

THE STATE OF WISCONSIN,

Plaintiff,

v.

VERNON D. HERSHBERGER
S6145 HWY 23
LOGANVILLE, WI 53943,

Case No. 2011-CM-_____

Defendant.

CRIMINAL COMPLAINT

COUNT 1: RETAIL FOOD ESTABLISHMENT LICENSURE VIOLATION

Between August 6, 2009, and June 3, 2010, in the county of Sauk, the above-named defendant did operate a retail food establishment without a valid license issued by the Wisconsin Department of Agriculture, Trade and Consumer Protection for that retail food establishment, in violation of Wis. Stat. § 97.30(2)(a).

Pursuant to Wis. Stat. § 97.72(1), upon conviction of this offense, an unclassified misdemeanor, the penalty for this crime is a fine of not less than \$100 dollars nor more than \$1000 dollars or imprisonment not to exceed six (6) months.

COUNT 2: MILK PRODUCER LICENSURE VIOLATION

Between February 15, 2010, and June 3, 2010, in the county of Sauk, the above-named defendant did operate a dairy farm as a milk producer without a valid license issued by the Wisconsin Department of Agriculture, Trade and Consumer Protection for that dairy farm, in violation of Wis. Stat. § 97.22(2)(a).

Pursuant to Wis. Stat. § 97.72(1), upon conviction of this offense, an unclassified misdemeanor, the penalty for this crime is a fine of not less than \$100 dollars nor more than \$1000 dollars or imprisonment not to exceed six (6) months.

COUNT 3: DAIRY PLANT LICENSURE VIOLATION

Between February 15, 2010, and June 3, 2010, in the county of Sauk, the above-named defendant did operate a dairy plant without a valid license issued by the Wisconsin Department of Agriculture, Trade and Consumer Protection for that dairy plant, in violation of Wis. Stat. § 97.20(2)(a).

Pursuant to Wis. Stat. § 97.72(1), upon conviction of this offense, an unclassified misdemeanor, the penalty for this crime is a fine of not less than \$100 dollars nor more than \$1000 dollars or imprisonment not to exceed six (6) months.

COUNT 4: HOLDING ORDER VIOLATION

Between June 2, 2010, and July 8, 2010, in the county of Sauk, the above-named defendant did violate an order (to wit: a holding order) issued under Wis. Stat. § 97.12(2), in violation of Wis. Stat. § 97.12(2)(d).

Pursuant to Wis. Stat. § 97.12(2)(d), upon conviction of this offense, an unclassified misdemeanor, the penalty for this crime is a fine of not more than \$10,000 (plus the retail value of the product moved, sold or disposed of in violation of the order) or imprisonment of not more than one (1) year in the county jail, or both.

FACTUAL BASIS

- 1.) The complainant is the former Field Services Director for the Bureau of Food Safety and Inspection for the Wisconsin Department of Agriculture, Trade, and Consumer Protection ("DATCP") and bases this complaint upon information and belief, her review of DATCP licensure records, her personal observations, the official reports of DATCP Regulatory Compliance Specialist Cathleen Anderson and the statements of Vernon D. Hershberger.
- 2.) The complainant has reviewed certified public records of the Wisconsin Department of Financial Institutions ("DFI"). Specifically, the complainant reviewed the "Articles of Organization - Limited Liability Company" for Grazin' Acres, LLC, which was filed with DFI on August 8, 2003. The filing designates "Vernon D. Hershberger" as the registered agent for Grazin' Acres, LLC. The filing designates "S6145 Hwy 23 Loganville, WI 53943" as the street address of the registered office for Grazin' Acres, LLC.

The complainant reviewed the "Wisconsin Domestic Limited Liability Annual Report" for Grazin' Acres, LLC, which was filed with DFI on August 15, 2006. The filing is signed by Vernon D. Hershberger on behalf of Grazin' Acres, LLC, as a member. The filing also reflects that Hershberger's description of the company's business was "Fresh Farm vegetables & other misc. products".

The complainant reviewed the "Limited Liability Company Annual Report" for Grazin' Acres, LLC, which was filed with DFI on July 31, 2009. The filing designates Vernon D. Hershberger as the registered agent of Grazin' Acres, LLC. Further, that document lists the signer as Vernon D. Hershberger with the title of "A Member". The filing also describes the "Nature of Business" for that Grazin' Acres, LLC as "Wholesale and Retail trade."

3.) The complainant knows that, pursuant to Wis. Stat. § 97.30(1)(c), a “Retail food establishment” means, among other things, a permanent facility from which food is sold to consumers at retail.

