

Opinion No. 67-115

October 16, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Honorable Michael Alarid State Senator 1608 Escalante, S.W. Albuquerque, New Mexico

QUESTION

QUESTIONS

1. Does the New Mexico Livestock Board have statutory authority to promulgate rules and regulations involving. --

- (a) Health of slaughterhouse employees?
- (b) Control of ingredients of meat and meat products?
- (c) Sanitation of slaughterhouse and other meat establishments?
- (d) Labeling of meat and meat products?
- (e) Adulteration of meat and meat products?
- (f) Weights and measures for meat and meat products?
- (g) Fraudulent advertising of meat and meat products?
- (h) Deceptive fill of containers for meat and meat products?
- (i) Embargo or condemnation of meat and meat products which are unwholesome or adulterated?
- (j) Protecting the public health from meat or meat products which are adulterated or misbranded?
- (k) Design, construction and maintenance of slaughterhouse and meat establishments?
- (l) Sanitation of slaughterhouses, meat establishments and transportation vehicles?
- (m) Sanitation and safety of water supplies and waste disposal systems?
- (n) Sanitation of retail food establishments such as food markets?

2. Does the New Mexico Livestock Board have statutory authority to perform the duties now being performed by (a) New Mexico Department of Public Health, or by (b) municipalities in New Mexico? (c) If so, does the delegation of authority have the effect of precluding enforcement action by the City of Albuquerque or Bernalillo County?

3. Does the New Mexico Livestock Board have statutory authority to promulgate rules and regulations involving definitions and standards of identity?

4. Do the meat inspection regulations of the New Mexico Livestock Board provide for standards and requirements as high and as comprehensive as those set forth in Albuquerque City Commission ordinance No. 1503 and Article 10 of Bernalillo County Commission Ordinance No. 18.

CONCLUSIONS

1. (a) Yes.

(b) See analysis.

(c) Yes.

(d) No.

(e) See analysis.

(f) No.

(g) No.

(h) No.

(i) Yes.

(j) See analysis.

(k) See analysis.

(l) Yes.

(m) See analysis.

(n) No.

2. (a) See analysis.

(b) See analysis.

(c) No.

3. No.

4. See analysis.

OPINION

{*167} ANALYSIS

The last session of our legislature created a New Mexico Livestock Board. This Board is said to have all of the powers which previously were held by the Cattle Sanitary Board or the Sheep Sanitary Board, except insofar as the Livestock Board Act repealed the Cattle Sanitary Act and the Sheep Sanitary Act. The purpose of the Livestock Board Act is to promote greater economy, service and efficiency in the administration of the laws relating to the livestock industry of New Mexico. In addition to the powers mentioned above the Livestock Board has been given the following powers:

". . . to exercise general regulatory supervision over the livestock industry of this state in order to protect the industry from theft and contagious {*168} or infectious diseases and **in order to protect the public from diseased or unwholesome meat or meat products;**

to make and publish rules and regulations for meat inspection including the slaughter and disposition of the carcasses of animals affected with contagious or infection diseases when the action appears necessary **to prevent the spread of any contagion or infection among livestock;**

to make and publish rules and regulations to otherwise carry out the purpose of the Livestock Board Act." See Section 47-23-6A (1), (8) and (11), N.M.S.A., 1953 Compilation.

From the foregoing Sections it is seen that the primary function of the New Mexico Livestock Board is to protect the livestock industry of this state from theft and contagious or infectious diseases.

The Livestock Board does have the additional power to protect the public from "diseased or unwholesome meat or meat products." Webster defines "unwholesome" as "not conducive to good health". Webster's New International Dictionary, 2d Ed., Unabridged. It is clear from the case law we have been able to find that the food must render ill a normal person in normal conditions before it may be classified as "unwholesome". See **Mills Restaurant Co. v. Clark**, 45 Ohio App. 25, 185 N.E. 470 (1933); **Great Atlantic & Pac. Tea Co. v. Hughes**, 131 Ohio St. 501, 3 N.E. 2d 415, 416 (1936); and **Tafoya v. Las Cruces Coca-Cola Bottling Co.**, 59 N.M. 43, 278 P.2d 575 (1955). With these powers in mind several of the questions asked may be easily answered.

We believe that the health of slaughterhouse employees, the sanitation of slaughterhouse, meat establishments and transportation vehicles and the maintenance of slaughterhouses and meat establishments are all reasonably related to the above powers of the Livestock Board and they may promulgate rules and regulations affecting these areas. The answers to questions 1 (a), 1 (c), 1 (l) are therefore all yes. Similarly the Livestock Board may promulgate rules and regulations controlling the ingredients of meat and meat products (question 1 (c)) if the ingredients may render the meat unwholesome.

