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July 5, 1979

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ATTORNEY GENERAL OPINION NO. 79- 136

Mr. Robert M. Corbett, Chief Attorney
Department of Health and Environment
Building 720, Forbes Field
Topeka, Kansas 66620

Re: Public Health--Adulterated Food--Compliance
with Federal Law

Synopsis: The State of Kansas may prohibit the distribution and sale of "water added hams," since such products are within the definition of the term "adulterated" contained in 21 U.S.C. §601(m)(8) and K.S.A. 65-664(b)(4). A federal regulation allowing the addition of water in an amount up to 10% of the fresh, uncured product weight is out of harmony with the federal statute pursuant to which it was promulgated and, therefore, is a mere nullity. Thus, there is no conflict between Kansas and federal laws.

* * *

Dear Mr. Corbett:

You request our opinion as to the legal propriety of the State of Kansas prohibiting the distribution and sale of "water added hams," that is, cured hams to which water has been added. You explain that the Department of Health and Environment has determined such hams to be "adulterated," within the definition of this term contained in K.S.A. 65-664(b)(4), and it is our understanding that your inquiry is prompted by a manufacturer's suggestion that there is an impermissible conflict between such prohibition and a federal regulation.

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Pursuant to the provisions of Section 678 of the Federal Wholesome Meat Act, 21 U.S.C. §§601 et seq.:

"[I]ngredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State . . . , but any State . . . may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the secretary over articles required to be inspected under said subchapter I for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated"

This section has been interpreted as preempting the field of ingredient requirements for meat products; thus, any state law or regulation which imposes ingredient requirements in addition to, or different than, those prescribed by the federal law are unenforceable. See Armour and Company v. Ball, 468 F.2d 76 (6th Cir. 1971), cert. denied 411 U.S. 981, 93 S.Ct. 2267, 36 L.Ed. 2d 957 (1973); and Jones v. Rath Packing Co., 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed. 2d 604 (1977), reh. denied, 431 U.S. 925, 97 S.Ct. 2201, 53 L.Ed. 2d 240 (1977).

Therefore, the issue is whether the laws and regulations of the State of Kansas impose ingredient requirements in addition to, or different than, those imposed by federal law. Specifically, are K.S.A. 65-664 and K.A.R. 4-16-180 in conflict with federal ingredient requirements?

K.S.A. 65-664, in relevant part, provides:

"A food shall be deemed to be adulterated:

. . . .

"(b) . . . (4) if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength or make it appear better or of greater value than it is."
(Emphasis added.)

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The foregoing provisions of K.S.A. 65-664(b)(4) substantially duplicate those of 21 U.S.C. §601(m)(8), where Congress defines the term "adulterated," as follows:

"(m) The term 'adulterated' shall apply to any . . . meat or meat food product under one or more of the following circumstances:

. . . .

"(8) . . . if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is"
(Emphasis added.)

Due to the substantial identity of these statutory provisions, we must conclude that there is no conflict between them.

K.A.R. 4-16-180 was promulgated by the State Board of Agriculture pursuant to the authority of K.S.A. 65-6a44. It is the Kansas counterpart to 9 C.F.R. §319.104, which was adopted pursuant to the Federal Wholesome Meat Act. These state and federal regulations are nearly identical, except that K.A.R. 4-16-180 does not include a provision comparable to subsection (d) of the federal regulation which sanctions the addition of up to ten percent (10%) of water to cured ham. Unquestionably, this creates a conflict between these regulations. However, we do not believe such conflict is proscribed by 21 U.S.C. §678.

This conclusion is based primarily on our determination that 9 C.F.R. §319.104(d) is an invalid exercise of administrative authority by the United States Secretary of Agriculture, since it clearly conflicts with the congressional pronouncement on the same subject, as stated in 21 U.S.C. §601(m)(8), quoted above. It is apparent that this federal statutory provision does not make an exemption for the addition of water to meat or meat food products. Under this clear and unambiguous statutory definition, the addition of water, or any other substance, "so as to increase its bulk or weight," renders the meat or meat food product adulterated. Thus, there is, in our opinion, a conflict between the provisions of 21 U.S.C. §601(m)(8) and those of 9 C.F.R. §319.104(d)--a conflict which renders the regulation a nullity. Similar conclusions regarding conflicts between statutes and

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implementing regulations have been reached, on numerous occasions, by the United States Supreme Court. As stated in United States v. Larionoff, 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed. 2d 48 (1977):

"[R]egulations, in order to be valid, must be consistent with the statute under which they are promulgated. (Footnote omitted.) Id. at 873.

Other cases stating the same rule are Dixon v. United States, 381 U.S. 68, 74, 85 S.Ct. 1301, 14 L.Ed. 2d 223 (1965); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-214, 96 S.Ct. 1375, 47 L.Ed. 2d 668 (1976); and Manhattan General Equip. Co. v. Commissioner, 297 U.S. 129, 134 56 S.Ct. 397, 80 L.Ed. 528 (1936). Moreover, in the latter case, the Court said:

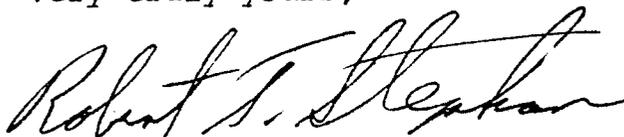
"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law . . . but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. Lynch v. Tilden Produce Co. 265 U.S. 315, 320-322, 68 L.Ed. 1034-1036, 44 S.Ct. 488; Miller v. United States, 294 U.S. 435, 439, 440, 79 L.Ed. 977, 980-981, 55 S.Ct. 440, and cases cited." (Emphasis added.) 297 U.S. at 134.

In our judgment, the provisions of subsection (d) of 9 C.F.R. §319.104 create a rule "out of harmony with" 21 U.S.C. §601(m)(8) and, therefore, render said subsection "a mere nullity." Said regulation not only allows the natural moisture of the meat lost during the curing process to be replaced by the addition of up to ten percent (10%) of the weight of the cured meat, but allows the addition of water "not in excess of 10 percent of the weight of the fresh, uncured products." (Emphasis added.) Thus, pursuant to said regulations, the final product offered for sale to the consumer could certainly contain a substance (water) which merely increases the bulk and weight thereof. Such is

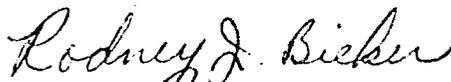
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clearly an "adulterated" product as defined by 21 U.S.C. §601(m)(8) and the secretary has "created a rule out of harmony with the statute." Thus, it is our opinion that the State of Kansas may, consistent with federal law, prohibit the distribution and sale of water added hams, since such products are within the definition of the term "adulterated," as defined in 21 U.S.C. §601(m)(8) and K.S.A. 65-664(b)(4).

Very truly yours,



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