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ATTORNEY GENERAL OPINION NO. 90- 83

Kenneth M. Wilke
Chief Counsel
State Board of Agriculture
109 S.W. 9th
Topeka, Kansas 66612-1280

Re: Public Health--Milk, Cream and Dairy Products--Establishment of Fees for Statewide System of Milk Inspection and Regulatory Services

Synopsis: Section 5(b) of 1990 S.B. 419 amending K.S.A. 65-745 evidences a clear legislative intent to establish a minimum milk inspection fee on package grade A pasteurized milk or grade A milk products imported into Kansas and sold at retail to final consumers, making language to the contrary surplusage. Cited herein: K.S.A. 65-745; 65-746, both as amended by 1990 Senate Bill No. 419.

* * *

Dear Mr. Wilke:

As chief counsel for the state board of agriculture you request an interpretation of section 5(b) of 1990 Senate Bill No. 419, amending K.S.A. 65-745 which deals with fees for milk inspection under the grade A milk act. You indicate that subsection (b) imposes a fee for milk inspection on grade A milk or milk products imported into Kansas and sold at retail to final consumers.

1990 Senate Bill No. 419 amends subsection (b) by adding the language:

> "If any fee computed pursuant to this subsection is less than $2.50, then the sum of $2.50 shall be paid in lieu of such computed fee. On and after the effective date of this act, no fees shall be assessed pursuant to this subsection."

By amending the statute, it is clear the legislature intended a change. Katz v. Katz, 191 Kan. 500 (163); Sutherland Stat. Const. § 22.30 (4th Ed., 1985 revision). However, the problem is that the two sentences added by the legislature lead to a clearly absurd and contradictory result. Thus the issue is one of statutory construction. The fundamental rule of statutory construction, to which all others are subordinate, is that the intent and purpose of the legislature governs when that intent can be ascertained from the statute, even though words in the statute must be omitted or inserted. Jones v. The State, ex rel., 1 Kan. 273 (1863); Richards v. Etzen, 231 Kan. 704 (1982). In determining legislative intent, courts are not limited to a mere consideration of the language used, but may consider the statute's historical background, the purpose to be accomplished and the effect the statute may have under various constructions suggested. State v. Thompson, 237 Kan. 562 (1985), Board of Education of U.S.D. 512 v. Vic Regnier Builders, Inc., 231 Kan. 731 (1982), State ex rel. v. Kalb, 218 Kan. 459 (1975), Brown v. Keill, 224 Kan. 195 (1978).

Historically (prior to the 1990 amendment), K.S.A. 65-745 established three fees for milk inspection under the grade A milk act: subsection (a) established a fee for milk produced by Kansas producers under grade A inspection; subsection (b) imposed a similar fee on packaged grade A pasteurized milk or grade A milk products imported into Kansas and sold at retail to final consumers; and subsection (c) established a similar fee on packaged grade A pasteurized milk or milk products processed by milk processors in Kansas for distribution outside of the state. The statute had no minimum fee provisions nor did it contain subsection (d).

In addition to the amendments to subsection (b) the 1990 legislature modified K.S.A. 65-745 by eliminating assessments pursuant to subsection (c) and replacing those assessments by creating a new fee of $.01 per hundred pounds or fraction thereof of grade A raw milk for pasteurization, subject to a minimum fee of $2.50 [subsection (d)]. Similar to subsection (b) the legislature added to subsection (c) the language: "on

and after the effective date of this act no fee shall be assessed pursuant to this subsection." In subsection (c), however, the language makes sense for the following reasons. Each of the fees, assessed pursuant to K.S.A. 65-746, is collected 30 days after the fact and the fee is based upon the quantity of milk for the preceding calendar month. Thus the language added to subsection (c) prevents future assessments but does not prevent collection of the past assessments made the preceding calendar month.

The statute's purpose has historically been a public health measure, imposing fees for the statewide system of milk inspection and regulatory services established pursuant to K.S.A. 65-737a. It is clear from the above analysis that the amendments made by the 1990 legislature do not change its purpose other than to increase the revenue by imposing certain minimum fees [subsections (b) and (d)] and by allowing collection of previous assessments [subsection (c)]. Increasing revenue is clearly not accomplished by the modifications made to subsection (b) where the legislature establishes a minimum fee pursuant to that subsection and then proceeds to prevent its collection in the next line. In fact, if effect were given to this modification it would cause a short-fall in the agency's budget of approximately $31,500.00 in fiscal year 1991.

The legislative intent to increase revenues is plain, and it can only be effectuated by construing subsection (b) as establishing a minimum fee and finding that language to the contrary is surplusage. But in order to reach this conclusion a reasonable interpretation of the language used must evidence not only intent; it must achieve that intent. The Supreme Court describes this standard:

> "[T]he court cannot delete vital provisions or supply vital omissions in a statute. No matter what the legislature may have really intended to do, if it did not in fact do it, under any reasonable interpretation of the language used, the defect is one which the legislature alone can correct." State ex rel. Stephan v. Martin, 230 Kan. 747, 753 (1982), citing Russell v. Cogswell, 151 Kan. 793, 795 (1940).

In our judgment the legislature did achieve their intent. Legislative history, the purpose of the act and various

constructions of the act clearly show the legislature intended to establish a collectable minimum fee pursuant to subsection (b). A reasonable interpretation of the language used achieves this legislative intent, making the last line in the subsection surplusage. See American Fidelity Ins. Co. v. Employees Mutual Casualty Company, 3 Kan.App.2d 245 (1979) (where the standard for a construction that results in rendering part of a legislative act surplusage is one of reasonableness) cited with approval by the Supreme Court in Beck v. Kansas Adult Authority, 241 Kan. 13, 19 (1987). See also Lakeside Village Improvement Dist. v. Jefferson County, 237 Kan. 106, 114 (1985). State v. Horn, 126 Kan. 591 (1928).

Very truly yours,

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