4.) On April 16, 2007, the complainant sent a letter to the above named defendant, Vernon Hershberger, at Grazin’ Acres LLC - S6145 Hwy. 23, Loganville, WI 53943. That letter informed Hershberger that the sale of refrigerated or frozen food items without a retail food establishment license is a violation of the law. Additionally, the complainant made it clear in that letter that Hershberger’s belief that he was exempt from licensing because he is only selling food items to a “closed community of ‘members’” does not, in fact, provide an exemption from the licensing requirements.

5.) On August 6, 2009, the complainant went to Grazin’ Acres - S6145 Hwy 23, Loganville, WI 53943. The location, a dairy farm, held a valid milk producer license at the time of the visit. The complainant spoke with Vernon D. Hershberger who stated that he held a milk producer license and that he did not hold a retail food license. The complainant personally observed that the establishment had numerous retail food products, stored in refrigeration and freezer units, including: cheese, milk, butter, yogurt, chicken, pork, and other meat products. Hershberger claimed that he did not need a retail food license because he did not sell to the public. He stated that store products are for private members only and that members sign a contract before purchasing. He claimed that he was told by Tom Leitzke he did not need a license if only selling to his members.

6.) The complainant reviewed a December 17, 2010, memorandum of Thomas Leitzke, the then Director of DATCP’s Bureau of Food Safety and Inspection. Therein, Leitzke stated he did not recall speaking to Mr. Hershberger about the subject of a license for a private club. He reported that if he had spoken with Hershberger, he would not have told him that a private club

did not need to be licensed to produce and sell food as that is not DATCP's opinion and has never been DATCP's opinion.

7.) The complainant has reviewed a letter dated January 19, 2010. The letter is signed by Leitzke and was directed to Hershberger. The subject line of the letter is titled: "**LICENSE REVOCATION.**" The letter informs Hershberger that his milk producer license has been inactive since January 16, 2010, and will be considered "abandoned" and "void" effective February 15, 2010, unless Hershberger resumes shipping milk to a licensed dairy plant within 30 days of his last milk shipment.

8.) The complainant has reviewed a DATCP database entry record that reflects that on February 15, 2010, Hershberger's milk producer license was summarily revoked. The complainant knows, pursuant to Wis. Stat. § 97.22(1)(f), that a "Milk producer" means any person who owns or operates a dairy farm, and sells or distributes milk produced on that farm. Further, "Milk" means the lacteal secretion of cows, sheep or goats, and includes skim milk and cream. Wis. Stat. § 97.22(1)(e).

9.) The complainant knows from her review of DATCP licensure records that neither Hershberger nor Grazin' Acres LLC has ever had a Dairy Plant license. The complainant knows, pursuant to Wis. Stat. § 97.20(1)(a), that a "'dairy plant' means any place where a dairy product is manufactured or processed for sale or distribution, and includes a receiving station or transfer station." Further, "Dairy product" means milk or any product or by-product of milk, or any commodity in which milk or any milk product or by-product is a principal ingredient. Wis. Stat. §97.20(1)(b).

10.) On June 2, 2010, the complainant spoke with Cathleen Anderson, then a DATCP Regulatory Compliance Specialist, whom the complainant believes to be truthful and reliable from her prior experience of working with Anderson at DATCP and has also reviewed the

DATCP reports of the events of that June 2, 2010 inspection. Anderson reported that on June 2, 2010, she, along with Sauk County Public Health Sanitarians Nick Oasen and Mitch Lohr met with Hershberger at his retail establishment and dairy farm facility at S6145 Hwy 23, Loganville, WI. They identified themselves to Hershberger and explained the purpose of the visit, which was to perform an inspection of his food establishment to determine what types of operations were being performed and to determine what licensing requirements may be required. At that time, the Hershberger location held no license with DATCP or the Sauk County Public Health Department. Hershberger stated that he did not sell to the public but admitted that he was selling products in his store to people who have signed a contract with him. Anderson advised Hershberger that food sales made to anyone outside of family members and employees would be considered sales to the public and that after conducting an inspection she would be able to provide him with information as to what type of license may be required. Hershberger responded that he does not believe that he needs a license.

11.) At the time of the June 2, 2010, inspection, the complainant and Anderson observed that Hershberger had milking cows, a milking barn, milking equipment, a bulk tank that contained milk, and milk transfer containers used to transfer milk from the bulk tank to the building where milk is bottled and sold. The complainant and Anderson inspected the retail area of the establishment and observed, among other things, that buttermilk, whey, cream and Jersey milk, all labeled Grazin' Acres LLC was bottled (in glass jars), priced and displayed for sale on retail display racks. During the course of the inspection, Anderson obtained a 4-page product price list which listed multiple types of Grazin' Acres brand milk, butter, other dairy products, and other food products available for purchase along with their retail purchase price.

