

JOURNAL OF THE ASSEMBLY [December 9, 1976]

STATE OF WISCONSIN

Assembly Journal

Eighty-Second Regular Session

THURSDAY, December 9, 1976.

The chief clerk makes the following entries under the above date:

OPINION OF THE ATTORNEY GENERAL

November 5, 1976

The Honorable, The Assembly
Assembly Chamber
State Capitol
Madison, Wisconsin 53702

Dear Representatives:

Pursuant to **Assembly Resolution No. 51**, you have requested my opinion whether a person extracting honey is subject to licensing as a food processor under sec. 97.28, Stats., or under any other provision. I have also received correspondence from individual assemblymen describing the problem in greater detail and informing me of a concern by licensees about the propriety of an increase in the license fee from \$5.00 to \$20.00 per year.

"The test of a reasonable [license] fee is that it shall be no greater than is sufficient to cover the expenses of administration." *Meyers v. Matthews* (1955), 270 Wis. 453, 460, 71 N.W. 2d 368, appeal dismissed, 350 U.S. 927, rehearing denied, 350 U.S. 977. The license fee is used by the Department of Agriculture to cover the costs of issuing the license and of investigating the construction and sanitary conditions of the plant and equipment. Sec. 97.28 (5), Stats. The increase in minimum license fees from five dollars to twenty dollars was enacted by the legislature as part of the biennial budget bill. See sec. 574, ch. 39, Laws of 1975. In the absence of facts which would clearly establish a contrary conclusion twenty dollars does not appear to be a unreasonable charge for performance of these functions.

JOURNAL OF THE ASSEMBLY [December 9, 1976]

The next question is whether the removal of honey from honeycombs with a machine known as an "extractor" constitutes food processing within the purview of sec. 97.28, Stats.

Section 97.28 (1) requires an operator of a food processing plant to obtain a license from the Department of Agriculture. Section 97.28 (2), defines "food processing plant" as:

"... any place where food is manufactured or prepared for sale through the process of canning, extracting, fermenting, distilling, pickling, freezing, drying, smoking, grinding, mixing, stuffing, packing, bottling, cutting and packaging, or otherwise treating or preserving the same for sale as and for food" (Emphasis added.)

As used in ch. 97, Stats., "food" means articles used for food or drink by man, including components of such articles. See sec. 97.01 (2), Stats. According to the Wisconsin Administrative Code, "extracted honey" is:

"... honey which has been separated from the crushed or uncrushed comb by centrifugal force, gravity, straining, or other means." Ag 91.01 (2), Wis. Adm. Code.

Webster's Third New International Dictionary (unabridged) contains the following definition of "extract:"

"Id: to separate or otherwise obtain (as constituent elements or juices) from a substance by treating with a solvent (as alcohol), distilling, evaporating, subjecting to pressure or centrifugal force, or by some other chemical or mechanical process [-ing an essence] [-ing the juice of apples] [-ed honey]." (Emphasis added.)

One who separates or withdraws honey from honeycombs by mechanical or other means is an extractor of honey. Honey constitutes an article of food. Any place where this extraction occurs for the purpose of preparing the honey for sale is a "food processing plant" and would, within the statutory requirement, be subject to licensing.

It has been suggested that the term "extracting" as used in sec. 97.28, Stats., refers to a more technical process or procedure in the food processing industry and, therefore, should not render a farmer subject to licensing solely because he harvests honey. Such a construction is in conflict with the Department of Agriculture's rule and the normal meaning of the words employed. Moreover, both

JOURNAL OF THE ASSEMBLY [December 9, 1976]

extraction and sale of the honey at wholesale for public consumption triggers the licensing requirement.

The Department of Agriculture has informed me that it has licensed honey extractors under sec. 97.28, Stats., or its predecessors, for at least 20 years. This has been the practice since the enactment of the statute by ch. 510, Laws of 1947, which extended the licensing requirement from canners to all food processors.

Even though the statute here is probably unambiguous, I would point out that even if it were ambiguous the construction and interpretation given to a statute by the agency charged with its administration is entitled to great weight if such interpretation is reasonable and not contrary to the clearly expressed meaning of the law. *Mednis v. Industrial Commission* (1965), 27 Wis. 2d 439, 444, 134 N.W. 2d 416; *Chevrolet Division G.M.C. v. Industrial Commission* (1966), 31 Wis. 2d 481, 488, 143 N.W. 2d 532. When an administrative interpretation has been unchallenged over a period of many years, such interpretation will control. *Forsberg Paper Box Co. v. Department of Taxation* (1961), 14 Wis. 2d 93, 109 N.W. 2d 457.

Moreover the clear intention of the law is that the state protect consumers from unwholesome processing of all types of food by a licensing system which includes inspections to assure proper handling and storing of food, sanitary conditions, and sound equipment. This intention is furthered by the broad construction of the terms "extraction" and "food processing plant" adopted by the Department of Agriculture.

