food-manufacturing establishment area. Only the food-service operation area would be governed by the regulations made by the Public Health Council while the food-manufacturing area of this same bakery would be governed by the regulations adopted under R.C. 925.01 by the Director of Agriculture or under the bakery law, R.C. Chapter 911, which is also administered by the Department of Agriculture.

Furthermore, R.C. 913.41 and 913.42 (Ohio's "Sanitary Requirements") are specifically designed to ensure enforcement of sanitation in food processing establishments by the Director of Agriculture. R.C. 913.41 - "Food processing establishments to be kept sanitary" - provides:

"No proprietor, owner, or manager, of a bakery, confectionary, creamery, dairy, dairy barn, milk depot, laboratory, hotel, restaurant, eating place, packing house, slaughter house, ice cream factory, canning factory, or place where a food product is manufactured, packed, stored, deposited, collected, prepared, produced, or sold for any purpose, shall fail to keep it in a clean and sanitary condition within ten days after being duly notified in writing or by posting the notice provided for in section 913.42 of the Revised Code, or fail to keep it in such condition thereafter."

R.C. 913.42 entitled "Posting of Sanitary notices" provides in pertinent part:

"If the director of agriculture or any of his

inspectors or agents, is of the opinion that a place named in section 913.41 of the Revised Code is being operated in violation of such section, he shall notify the proprietor, owner, or manager thereof, in writing to place it in a clean and sanitary condition within a reasonable time to be stated in such notice, which time shall not be less than ten days.

"The director or any of his inspectors or agents shall post in a conspicuous place in such of the places mentioned in section 913.41 of the Revised Code, a copy of the Sanitary Code adopted by the Department of Agriculture, printed in plain, legible type."

Accordingly, it is clear that authority over sanitation requirements in food-processing and food-manufacturing establishments is granted to the Director of Agriculture.

I also note that R.C. 3701.34 ("Powers and duties of public health council") provides that the Council shall "make and amend sanitary regulations to be of general application throughout the state." As to this, however, a distinction must be drawn between the power to make general sanitary regulations and the power to make sanitary regulations in certain substantive areas which are nevertheless to be of general application. That is to say that R.C. 3701.34 does not grant authority to the Council to make general sanitary regulations which would address food-processing and food-manufacturing establishments, but those regulations which are properly made by the Council do have general application throughout the state.

The regulations in question here are known as the Ohio Food Establishment Regulations of the Ohio Sanitary Code (HE-22-01 to HE-22-14) adopted by the Public Health Council. Food establishments are defined therein as follows, at HE-22-01(G):

"'Food Establishment' means any place whether temporary or permanent, stationary or mobile, or whether it be considered public, semi-public or private, where food or drink is prepared, processed, manufactured, packaged, stored, served, sold, or offered for sale. Provided that the following places are not included:

- "(1) Homes containing what is commonly known as the family unit and their non-payment guests;
- "(2) Food service operations as defined in section 3732.01 of the Revised Code;
- "(3) Milk producers, milk plants, milk processors, and milk haulers as defined in section 3707.371 of the Revised Code;
- "(4) Meat and poultry plants registered under sections 918.08 and 918.28 of the Revised Code."

Further, HE-22-01(J) provides:

"Regulating Agency" means the Director of Agriculture except in health districts which have current approval to administer and enforce regulations HE-22-01 to HE-22-14 of the Ohio Sanitary Code, from the Director of Health."

Note that "food establishment" as defined in these new regulations excludes food service operations as defined in R.C. 3732.01 but includes food processing and food manufacturing establishments as defined in R.C. 925.01, 913.41 and 913.42. A review of the definition set out in the new regulations and in the statutes mentioned above demonstrates that the questioned Public Health Council regulations are designed to regulate the very food establishments for which specific regulatory control has been legislatively granted to the Director of Agriculture. Clearly then these regulations impinge upon the specific statutory authority granted to the Director of Agriculture in the regulation of food processing and food manufacturing establishments.

More specifically, the following discussion addresses each of your nine questions individually.

(1) Does R.C. 3715.69 permit the Public Health Council to consider regulations dealing with general sanitation requirements for the State of Ohio for all food establishments?

