Elizabeth Gamsky Rich & Associates SC

May 25, 2010

The Honorable Patrick J. Fiedler
Circuit Court Judge, Br. 8
Dane County Courthouse
215 S. Hamilton Street, Room 8103
Madison, WI 53703-3292

VIA FACSIMILE 608.266.4080

Re: *Farm-to-Consumer Legal Defense Fund, et al. v. WDATCP*
Dane County Case No. 09-CV-6313

Dear Judge Fiedler:

Attached please find Plaintiffs' Response to the Defendant's Motion for Judgment on the Pleadings. A copy has been provided to counsel of record this date via facsimile transmission and electronic mail.

Very truly yours,

ELIZABETH GAMSKY RICH & ASSOCIATES SC

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STATE OF WISCONSIN | CIRCUIT COURT Branch 8 | DANE COUNTY

FARM-TO-CONSUMER LEGAL DEFENSE FUND, GRASSWAY ORGANICS FARM STORE LLC, GRASSWAY ORGANICS ASSOCIATION, and KAY and WAYNE CRAIG, d/b/a GRASSWAY FARM,

Plaintiffs,

v.

Case No. 09-CV-6313
Declaratory Judgment: 30701

WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION,

Defendant.

RESPONSE TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

The Defendant Wisconsin Department of Agriculture, Trade and Consumer Protection ("DATCP"), has moved the Court for an order granting it judgment on the pleadings.

The sole basis for the motion is DATCP's assertion that its promulgation and interpretation (as set forth in a letter dated May 18, 2009) of Wis. Admin. Code § ATCP 60.235 is "not plainly erroneous or inconsistent with the language of the rule or regulation and is, therefore, controlling," *citing Hillhaven Corp. v. DHFS,* 2000 WI App 20 ¶12, 232 Wis. 2d 400, 606 N.W.2d 572. Defendant's Motion at p. 2.

The motion must fail for several reasons. First, DATCP has cited authority applicable to review of an agency's interpretation of its own rule, but the complaint alleges arbitrary and capricious enforcement of a statute. Second, DATCP has asked the Court to

rely on its May 18, 2009 letter in rendering judgment on the pleadings, which is improper. Third, the complaint alleges facts which must be taken as true for purposes of deciding the motion before the Court and which, if true, establish that DATCP's interpretation and enforcement of ATCP 60.235 is arbitrary and capricious.

Standard of Review

Judgment on the pleadings is proper only when, taking all the allegations of the complaint as true, those allegations are not sufficient as a matter of law to constitute a claim for relief. *All Electric Service, Inc. v. Matousek,* 46 Wis. 2d 194, 199, 174 N.W.2d 511 (1970). Questions of fact are not to be resolved on such a motion. *Poeske v. Estreen,* 55 Wis. 2d 238, 242, 198 N.W.2d 625 (1972).

"A judgment on the pleadings is essentially a summary judgment minus affidavits and other supporting documents." *Jares v. Ullrich,* 2003 WI App 156, ¶ 8, 266 Wis. 2d 322, 667 N.W.2d 843. Thus, when considering a motion brought under Wis. Stat. §802.06(3), the court must construe all facts and draw all reasonable inferences in favor of the non-moving party. *Anders v. Waste Management of Wisconsin, Inc.* 463 F.3d 670, ¶18 (7th Cir. 2006).

Argument

I. <u>The Complaint alleges arbitrary and capricious enforcement of a statute, raising issues that cannot be resolved without factual inquiry.</u>

DATCP's motion is based upon the assumption that the only issue to be resolved is the agency's interpretation of its own rule. The rule, however, is not referenced anywhere in the Complaint. Rather, the Complaint challenges DATCP's interpretation of a statute—Wis. Stat. §97.24.