We do not believe that the design and construction of slaughterhouses and meat establishments (question 1 (k)) is sufficiently related to protecting the public from unwholesome meat so as to allow the Livestock Board to require approval of plans of construction of slaughterhouses and meat establishments without specific statutory power. The Livestock Board, however, may require that slaughtering of the animals and the processing of the meat take place in suitable buildings which are properly maintained.

Question 1 (j) related to protecting the public health from meat or meat products which are adulterated or misbranded. "Adulterated" within food adulteration means to debase by adding inferior materials or elements to make impure by admixture. **People v. Enders**, 38 Misc. 2d 746, 237 N.Y.S.2d 879, 888 (1963). Insofar as meat is made "unwholesome" by adding inferior material or elements, the Livestock Board may promulgate regulations prohibiting the addition of such materials. Otherwise the answer to question 1 (j) is no. "Misbranding" of meat will be discussed below along with the rest of question 1.

The second question asked has three jurisdictional questions which we will undertake to answer individually. First of all we are asked if the New Mexico Livestock Board has the statutory authority to perform the duties now being performed by the New Mexico Department of Public Health. We assume the Public Health Department's powers referred to are those powers found in the New Mexico Food Act {*169} which was enacted by our Legislature in 1951. Section 54-1-3, N.M.S.A., 1953 Compilation sets forth the violations of the New Mexico Food Act as follows:

"(a) The manufacture, sale, or delivery, holding or offering for sale of any food that is adulterated or misbranded.

(b) The adulteration or misbranding of any food.

(c) The receipt in commerce of any food that is adulterated or misbranded and the delivery or proffered delivery thereof for pay or otherwise.

(d) The sale, delivery for sale, holding for sale, or offering for sale of any article in violation of section 12.

(e) The dissemination of any false advertisement.

(f) The refusal to permit entry or inspection, or to permit the taking of a sample, as authorized by Section 16.

(g) The giving of a guaranty or undertaking which guaranty or undertaking is false, except by a person who relied on a guaranty or undertaking to the same effect signed by, and containing the name and address of the person residing in the state of New Mexico from whom he received the food in good faith.

(h) The removal or disposal of a detained or embargoed article in violation of section 6.

(i) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to a food, if such act is done while such article is held for sale and results in such article being misbranded.

(j) Forging, counterfeiting, simulating, or falsely representing, or without proper authority using any mark, stamp, tag, label, or other identification device authorized or required by regulations promulgated under the provisions of this act." Section 54-1-3, N.M.S.A., 1953 Compilation.

We believe that "meat" is a "food" as defined in the New Mexico Food Act, and therefore the State Health Department has the power to protect the public from the violations of the law set forth above. We find nothing in the New Mexico Livestock Act granting the Livestock Board the powers granted to the Health Department in the New Mexico Food Act. Since we have concluded that the Livestock Board's powers are limited to the protection of the public from diseased or unwholesome meats, it is the opinion of this office that the Livestock Board may not promulgate rules or regulations involving:

(1) Control of ingredients of meat and meat products, unless the ingredients may result in the meat becoming unwholesome.

(2) Labeling or misbranding of meat and meat products.

(3) Adulteration of meat and meat products, unless the adulteration may result in the meat becoming unwholesome for human consumption.

(4) Weights and measures for meat and meat products.

(5) Fraudulent advertising of meat and meat products, or

(6) Deceptive fill of containers for meat and meat products.

All of these powers are vested in the State Health Department. The State Health Department has been given the power to promulgate regulations for the enforcement of the Food Act and to make inspections of any factory, warehouse, { *170 } or establishment in which foods are manufactured, processed, packed, or held for introduction into commerce. See Sections 54-1-15 and 54-1-16, N.M.S.A., 1953

Compilation. Thus we see that the State Health Department may inspect meats for different purposes than the Livestock Board and use higher standards in their inspection.

Although the inspection powers of the Health Department are more extensive than those of the Livestock Board there will be an overlap of the inspection function. We have pointed out that the Health Department has authority to inspect meats which may be adulterated. Meats that are unwholesome may be so because of some adulteration. A food is deemed adulterated under the New Mexico Food Act:

"(1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance is such good [food] does not ordinarily render it injurious to health, or (2) if it bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of section 13 (54-1-13); or (3) if it consists in whole or in part of a diseased, contaminated, filthy, impure or infested ingredient, putrid, or decomposed substance, or if it is otherwise unfit for food; or (4) **if it has been produced, prepared, packed, or held under insanitary conditions whereby it may have been rendered diseased, unwholesome, or injurious to health;** or (5) if it is the product of a diseased animal or an animal which has died otherwise than by slaughter, or that has been fed upon the uncooked offal from a slaughterhouse; or (6) if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health." Section 54-1-10, N.M.S.A., 1953 Compilation. (Emphasis added).