R.C. 3715.69 provides in part:

"The authority to adopt regulations for the enforcement of sections 3715.01 and 3715.52 to 3715.72, inclusive, of the Revised Code, excluding sections 3715.58, divisions (E), (G), (H), and (I) of section 3715.60, division (A)(2) of section 3715.64, and section 3715.67 of the Revised Code, is vested in the public health council, provided that such regulations are first proposed for adoption by the director of the board of pharmacy. The regulations adopted insofar as practicable shall conform with those promulgated under the 'Federal Food, Drug & Cosmetic Act.'"

R.C. 3715.01, and R.C. 3715.52 to 3715.72 deal primarily with the adulteration and misbranding of food products, drugs and cosmetics (The "Pure Food and Drug Law") and therefore do not provide for the promulgation and adoption of sanitary standards for any general or specific type of food establishment. R.C. 3715.59(D) does provide that food is adulterated within the meaning of R.C. 3715.01 and R.C. 3715.72, inclusive, if it has been produced, processed, prepared, packaged or held under unsanitary conditions whereby it may have become contaminated itself or whereby it may have been rendered diseased, unwholesome or injurious to health. However, this Section is a further definition of what constitutes adulterated food and is not authority for the adoption of sanitary regulations for food establishments.

I conclude therefore that R.C. Chapter 3715 and the sections contained therein dealing with the authority of the Public Health Council to adopt regulations do not grant authority to that council for the adoption of sanitary regulations for food establishments.

However, it should be noted that R.C. Chapter 3715 does provide for good manufacturing practice regulations to be adopted by the Public Health Council in very specific cases. For example, R.C. 3715.61 provides in pertinent part:

"Whenever the Director of Agriculture finds after investigation that the distribution in this state of any class of food may, by reason of contamination with microorganisms during manufacture,

processing or packaging thereof in any locality be injurious to health and such injurious nature cannot be adequately determined after such articles have entered commerce and in such case only he shall propose regulations for adoption by the public health council providing for the issuance to manufacturers, processors or packagers of such class of foods in such locality of permits to which shall be attached such conditions covering the manufacture, processing or packaging of such class of foods for such temporary period of time as may be necessary to protect the public health. . . ."

Therefore, when the Director of Agriculture determines there is a potential health hazard from microorganisms in any class of food, for example, canned mushrooms, he shall propose regulations for adoption by the Public Health Council. Further, in R.C. 3715.62 whereby the Director of Agriculture determines that any poisonous or deleterious substance added to any food renders the food unsafe, for example, processing of tomatoes through caustic (NaOH) solution, then the Director of Agriculture shall propose regulations for adoption by the Public Health Council which set forth safe levels of additives and the proper manufacturing practices to be followed.

(2) Must regulations adopted under R.C. 3715.69 by the Public Health Council deal primarily with adulterated and misbranded foods or may they also deal with general sanitation requirements in food establishments?

Regulations dealing with adulterated and misbranded foods, drugs and cosmetics may be adopted by the Public Health Council pursuant to R.C. 3715.69 after they have been submitted by the Director of Agriculture. There is no provision, however, for the adoption of sanitary regulations for food establishments by the Public Health Council contained in R.C. Chapter 3715.

(3) Was there proper authority for the Director of Agriculture to recommend the adoption of these regulations to the Public Health Council?

(4) If the regulations have been properly adopted within the authority granted the Public Health Council, how broad in scope is the regulatory power granted to a "certified" local health district as the regulating agency?

The regulations in question can only be characterized as general sanitary regulations for general food establishments and they were therefore adopted without proper authority because the rule making powers outlined in R.C. 3715.69 are specific. There is no authority for the Director of Agriculture to recommend the adoption of general sanitary regulations for general food establishments to the Public Health Council.

(5) Specific authority is granted the Director of Agriculture by R.C. 925.01 relative to sanitation requirements; how broad in scope is this specific authority as it relates to the regulations in question?

R.C. 925.01 grants the Director of Agriculture broad authority to adopt uniform rules and regulations for the enforcement of sanitary laws. These regulations would cover all food establishments mentioned in R.C. 913.41 except grade A milk establishments which are covered by R.C. 3707.371 to 3707.376. However, the

specific authority of the Public Health Council to regulate food service operations (R.C. Chapter 3732) takes priority over the general authority of the Department of Agriculture to promulgate sanitary standards for such operations. See R.C. 1.51; 1974 Op. Att'y Gen. No. 74-023 (which concludes that specific power to regulate collection of raw rendering materials does not imply the power to also license and regulate the operation of a rendering plant).