12.) At the time of the June 2, 2010, inspection, the complainant and Anderson observed that Hershberger was manufacturing several kinds of dairy products for sale. The complainant and

Anderson observed that Hershberger was culturing yogurt, that he had an ice-cream maker, that he had a stainless steel butter churn, a milk separator and that he had what appeared to be cheese hanging in cheesecloth that was draining what appeared to be whey at the time of the inspection. Further, the complainant and Anderson inspected the retail area of the establishment and observed that Grazin' Acres brand Whey, Butter, Cheese, Cottage Cheese, and Ice Cream was labeled and displayed for sale on retail display racks in refrigerator or freezer units in the retail store area. Additionally, the complainant and Anderson observed in a refrigeration unit in another part of the facility various dairy products including Grazin' Acres labeled kefir, yogurt, grape flavored whey and crème fraiche. The 4-page product price list obtained during the inspection listed Grazin' Acres brand whey, butter, cottage cheese, ice cream, other dairy products, and other food products available for purchase along with their retail purchase price.

13.) At the time of the June 2, 2010, inspection, the complainant and Anderson observed in the retail area of the establishment that various retail food products, located in a refrigeration unit, in multiple freezer units, and on display shelving were available for sale. Specifically, the complainant and Anderson observed several cuts of beef products, pork, and chicken products which were individually packaged, labeled and displayed for sale in the retail display area of Hershberger's store. The 4-page product price list includes, among other things, Grazin' Acres brand beef, pork, and chicken.

14.) On June 2, 2010, the complainant made contact with Hershberger and encouraged him to apply for a retail food establishment license from the Sauk County Health Department to continue sales of meat and other food items. The complainant served Hershberger with a DATCP Holding Order No. 52014 and explained it to him. The Holding Order "prohibits the sale or movement" of specific food products set forth therein.

The holding order designates the following products as being subject to that holding order: 1. Chest Freezer Contents – Meat, Ice Cream, Cottage Cheese – NW Retail Store – estimated at 175 lbs; 2. Chest Freezer Contents – Meat – W Wall Retail – estimated at 126 lbs; 3. Walk-in Cooler – Dairy, beverages, vitamins, nuts, minus milk products on second shelf E Wall – Retail Store – estimated at 1100 lbs; 4. Chest Freezer (not monarch) in production room – estimated at 500 lbs; 5. Curing Room except for bottom shelf, cream yogurt – estimated at 394 lbs; 6. Upright Meat Freezer in Retail Store – estimated at 400 lbs.

In order to enforce the Holding Order, DATCP placed tape on freezer units containing food products. The Holding Order was extended on June 11, 2010, for an indefinite period by the issuance of a “Special Order” pursuant to Wis. Stat. § 97.12(2)(c).

15.) The complainant reviewed a June 3, 2010 news report by Chris Woodard, a news reporter, in which Mr. Woodard reports that Hershberger continued his milk sales to customers one day after being told by authorities “to shut the business down.” Hershberger told Woodard “We believe that this is our right to do this and we have a lot of families that feel that way.”


16.) On July 8, 2010, the complainant went back to Hershberger’s facility at S6145 Hwy 23, Loganville, WI 53943. The complainant observed that approximately 300 pounds of butter was removed from a freezer chest as well as all of the bologna, in violation of the holding order. Further, the complainant observed that all products in the Culture/Curing room that had been marked with a date of June 11, 2010, were gone, in violation of the holding order. The complainant inspected a freezer chest marked Pork that DATCP tagged and sealed with tape on June 2, 2010. On July 8, 2010, the complainant observed that the DATCP evidence tape seal had been broken and that multiple pork meat products had been removed from the unit, in violation of the holding order. The complainant inspected a freezer marked Ice Cream/Cottage Cheese

that DATCP tagged and sealed with tape on June 2, 2010. The complainant observed that the DATCP sealing tape and tag were missing and that approximately 77 pounds of meat products and 8 pounds of cottage cheese that had been observed on June 2, 2010, were gone, in violation of the holding order.

END OF COMPLAINT

Dated this 28 day of October, 2011.

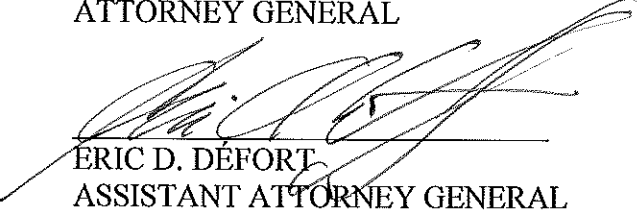
Complaining Witness:



JACQUELINE OWENS
Wisconsin Department of Agriculture,
Trade, and Consumer Protection

*Subscribed and sworn to before me and approved for filing
this 28th day of October 2011.*

J.B.VAN HOLLEN
ATTORNEY GENERAL



ERIC D. DÉFORT
ASSISTANT ATTORNEY GENERAL
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