

Bartel
COPY

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

SEPTEMBERFEST SALUTE TO)
LABOR, INC., A Nebraska)
Nonprofit Corporation,)
)
Plaintiff,)
)
vs.)
)
NEBRASKA DEPARTMENT OF)
REVENUE, M. BERRI BALKA,)
Nebraska Tax Commissioner and)
STATE OF NEBRASKA,)
)
Defendants.)

Docket 571

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ORDER

DEPT. OF JUSTICE
DEC 5 1998
STATE OF NEBRASKA

This matter came before the Court on October 22, 1998, for trial on the merits of petition. The plaintiff appeared by Attorney Jennifer L. Sellers and the defendants appeared by Assistant Attorney General L. Jay Bartel. Sworn testimony was adduced and Exhibits 1 and 2 were received into evidence. The matter was argued on the record and submitted on briefs. The Court now being fully advised, finds and orders as follows:

STANDARD OF REVIEW

The Administrative Procedure Act provides that the review of the Department of Revenue's decision is de novo on the record created before the agency. NEB. REV. STAT. § 84-917(5)(a).

STATUTES INVOLVED

Pickle card units shall be delivered by the sales agent to the pickle card operator in any manner which results in a signed receipt from the pickle card operator, including personal delivery or delivery through the mail or by a common carrier.

NEB. REV. STAT. § 9-340.02(3).

STATEMENT OF THE CASE

This is an appeal pursuant to NEB. REV. STAT. §§ 9-325(3) (1997) and 84-917 (1997 Supp.) from a May 26, 1998, order of the State Tax Commissioner imposing a \$200 administrative fine against plaintiff Septemberfest Salute to Labor, Inc., an organization licensed to conduct a lottery by the sale of pickle cards, for violating the Nebraska Pickle Card Lottery Act (hereafter "the Act"). The Commissioner based his decision on his determination that the plaintiff had violated the Act by allowing pickle cards to be delivered by someone other than its licensed sales agent on June 4, 1997, to Cubby's in Tekamah, a store that was authorized to sell pickle cards for Septemberfest. (Commissioner's Order at 5). The Commissioner also was not swayed by the plaintiff's claims that even if the statute *did* require *only* its licensed sales agent to make deliveries of its pickle cards, the plaintiff still should not be responsible for the fine because such agent was an independent contractor and not an employee.

There are three central disputes in the case. First, the plaintiff disputes that pickle cards were ever delivered by someone other than their licensed sales agent, Linda Lowe. (Transcript at 7; Plaintiff's Brief in Support of Petition at 7). Second, the plaintiff disputes whether the Act even requires delivery by a registered sales agent alone (Plaintiff's Brief in Support at 6). Third, the plaintiff disputes that even if such a delivery were made by someone other than the licensed sales agent Linda Lowe, Miss Lowe is an independent contractor and not an employee of the plaintiff, and therefore the plaintiff cannot be held responsible for any missteps on her part. (Transcript at 08; Plaintiff's Brief in Support of Petition at 2).

QUESTIONS PRESENTED

I. Does delivery of pickle cards by someone other than the plaintiff's licensed agent violate the Nebraska Pickle Card Lottery Act?

First, the issue of whether the statute in fact requires what the Tax Commissioner found -- specifically that the delivery of pickle cards must be made personally by a registered sales agent.

The relevant parts of the Nebraska Pickle Card Lottery Act state:

Sales agent shall mean any person who markets, sells, or delivers any pickle card unit on behalf of a licensed organization to any licensed pickle card operator.

NEB. REV. STAT. § 9-320 (1997).

No sales agent shall market, sell, or deliver any pickle card unit to any pickle card operator without first obtaining a license.

NEB. REV. STAT. § 9-329(1) (1997).

Pickle card units *shall* be delivered by the sales agent to the pickle card operator *in any manner* which results in a signed receipt from the pickle card operator, *including* personal delivery or delivery through the mail or by a common carrier.

NEB. REV. STAT. § 9-340.02(3) (1997) (emphasis added).

The state argues that delivery of pickle card units to operators may be made only by individuals licensed as sales agents, either by personal delivery or via commercial carrier, according to the provisions of Neb. Rev. Stat. §§ 9-320, 9-329 and 9-340.02(3) (1997) and 316 NAC 35-308 (1993). (Defendant's Brief at 13.) The defendant notes that in construing a statute, "it is not within the province of the courts to read a meaning into a statute that is not there . . ." *State v. Kelley*, 249 Neb. 99, 104, 541 N.W.2d 645, 650 (1996). Instead, the state argues, citing *Sorensen v. Meyer*, 220 Neb. 457, 463, 370 N.W.2d 173, 177 (1985), courts "will, if possible, give effect to every word, clause, and sentence of a statute, since the Legislature is presumed to

have intended every provision of a statute to have meaning.” The state claims that the plain language of the Act in this instance requires the pickle card units to be delivered by the sales agent, noting the “shall” language in the Act. (Defendant’s Brief at 14). The state claims that while delivery must be by the sales agent, the Act allows delivery to be the mail or use of common carrier, providing that either method results in a signed receipt from the operator. (Defendant’s Brief at 14).