Section 97.28 (2), Stats., in addition to defining "food processing plant," also creates certain exceptions to the general requirement that processing activities be licensed. Among these exceptions are:

"... retail merchants having a fixed or established place of business in this state if such merchant does not also sell at wholesale any food processed by the merchant or engage in [processing delicatessen foods for retail]." (Emphasis added.)

This exception excuses from the licensing requirement any person who is strictly a retail seller of honey and who has a fixed place of business in the state. The typical example is one who produces honey only for personal consumption and/or for sale at a

JOURNAL OF THE ASSEMBLY [December 9, 1976]

roadside stand. However, one who sells at retail without a fixed place of business or at wholesale any portion of a honey crop is subject to licensing.

Several inquirers raise an equal protection issue because of this distinction. Should honey extractors who sell at wholesale be licensed when those selling at retail or extracting honey only for their own use are exempt from the licensing requirement? In other words, is the classification rational?

A licensing classification is "presumed to be valid unless the court can say no state of facts can reasonably be conceived that would sustain it." *State ex rel. Real Estate Board v. Gerhardt* (1968), 39 Wis. 2d 701, 710, 159 N.W. 2d 622. In *Adams v. Milwaukee* (1913), 228 U.S. 572, the court upheld a classification of milk vendors which required those who produced milk outside of Milwaukee for sale in the city to obtain a certificate of inspection, including proof of administration of a tuberculin test to the animals, whereas those producing milk in the city needed only to obtain a permit from the city to keep cows. The court reasoned that the animals and milk-producing facilities within the city could be inspected by city health officials, while those outside the city could not be, and therefore it found the classification to be reasonable.

The same rationale may be applied in the present case. The only merchants exempted from the licensing requirement are those who have a fixed place of business in the state and who do not sell any of the food which they process at wholesale. A purchaser from an exempt processor-retailer has some opportunity if he wishes to observe or inquire into the cleanliness of the operation and the reputation of the retailer. On the contrary, if there are unidentified intermediate processors, the purchaser is more effectively prevented from observing the cleanliness of the facility or operation. Therefore, the state arguably has a stronger interest in regulating the production of such wholesale processors than it does in regulating the production of the processor-retailers. In my opinion the presence of this different interest is sufficient to sustain the classification as reasonable.

Sincerely yours,

BRONSON C. La FOLLETTE

Attorney General

JOURNAL OF THE ASSEMBLY [December 9, 1976]

CAPTION:

A person who extracts honey for the purpose of preparing it for sale is subject to the licensing requirement of sec. 97.28, Stats., unless the honey is sold on a retail basis only at a fixed place of business.

December 1, 1976

Mr. Everett E. Bolle
Director of Legislative Services
Wisconsin State Assembly
220 West, State Capitol
Madison, Wisconsin 53702

Dear Mr. Bolle:

On April 3, 1975, you forwarded me a copy of 1975 **Assembly Resolution 19** requesting my opinion as to the affect of the decision of the United States Supreme Court in *Cousins v. Wigoda*, 419 U.S. 477 (1975) on Wisconsin's presidential primary law.

While the answer to this request was pending, Governor Lucey requested that I commence a lawsuit to protect the integrity of the state's presidential preference primary in the face of a threat by the National Democratic Party to refuse to seat the Wisconsin delegation to the 1976 Democratic National Convention if our primary law were not changed to require all voters to publicly declare their party affiliation before voting. Pursuant to the Governor's request, I commenced an action in the Federal District Court for the District of Columbia.

In conformity with long-standing policy and practice of this office to decline to render opinions on issues that are the subject of pending litigation, the opinion request was removed from active status.

During the pendency of this action against the Democratic National Committee, Governor Lucey obtained an agreement with the Democratic National Committee which resolved the issues involved in the lawsuit insofar as the 1976 Presidential primary election was concerned. Consequently, the lawsuit was dismissed as moot, and an opinion on the merits of our case was not rendered.

I do not believe that now is an appropriate time to address the problem of the apparent conflict between the party's interest in controlling its nomination process and the state's interest in

JOURNAL OF THE ASSEMBLY [December 9, 1976]

protecting the voting rights of its citizens. The 1976 presidential primary is now history. The rules of the 1976 convention are subject to change prior to the 1980 primary and convention. The 1980 presidential primary is nearly four years away and, given the nature of the political process, it would be unwise to speculate about the potential for conflict between state law embodying the "open primary" and the rules to be applied at the 1980 Democratic convention. Moreover, there may be federal court decisions between now and 1980 that will shed further light on the issue and further define the applicable law. Finally, issuing an opinion now may foreclose options available to the Legislature, the Governor, and the Wisconsin Democratic Party.

Accordingly, we are declining to answer this opinion request and you may consider this response as our final action on 1975 Assembly Resolution 19.

Sincerely,

BRONSON C. La FOLLETTE

Attorney General

SPEAKER'S APPOINTMENTS

October 8, 1976

Pursuant to the authority vested in me under Assembly Rule 5 (11), and in compliance with Sec. 14.019 of the Wisconsin Statutes, I herewith appoint to the Rural Area and Community Development Council the following:

Rep. Sheehan Donoghue, Merrill (R-District 35)

NORMAN C. ANDERSON

Speaker