

February 29, 1960.

HON. FLOYD R. HOFFMAN, *Director*
Office of Milk Industry
P. O. Box 1424
Trenton, New Jersey

FORMAL OPINION 1960—No. 4

DEAR DIRECTOR :

You have asked whether you have power under the Milk Control Act to require machines vending milk to be licensed as stores and whether you have authority to fix minimum prices chargeable to purchasers from vending machines at levels different than those fixed for purchasers from conventional stores. You do have power to require ordinary vending machines to be licensed as stores. You have authority to fix prices chargeable out of vending machines at different levels than prices chargeable in conventional stores on condition that statutory standards are shown to be satisfied by evidence at a hearing justifying the difference in treatment.

Section 28 of the Milk Control Act now in effect, L. 1941, c. 274, N.J.S.A. 4:12A-28, provides that "no * * * store, as defined in this act shall * * * engage in the milk business within this State, unless duly licensed as in this act provided * * *." Section 1 of the present act, N.J.S.A. 4:12A-1, defines the term "store" as follows:

"A grocery store, delicatessen, food market, hospital, institution, hotel, restaurant, soda fountain, dairy products store, any governmental agency, roadside stand and similar mercantile establishments."

To determine whether a vending machine was intended to be included within the statutory definition of "store" it is necessary to examine the purpose and history of the legislation. The original Milk Control Act, L. 1933, c. 169, granted the Milk Control Board the power to fix prices "to be paid to the producer and to be charged the consumer." Although the Board was thus given power to fix prices at every stage of the distribution process, licenses were required only of dealers. *Id.*, Art. V, § 1(a).

The 1933 act did not satisfy all the needs for milk control. It expired of its own force in 1935 and was succeeded by a more comprehensive act, L. 1935, c. 175. The preamble to the 1935 act stated that "demoralizing practices" (i.e., price cutting) threatened not only the production of milk but also its distribution, creating conditions inimical both to the agricultural interests of the State and to the consumers. In order more effectively to prevent destructive price cutting the 1935 act extended the licensing requirement to stores. *Id.* § 500. The act defined the term "store" as follows:

"A grocery store, delicatessen, hospital, institution, hotel, restaurant, soda fountain, dairy products store, roadside stand and similar mercantile establishments." *Id.* § 112.

The inclusion in the definition of the word "store" in the 1935 act of all the then known means of carry-away sales to the consumer plus a more general definition to include all "similar mercantile establishments," indicates a recognition that price cutting is just as harmful, regardless of the form of the outlet. You have recognized this potential for many years by prescribing in price-fixing orders the minimum price at which milk may be sold out of vending machines.

Because advancements in technology have introduced a new method of making carry-away sales to the consumer that was unknown at the time of the adoption of the 1935 act must not be allowed to frustrate the purpose of the law to require licenses of all means of carry-away sales to the consumer.

In every aspect that is important to the requirement of licenses, the usual roadside vending machine is identical with a "dairy products store" and a "roadside stand." Certainly vending machines are mercantile establishments similar to the more particularly enumerated stores. For all of these reasons it is our opinion that the usual roadside machine vending to consumers who carry the milk away must be licensed under the Milk Control Act. Section 36 of the present act, L. 1941, c. 274, N.J.S.A. 4:12A-36, provides further, however, "that a store selling milk exclusively for consumption on the premises shall not be required to obtain a license * * *." Milk vending machines in factories and office buildings which are patronized by occupants of the building who drink the milk in the building, and outdoor machines which may be similarly patronized by people who drink the milk in the immediate area, may come within this exception. Whether or not the milk is consumed "on the premises" presents a question of fact in each case. You have power under section 21 of the Milk Control Act, N.J.S.A. 4:12A-21, to adopt regulations to establish prima facie tests of what is or is not on premises consumption. For example, you might by regulation provide that milk vended in quart containers is prima facie for off-premises consumption.

You also ask whether the prices fixed for vending machine sales may be different from those fixed for sales out of conventional stores. Section 21 of the Milk Control Act grants a number of general powers, including the power to "fix the price at which milk is to be sold or distributed * * *." N.J.S.A. 4:12A-21. The grant of power in this section is given meaning by the purposes therein listed, to prevent destructive or demoralizing practices which would interfere with the interests of producers and consumers. Section 22 of the Milk Control Act more specifically grants you the power to fix "minimum prices to be charged the consumer * * *." N.J.S.A. 4:12A-22. In exercising this power, this section provides that you are to take into consideration what will best insure a sufficient quantity of fresh, pure and wholesome milk to the inhabitants of this State, including the cost of transportation and marketing, and the amount necessary to yield a reasonable return to the dealer or subdealer who supplies stores. Prices may be fixed only after investigation and proof, N.J.S.A. 4:12A-22, *Abbotts Dairies, Inc. v. Armstrong*, 14 N.J. 319 (1954), and after an advertised public hearing and a finding of fact by you, N.J.S.A. 4:12A-23. Whether or not the prices fixed for sales out of vending machines may be different from that fixed for sales out of conventional stores depends upon whether an application of these statutes would warrant a finding of fact by you that the purposes of the Milk Control Act will be served by such a distinction.

Very truly yours,

DAVID D. FURMAN
Attorney General

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