S T A T E O F T E N N E S S E E
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December 20, 2000

Opinion No. 00-189

Regulatory Authority of the Commissioner of the Tennessee Department of Agriculture

QUESTIONS

1. Whether the Commissioner of Agriculture ("Commissioner") is required to conduct a hearing in every case in which a regulatory violation is suspected, or only when there is a request for a hearing by the person cited, or when the issue is one in which the denial, revocation or suspension of a charter, license or permit issued by the Department of Agriculture ("Department") is a possibility.

2. Whether the Commissioner has authority to impose civil penalties of up to $1,000 under Tenn. Code Ann. § 62-21-118 and -119, and if so, whether the amount of such penalty is at the Commissioner's discretion, so long as it is under $1,000.

3. Whether a civil penalty issued for a regulatory violation is a "fine" within the meaning of Article VI, Section 14, of the Tennessee Constitution such that the person penalized has the right to a jury trial.

4. Against whom may civil penalties be assessed or actions affecting charters, licenses or permits be taken for violations of regulations and statutes governing the commercial application of pesticides? Are employers liable for their employees' violations of such statutes, regulations, and label instructions in the application of pesticides?

OPINIONS

1. The Commissioner must conduct a hearing, without request, in any case in which the Commissioner has reason to believe a charter holder, licensee, or certificate holder has violated Title 62, Chapter 21 or Title 43, Chapter 8, Parts 1 and 2, and the rules and regulations promulgated under these respective chapters, if the Commissioner wishes to impose a civil penalty or take any adverse action against a charter, license or certificate. However, the Commissioner may issue a warning notice without a hearing.

2. Yes, pursuant to Tenn. Code Ann. § 62-21-118 and -119 (Repl. 1997), the Commissioner has authority to impose penalties at his discretion for any amount up to $1,000 for each violation of Title 62, Chapter 21 or Title 43, Chapter 8, Parts 1 and 2, and the rules and regulations promulgated under these respective chapters.

3. No, a civil penalty for a regulatory violation does not constitute a "fine" such that a person so cited is entitled to a jury trial.

4. The Commissioner may assess a civil penalty against, and/or revoke, deny, suspend or modify any license, charter or certification, of any charter holder, licensee or certificate holder. An employer is not vicariously liable for violations by its employees under Title 62. Accordingly, a civil penalty could only be imposed upon the employer if the employee's violation also constituted a violation by the employer as well.

ANALYSIS

1. The Commissioner must conduct a hearing before any action may be taken against a charter, license or certification, or any civil monetary penalty may be imposed:

> If the commissioner has reason to believe that a charter holder, licensee or certificate holder has violated any provision of this chapter, including its rules and regulations, or has used any economic poison in violation of the provisions of the Tennessee insecticide, fungicide, and rodenticide law, compiled in title 43, chapter 8, parts 1 and 2, including its rules and regulations, the commissioner shall conduct a hearing to determine if any license, charter or certification should be denied, revoked, suspended or modified, and/or impose civil penalties of up to one thousand dollars ($1,000) for each violation, or the commissioner may issue a warning notice.

Tenn. Code Ann. § 62-21-119(a) (Repl. 1997) (emphasis supplied). An alleged violator need not request a hearing, as one is required. *Id.* A ten-day written notice setting forth the charges of the alleged violation must be given, and the hearing must be conducted in accordance with the Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-101, *et seq*. *See* Tenn. Code Ann. § 62-21-119(c) (Repl. 1997). The Commissioner may, however, issue a warning notice without a hearing.

2. The Commissioner has discretion to impose a civil penalty up to one thousand dollars for each violation pursuant to Tenn. Code Ann. § 62-21-118, which provides in pertinent part, "[t]he commissioner has the power and duty to . . . (7) [h]old hearings and deny, revoke, modify or suspend

charters, licenses and certification, and/or impose civil penalties up to one thousand dollars ($1,000) for each violation." Tenn. Code Ann. § 62-21-118(a)(7) (Repl. 1997).

3. Article VI, Section 14 of the Tennessee Constitution provides that a citizen may not be fined more than fifty dollars ($50.00) except by trial by jury. The Tennessee Supreme Court has concluded this provision does not apply to civil penalties, such as a penalty imposed for violation of a city ordinance, because such a proceeding is civil and not criminal. *See O'Dell v. City of Knoxville*, 214 Tenn. 237, 379 S.W.2d 756 (1964). In *O'Dell*, a person convicted in a municipal court of violating a city ordinance by operating an automobile under the influence of an intoxicant was fined $100 by a judge in a municipal court. The individual appealed the fine on the ground, among others, that it violated Article VI, Section 14 of the Tennessee Constitution. The Court concluded that a penalty for violation of a city ordinance is not a "fine" within the meaning of Article VI, Section 14. The Court pointed out that a prosecution for violation of a city ordinance is generally considered a civil, not a criminal, proceeding. *Accord Town of Nolensville v. King*, 2000 WL 1291984 (Tenn. Ct. App. Sept 14, 2000); *City of Chattanooga v. Davis*, 2000 WL 1635604 (Tenn. Ct. App. Oct. 31, 2000).