We must conclude that the fact that the Livestock Board may be inspecting meats to determine if they are unwholesome in no way limits the powers of the Health Department to independently determine whether the meat is unwholesome.

The second part of question 2 asks if the New Mexico Livestock Sanitary Board has the statutory authority to perform the duties now being performed by municipalities in New Mexico.

Section 14-17-10, N.M.S.A., 1953 Compilation provides in part as follows:

"B. A municipality may provide for the:

- (1) inspection and regulation of food;
- (2) regulation, inspection, weighing and measuring of any article of merchandise."

In addition municipalities have been given the power to adopt by ordinance the conditions, provisions, limitations and terms of a health code. Section 14-16-5 A (5), N.M.S.A., 1953 Compilation. We believe that the "Food Act" is a health code and may therefore be adopted by reference by municipalities. We must therefore conclude that municipalities may also act to protect the public generally in the inspection of meats. We

believe that the powers of our municipalities in the inspection and regulation of food are broader than those granted to the Livestock Board and therefore we must conclude that the New Mexico Livestock Board does not have the statutory authority to perform all of the powers that could be performed by our municipalities under a properly adopted city ordinance. Just as the State Health {^{*}171} Department, municipalities may perform their inspection powers independently of the Livestock Board. The answer to 2 (c) is No.

There are three parts to question 1 which we have not yet answered. The first is question 1 (i) concerning embargo or condemnation of meat. The Livestock Board has the power to quarantine animals (Section 47-23-6A (7), N.M.S.A., 1953 Compilation. The power to embargo meat is vested in the State Health Board. Section 54-1-6, N.M.S.A., 1953 Compilation.

The second is question 1 (m) which asks if the Livestock Board may promulgate rules and regulations governing the sanitation and safety of water supplies and waste disposal systems. We note that the Cattle Sanitary Board, the predecessor of the Livestock Board promulgated the following regulation:

"The board shall cooperate with all local and municipal health authorities in requiring all slaughtering establishments, meat processing plants and dealers in fresh meats to maintain sewage systems which shall not contaminate water supplies and shall not endanger public health. Rule 26."

Rule 4 of the Rules promulgated by the Cattle Sanitary Board requires that slaughterhouse and meat packing houses have efficient drainage and plumbing systems. In addition such plants must have ample hot and cold water with adequate facilities for its distribution in the plant. We believe that these rules are reasonably designed to protect the public from diseased or unwholesome meat and therefore there is statutory authority for such rules and regulations. Rule 26 exceeds the statutory powers of the Livestock Board insofar as it relates to dealers in fresh meats and water pollution.

Question 1 (n) asks if the Livestock Board has the power to promulgate rules governing the sanitation of retail food establishments such as food markets. Again this power has been expressly delegated by our legislature to the State Health Department. Meat markets and food stores selling meat are "Restaurants" within the meaning of that term as used under the act regulating "food establishments." Under Section 54-3-6 the State Health Department has the duty to inspect every food store selling meat at least once every six months. We do not believe that by granting the Livestock Board the power to "exercise general regulatory supervision over the livestock industry of this state . . . in order to protect the public from diseased or unwholesome meat or meat products" the Legislature has given the Livestock Board the power to inspect food stores for unwholesome meat. This power is in the State Health Department.

Next we are asked if the New Mexico Livestock Board has the statutory authority to promulgate rules and regulations involving definitions and standards of identity. Again

we find this power is vested in the State Health Board pursuant to Section 54-1-9, N.M.S.A., 1953 Compilation which provides as follows:

"When ever in the judgment of the board such action will promote honesty and fair dealings in the interest of consumers, the board shall promulgate regulations fixing and establishing for any food or class of food a reasonable definition and standard of identity, and/or reasonable standard of quality and/or fill of container. In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the board shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label. The definitions and standards so promulgated shall conform so far as practicable {*172} to the definitions and standards promulgated under the authority of the federal act."

We have already pointed out that the Livestock Board is limited to protecting the public from diseased or unwholesome meat or meat products. We do not believe that a regulation designed to promote honesty and fair dealing in the interest of consumers could be promulgated under the statutory powers of the Livestock Board.

Last of all we are asked if the meat inspection regulations of the Livestock Board provide for standards and requirements as high and as comprehensive as those set forth in Albuquerque City Commission Ordinance No. 1503 and Article 10 of Bernalillo County Commission Ordinance No. 18. This question is more factual than legal and therefore we do not believe it to be a proper question for this office to answer.

By: Gary O' Dowd

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