The state also notes that the regulations promulgated under the Act clarify how a sales agent must deliver pickle cards to authorized operators. Those regulations provide:

308.02 An individual licensed as a sales agent shall have the following responsibilities:

308.02D Ordering, picking up, and/or accepting delivery of pickle card units and punchboards from licensed distributors or the licensed organization which he or she represents and delivering such units or boards to licensed pickle card operators who are authorized to sell pickle cards or punches from a punchboard on behalf of the licensed organization he or she is licensed to represent; . . .

(Vol. I, E3, 2-4, 316 NAC 35-308 (1993)).

The state notes that the regulations go on to state:

308.02D(2) A licensed sales agent may arrange delivery of pickle card units and punchboards to a licensed pickle card operator by mail or common carrier provided the requirements of Regulation 35-308.02F are adhered to.

(Vol. I, E3, 4, 316 NAC 35-308 (1993)).

The regulations cited by the state tend to support the state’s interpretation that a licensed sales agent can effect delivery only by personally doing so or by common carrier or mail. It is also true that “[a]lthough construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such construction, when the Legislature has failed to take any action to change such interpretation.” *Metropolitan Utilities District v. Balka*,

252 Neb. 172, 176, 560 N.W.2d 795, 799 (1997). The state also correctly cites case law stating that “[a]gency regulations, properly adopted and filed with the Secretary of State, have the effect of statutory law.” *Nucor Steel v. Leuenberger*, 233 Neb. 863, 866, 448 N.W.2d 909, 911 (1989).

However, the plain meaning of the statute cannot be ignored, regardless if the regulations tend to favor the state’s position. Despite the state’s contention, the plain meaning of the Act is that the pickle cards shall be delivered by the sales agent to the licensed pickle card operator “*in any manner which results in a signed receipt from the pickle card operator, including personal delivery through the mail or by common carrier.*” (emphasis added). The statute specifically uses words that indicate the pickle cards may be delivered by the licensed sales agent in a manner that results in a receipt for the cards, *including* mail or common carrier. The statute clearly does not state that the sales agent *must* either hand deliver the cards or mail them or have them delivered by common carrier. Instead, the statute says the licensed sales agent shall deliver the cards *in any manner* which results in a signed receipt for the cards, most obviously through personal delivery, but also including (but not exclusively) mail or common carrier. It is a stretch of the plain meaning of all the words in the Act to interpret it as saying that a sales agent may mail the cards if a receipt is obtained, or may entrust the cards to a common carrier if a receipt is obtained, but would not be able to send an employee or agent to deliver the cards as long as a receipt was obtained. The state’s desire for such an interpretation is clearly at odds with the phrase “in any manner” in the statute. Why would the Legislature include such an expansive phrase right in the language of the Act if its true intent was to limit the means of delivery only to personal delivery by the licensed sales agent, mail or common carrier? Such an interpretation runs counter to the plain meaning of the statute and seems incorrect.

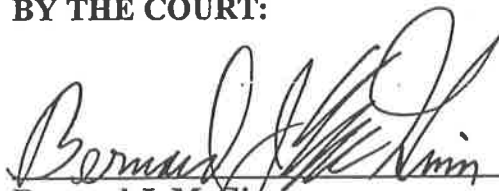
Therefore, the plain meaning of the statute allows for delivery of the pickle cards to a pickle card operator, as long as a receipt is obtained, by someone other than the specific sales agent. Essentially, the statute seems to make the licensed sales agent the responsible party in the transaction. Not everyone is authorized to effect the delivery of pickle cards to authorized pickle card operators -- only licensed sales agents are. However, the manner in which this responsible and authorized party -- the licensed sales agent -- is able to effect that delivery might include personal delivery, mail, common carrier, or delivery through an agent of the licensed sales agent. Regardless of the method chosen, *only* a licensed sales agent may effect such delivery, and the sales agent is the responsible party for the cards. But the method of delivery is up to the sales agent. Due to the Court's finding on interpretation of Neb. Rev. Stat. § 9-340.02(3), there is no need for the Court to address other issues.

CONCLUSION

Therefore, the Court finds and orders that the order of the Tax Commissioner, imposing a \$200 administrative fine against the plaintiff, was in error and should be and is hereby reversed. Costs of this appeal are to be paid by defendants.

DATED AND SIGNED this 30th day of December, 1998.

BY THE COURT:



Bernard J. McGinn
District Judge

cc *Jennifer J. Sellers*, Attorney for Plaintiff
Assistant Attorney General L. Jay Bartel,
Attorney for Defendants