Most Wisconsin courts have held that the deference to be accorded an agency interpretation of its own rule is different than the deference given to an agency interpretation of a statute.[1] *See, e.g., Hillhaven* at ¶12. While agency interpretations of their own rules may be entitled to "great weight" deference, agency interpretations of statutes are reviewed differently. *Id.*

The analysis must be conducted in steps. The threshold inquiry is whether the statute is ambiguous in any way. "[A] statutory provision is ambiguous if reasonable minds could differ as to its meaning." *Harnischfeger Corp. v. Labor and Industry Review Com'n,* 196 Wis. 2d 650, 539 N.W.2d 98 (1995). If the statute is ambiguous, the court must look beyond the statute's language and examine the "scope, history, context, subject matter and purpose of the statute." *UFE Inc. v. Labor and Industry Review Com'n,* 201 Wis. 2d 274, 548 N.W.2d 57 (1996).

There is no question that Wis. Stat. §97.24 contains several ambiguities. Among them is §97.24(2)(d), which provides in pertinent part:

> This Section does not prohibit:
> . . .
> (2) Incidental sales of milk directly to consumers at the dairy farm where the milk is produced.

At issue in this case is whether the milk distribution to Plaintiff GrassWay Organics Association ("Association") members falls within the incidental sales exemption set forth above. Also at issue is whether the Association members are "consumers" within the meaning of statute, or whether they are parties to a private contract exercising ownership rights conferred by that contract. Both inquiries require further factual investigation.

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[1] A proper analysis, however, recognizes that "[W]hen interpreting administrative regulations, we use the same rules of interpretation as we apply to statutes." *DaimlerChrysler v. LIRC,* 2007 WI 15, ¶10, 299 Wis. 2d 1, 727 N.W.2d 311.

Another ambiguity is created by the provision set forth at Wis. Stat. §97.24(3), which contains an exception to the directive that DATCP issue rules governing the "production, transportation, processing pasteurization, handling, identity, sampling," etc. of milk products. Such rules are to be "in reasonable accord" with federal public health standards, with the following exception:

> except that the requirements for bottling and sterilization of bottles in such standards shall not apply to milk sold by a producer, selling only milk produced by the producer on the producer's dairy farm under the producer's own supervision, and selling such milk only in the producer's own milk house, which milk meets the requirements of grade A standards as set forth by the department of agriculture, trade and consumer protection, to a purchaser who has provided his or her own container, which has been sanitized in a manner comparable to the sanitizing of the utensils used in the production of milk by the producer, if the purchaser is purchasing milk for his or her own consumption.

The foregoing provision appears to contemplate sales to purchasers directly from a bulk tank before pasteurization has occurred.

When a statute is ambiguous, it is the responsibility of the judiciary to interpret it. As stated by the Court in *DOR v. Menasha Corporation,* 2007 WI App 20, ¶46, 299 Wis. 2d 348, 728 N.W.2d 738, "The specific characterization of deference given to an agency is dependent upon whether the agency is interpreting a statute or a regulation." The Court went on to quote *Racine Harley Davidson, Inc. v. Wis. Div. of Hearings & Appeals,* 2006 WI 86, ¶14, 292 Wis. 2d 549, 717 N.W.2d 184:

> By granting deference to agency interpretations, the court has not abdicated, and should not abdicate, its authority and responsibility to interpret statutes and decide questions of law. Some cases, however, mistakenly fail to state, before launching into a discussion of the levels of deference, that the interpretation and application of a statute is a question of law to be determined by a court. In any event, it is the court's responsibility to decide questions of

> law and determine whether deference is due and what level of deference is due to an agency interpretation and application of a statute.

Wisconsin courts apply three different standards of review to agency interpretations: (i) "great deference;" (ii) "due weight;" and (iii) no deference, or *de novo*. Massa, "The Standards of Review for Agency Interpretations of Statutes in Wisconsin," 83 *Marq. L. Rev.* 597 (2000) at 4. There are at least five triggers for *de novo* review:

- The agency's decision is one of first impression;
- The statute in question raises a jurisdictional question, such as the constitutional limits of the agency's conduct;
- The agency's prior decisions are so inconsistent that they provide a court little or no guidance;
- The agency is not charged with interpreting the statute at issue; and
- Prior appellate decisions have interpreted the same statute that the agency has interpreted.