In analyzing whether a proceeding under a statute is civil rather than criminal for these purposes, courts have used a two-prong test. The first prong requires a determination of whether the legislature intended the proceedings under the statute to be civil or criminal. *United States v. Ursery*, 518 U.S. 167, 288, 116 S.Ct. 2135, 2147 (1996), *on remand on another issue*, 92 F.3d 1129 (6th Cir. 1997) (discussing whether forfeiture proceedings violate the constitutional prohibition against being punished twice for the same offense). The second prong requires a determination of whether the proceedings are so punitive in form and effect as to render them criminal in spite of the legislature's contrary intent. *Id.* A determination that the proceedings are so punitive requires the "clearest proof." 518 U.S. at 290, 116 S.Ct. at 2148. In *Ursery*, in making this determination, the Supreme Court also noted that the procedure had not historically been regarded as punishment. In applying the second part of the test, the Court noted that the penalty served a remedial, as well as a deterrent purpose. *Id.* The Court, therefore, concluded that forfeiture was a civil, and not a criminal, penalty. *See also Stuart v. Tennessee Department of Safety*, 963 S.W.2d 28 (Tenn. 1998) (same). It is our opinion that a court would reach the same conclusion with regard to the regulatory violations at issue here, especially given the explicit language of the statute providing for the imposition of "civil penalties up to one thousand dollars." Tenn. Code Ann. § 62-21-119(a); *see also* Op. Tenn. Atty. Gen. No. 99-123 (June 18, 1999) (imposition of civil penalties greater than $10 for violation of occupational health and safety regulations without trial by judge or jury is constitutional under both the Tennessee and U. S. Constitutions).

4. The Commissioner may take an adverse action affecting a charter, license or certification and/or assess civil penalties against a "charter holder, licensee or certificate holder" who has violated Title 62, Chapter 21 or Title 43, Chapter 8, Parts 1 and 2, or any of the rules and regulations promulgated thereunder. Tenn. Code Ann. § 62-21-118(7). It appears the Commissioner does not have jurisdiction

to penalize violations under Title 62 or 43 unless the violator holds a charter, a license or a certification from the Department.[1]

The last question is whether an employer may be penalized by the Commissioner for violations by the employer's employees.[2] The rule of respondeat superior, under which civil liability is imposed upon the master for acts of an employee, is inapplicable to the imposition of a civil penalty or forfeiture. *See Davis v. Missouri Real Estate Comm.*, 211 S.W.2d 737, 739 (Mo. Ct. App. 1948); *Greene v. Real Estate Comm.*, 218 A.2d 508, 511 (D.C. 1966); *Ohio, ex. rel. Celebrezze v. Environmental Enter., Inc., et al.*, 559 N.E.2d 1335 (Ohio 1990); *see generally* 36 Am.Jur.2d, Forfeitures and Penalties, § 62; 35 Am.Jur. 1045, § 605. Unless the statute imposing the penalty expresses a contrary intent, that is, that the employer shall be liable for acts or omissions of his or her employees, then an employer must also be culpable in some way in order to impose a civil penalty. Therefore, the answer to this question depends upon whether the violation by an employee constitutes a separate violation by the employer as well. If so, the employer (charter holder) would be subject to penalties as well as the employee, assuming the employee is licensed or certified.

For example, Tenn. Code Ann. § 62-21-103(a) (Repl. 1997) provides "[n]o person shall engage in business as a commercial pest control operator until the person has secured a charter from the department [of Agriculture]." The actual application of pesticides, the "technical service work," must "be performed under the direct supervision such licensed operator." Tenn. Code Ann. § 62-21-106(a)(2) (Repl. 1997). Technical service work must be performed by employees meeting certain qualifications established by the Pest Control Board ("Board") through regulations. Tenn. Code Ann. § 62-21-106(a)(3). A charter holder could be liable if it knowingly allowed employees not meeting qualifications set by the Board to perform technical service work. Likewise, if such work were not performed under the direct supervision of a licensed operator, the charter holder may be in violation and may be subject to penalties under Title 62. Another example in which a licensed operator or charter holder may be determined in violation for the actions of an employee would be a case in which an uncertified technician were allowed to apply pesticides without the "close

[1]It is a criminal offense to apply pesticides for a fee without a valid charter: Tenn. Code Ann. § 62-21-120 provides "A custom application without a valid charter is a Class A misdemeanor." "Custom application of pesticides" is defined as "the application of pesticides for a fee." Tenn. Code Ann. § 62-21-102(9) (Repl. 1997).

[2]This opinion is limited to consideration of an employer's (charter holder's) "liability" in the form of civil penalties and/or adverse actions affecting a charter, license or certificate under Title 62 of Tennessee Code Annotated and does not address any other forms of civil liability, such as the tort theories of respondeat superior or vicarious liability.

supervision of [a] licensed pest control operator" or in the presence of a certified person. *See* Rule 0080-6-14-.11 of the Rules and Regulations of the State of Tennessee.

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