(6) R.C. 913.42 specifically refers to a sanitary code adopted by the Department of Agriculture; can the Department of Agriculture be specifically excluded from inspecting any food establishment as set out in R.C. 913.41 for sanitation requirements by any other regulations adopted by any other state agency?

The legislature has assigned specific duties, responsibilities and authority to the Director of Agriculture for the inspection of food establishments as set out in R.C. 913.41. No other state agency can preempt the duties, responsibilities and authority of the Director unless the General Assembly delegates such authority to another agency. R.C. 3707.371 to 3707.376 is an example of a delegation of authority to the Public Health Council and local departments of health as it relates to milk handlers at dairy plants and dairy farms. However, as noted in my answer to the preceding question, food service operations, as opposed to food establishments, are regulated by local health departments, pursuant to regulations adopted by the Public Health Council.

(7) Is there a conflict of authority in the Ohio Revised Code relative to sanitary inspections of specific food establishments between the Ohio Department of Health and the Ohio Department of Agriculture?

There is no conflict of authority relative to sanitation inspections of food establishments. Food establishments mentioned in R.C. 913.41 are under the jurisdiction of the Director of Agriculture, not that of the Public Health Council. See R.C. 913.28 (providing the Director of Agriculture power to promulgate regulations concerning canneries and soft drink bottling plants); R.C. 915.17 (providing the Director of Agriculture power to promulgate regulations concerning cold storage facilities); R.C. 918.04 (providing the Director of Agriculture power to promulgate regulations concerning meat inspection), and R.C. 919.15 (providing the Director of Agriculture power to adopt regulations concerning horse meat food products). The only exceptions to the Director of Agriculture's sanitary inspection jurisdiction relate to milk establishments (regulated by the Director of Health and approved health districts, R.C. 3707.376) and food service operations (regulated by the Public Health Council, R.C. 3732 et seq), in accord with language of R.C. 925.01.

(8) Since the Ohio Department of Agriculture has been granted specific statutory authority for the adoption of sanitary regulations for certain food establishments and other facilities which are regulated, licensed or registered by this department, can any other state agency adopt and enforce sanitary regulations which are in conflict with the jurisdiction of the Ohio Department of Agriculture?

A state agency can only adopt and enforce regulations where it is granted the specific authority to do so by the Legislature. In the case of the adoption and enforcement of regulations for food establishments designated in R.C. 913.41 as provided for in R.C. 925.01, the Department of Agriculture is the sole state agency responsible for the adoption and enforcement of sanitary regulations.

The only exceptions are those referenced in my answer to the preceding question.

(9) Can regulations adopted by the Public Health Council and enforced by the Ohio Department of Health usurp the specific statutory duties of the Director of Agriculture and delegate them to local health districts which are certified as the regulatory agency?

Again, the authority for the adoption and enforcement of any regulation by a state agency must be mandated from the legislature. There exists no statutory authority for the Public Health Council to adopt and for local health districts to enforce sanitary regulations for food establishments, except for the two areas described previously. Furthermore, there is no authority in R.C. Chapter 3715 for the State Department of Health to certify any local health districts to enforce any state sanitation regulation for any food establishment. Finally, there is no authority granted by R.C. Chapter 3715 for the Department of Agriculture to delegate the enforcement responsibilities of any state sanitation regulations for any food establishment to any local health district and, therefore, such an attempted delegation of statutory duties of the Director of Agriculture to local health districts is improper.

In answer to your questions, it is my opinion and you are so advised that:

1. R.C. 3715.69 (part of the Ohio Pure Food and Drug Law) does not provide the Public Health Council with authority to prescribe sanitation standards for food establishments.

2. The Food Establishment Regulations of the Ohio Sanitary Code (HE-22-01 to HE-22-14), proposed by the Director of Agriculture and adopted by the Public Health Council, are invalid, because there is no statutory authority for the Public Health Council to promulgate rules governing general sanitation standards for food processing and manufacturing establishments.

3. Under R.C. 925.01, 913.41, and 913.42, only the Director of Agriculture has authority to prescribe sanitary regulations for food establishments, other than those regulated under R.C. 3707.371 to 3707.376 (concerning milk handlers) and R.C. Chapter 3732. (concerning food service operations).