Id. at 7. In the case at hand, the first three triggers are applicable, and de novo review is appropriate. Such review will require examination of numerous facts, including the agency's conduct in enforcing the statute, the agency's past and present interpretations of the statute, and the inconsistent nature of the agency's prior decisions under the statute. Because these facts are not before the Court at this time, judgment on the pleadings is inappropriate.

The May 18 letter relied upon by DATCP is a recent agency decision of first impression. The Complaint has raised a jurisdictional question—specifically, whether

DATCP's authority to regulate retail food establishments extends to the private contract entered into by Association members. And finally, the Complaint alleges that the agency has rendered a host of decisions inconsistent with the determinations in the May 18 letter, all of which must be construed as true. [*cf Marten Transport, Ltd., v. Dep't of Industry, Labor and Human Relations,* 176 Wis. 2d 1012, 501 N.W.2d 391 (1993), holding that *de novo* review is appropriate when an agency's position on an issue has been so inconsistent so as to provide no real guidance.] Any one of the foregoing is sufficient to trigger de novo review by this Court. *See* Massa at 8. Of course, meaningful *de novo* review will require development of relevant facts—for example, evidence of the agency's prior inconsistent decisions. Consequently, a judgment on the pleadings is not appropriate and DATCP's motion should be denied.

II. The Motion must be decided based only on the allegations in the Complaint.

In support of its motion, DATCP cites to Wis. Admin. Code ATCP 60.235 and a letter issued by DATCP attorney Cheryl Daniels on May 18, 2009. DATCP asserts, without support, that the letter constitutes DATCP's current interpretation of its rule.[2] The Plaintiffs allege that DATCP's interpretation is arbitrary and capricious in part because the agency's own interpretation is in a constant state of flux; because the agency interpretation of May 18 is only one of numerous inconsistent interpretations; and because the agency interpretation is inconsistent with agency enforcement.

[2] It is not clear why DATCP is asserting that the May 18 letter, and not, for example, DATCP's letter of June 22, 2009, attached to the Complaint as Exhibit 15, or DATCP's July 20, 2009 letter attached to the Complaint as Exhibit 17 constitutes DATCP's current interpretation of its rule. Nor is it clear that the positions articulated in these letters do in fact constitute official statements of DATCP policy. These are facts that will need to be explored using the discovery process as the case proceeds.

These are questions of fact that must be established during discovery. Inquiry must be made into DATCP's current interpretation of the rule; what its past interpretations have been; and what caused the change. These are not questions that can be resolved by examination of the pleadings. Moreover, DATCP cannot make a bald assertion in a motion that the May 18 letter constitutes its current interpretation of its rule. Rather, evidence of the agency's interpretation must be gathered and examined to determine that factual question.

Consequently, and construing the allegations in the Complaint as true, DATCP' motion is not well taken and it should be denied.

III. The Complaint alleges that DATCP acted beyond its authority in enforcing the statute, and that DATCP lacks jurisdiction to regulate the farm store, raising issues that cannot be resolved without factual inquiry.

The Complaint alleges that the Association members have a bona fide ownership interest in the GrassWay Organics Farm Store LLC (the "Store") that entitles them to procure milk from the cows that they own by virtue of their membership in the Association. The details of that ownership interest are questions of fact that must be examined in order to determine whether DATCP's interpretation of Wis. Stat. §97.24 is arbitrary and capricious.

The Complaint also alleges that the Store is private and not open to the public, and that members of the Association are not "consumers" within the meaning of the statute. The Complaint further alleges that the Store is not a "retail food establishment" within the meaning of the statute, because no retail sales to consumers take place there. Whether Wis. Stat. §97.24 confers jurisdiction for DATCP's regulation of these Plaintiffs requires inquiry into factual matters such as the validity of the Plaintiff's ownership interest in the milk

producer license and whether they are members of the public intended to be regulated as "consumers" under the statute, or whether they are informed private contractors with ownership interests not subject to such regulation.

Conclusion

For the reasons set forth above, the Defendant's motion for judgment on the pleadings must be denied.

Dated this 25th day of May, 2010.

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