Commonwealth of Pennsylvania
Milk Marketing Board
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Official General Order No. A-989

Posted: December 3, 2014
Effective: January 1, 2015

OVER-PRICE PREMIUM

NOW, this 3rd day of December 2014, the Commonwealth of Pennsylvania, Milk Marketing Board (Board) adopts and issues this official general order pursuant to the authority conferred by the Milk Marketing Law, 31 P.S. §§ 700j-101 – 700j-1204. This order will become effective at 12:01 a.m. on January 1, 2015.

SECTION A
INCORPORATION

The attached Findings of Fact, Conclusions of Law, and Discussion are incorporated herein by this reference as though fully set forth in this order.

SECTION B

The $0.20 per hundredweight processor assessment under the Fluid Milk Promotion Order shall be accounted for in Class I skim and butterfat values and footnoted in the applicable price sheets to alert users of its presence in those values. The $0.20 per hundredweight assessment shall not be additionally shown in the over-price premium.

SECTION C
SEVERABILITY

If any section, provision, subsection, paragraph, or clause of this order is determined to be unconstitutional or otherwise contrary to law, the remainder of the order shall be given effect as though that section, provision, subsection, paragraph, or clause has not been included.

PENNSYLVANIA MILK MARKETING BOARD

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Luke F. Brubaker, Chairman

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Lynda J. Bowman, Consumer Member

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James A. Van Blarcom, Member

Date: December 3, 2014

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FINDINGS OF FACT AND CONCLUSIONS OF LAW
OVER-PRICE PREMIUM
NOVEMBER 6, 2013

FINDINGS OF FACT

1. On June 5, 2013, the Pennsylvania Milk Marketing Board ("Board") approved a petition from the Greater Northeast Milk Marketing Agency ("GNEMMA") to hold a hearing to consider terminating the over-price premium. The Board scheduled the hearing for November 6, 2013.

2. On September 25, 2013, the Board partially granted a request from GNEMMA to postpone the hearing date. GNEMMA requested the postponement to allow it additional time to fully prepare and present the required data for the hearing.

3. The Board identified two issues related to the over-price premium that could be addressed on the originally scheduled hearing date and on September 25, 2013, ordered that Board Staff present evidence on November 6, 2013, regarding those two issues: (1) whether the mandatory $0.20 per hundredweight processor assessment under the Fluid Milk Promotion Order should be included in the over-price premium and if not, where in the price build up it should be accounted for, and (2) how and to what extent adjustments to the over-price premium that may be necessary from time-to-time are accounted for and recovered.

4. On November 6, 2013, the Board convened the hearing to receive testimony and exhibits concerning the two issues identified. Notice of the original hearing was published at 43 Pennsylvania Bulletin 4193 on July 20, 2013, and was mailed to those who have requested mailed notice of Board hearings by means of Bulletin No. 1494, dated July 9, 2013. The order bifurcating the hearing and ordering Board Staff to present evidence on the $0.20 assessment and over-price premium adjustments was sent to interested parties who had filed notices of appearance regarding the original over-price premium hearing.

5. David DeSantis testified on behalf of Board Staff as an expert in milk cost accounting and regulation. Mr. DeSantis testified that the $0.20 per hundredweight processor assessment is not really part of the over-price premium and should be moved to the skim and butterfat columns of the summary price sheet. He testified that this would allow users to be better able to compare surrounding market prices to the raw milk prices in their Pennsylvania area.

6. Carl Herbein testified on behalf of the Pennsylvania Association of Milk Dealers ("Dealers") as an expert in cost accounting and milk cost accounting. Mr. Herbein testified that the processor assessment should be included in the raw milk portion of the Class I price because that is the way it is handled in the federal context. He agreed with Mr. DeSantis that the assessment should be included in the skim and butterfat values each month.

7. Mr. DeSantis also testified regarding a recently discovered over-price premium miscalculation. The over-price premium is an amount paid by dealers to producers in excess of the Board-mandated minimum price for milk produced, processed, and sold as Class I in Pennsylvania. Mr. DeSantis explained that for each of the cross-section dealers, Board auditors calculate, on a monthly basis, the allowable amount of over-price premium dollars (per Board order) for each milk marketing area, using cooperative billings and other documentation maintained by the dealers. The auditors' calculations are reviewed for reasonableness by comparing each dealer's current month over-price premium rate with its prior month rate; if the comparative rates for each dealer are essentially same from month-to-month the calculation is accepted as correct. If the rate has changed significantly from month-to-month, the auditor is alerted to do a thorough review and correct the calculation if necessary.

8. Mr. DeSantis explained that to the extent that over-price premium levels had remained relatively stable, extensive reviews of backup documentation had not been performed to determine if the makeup of the premiums being paid had changed from being allowable for over-price premium purposes to being not allowable. He testified that some time ago, some of the dealers in the cross sections changed milk suppliers and that although the premium rates had remained consistent, the character of the premiums had changed in some cases such that premiums that were formerly billed as Pennsylvania premiums were now being billed as out-of-state premiums or as some other premium that should not have been included in the over-price premium calculation.

9. Mr. DeSantis testified that, after detecting the differences in over-price premium billings, a thorough review disclosed that the issue had been on-going for 45 months and affected Milk Marketing Areas 1, 2, 3, and 4. The consequence was that wholesale and retail milk prices in those areas were higher than they otherwise should have been for that 45 month period. The difference was less than one cent per gallon.

10. Mr. DeSantis opined that although the difference was less than one cent per gallon consumers in the affected areas should be able to recapture the overpayment. He testified that the recapture could not be accomplished as refunds based on actual individual past purchases. Rather, Mr. DeSantis recommended that the Board adjust future prices in the affected areas in an amount that would allow the overpayment to be recaptured by consumers generally.

11. Mr. Herbein testified that changes in the marketplace since and during the occurrence of the over-price premium miscalculation would make a recapture of the overpayment difficult to accomplish. He also testified that it was not a "sensible" way for dealers to operate; they made business decisions and used revenue from the 45 month period to meet expenses or to invest. Mr. Herbein also testified that dealers were struggling through difficult financial times and that providing for recapture of the overpayment would in effect penalize dealers for an error that they had no part in creating.

12. John Pierce testified on behalf of Dean Foods plants in Pennsylvania. Mr. Pierce agreed with Mr. DeSantis's method to account for the $0.20 processor assessment. He testified that it was important for customer consistency for the Pennsylvania price announcement to be consistent with federal order price announcements.

13. Mr. Pierce testified that, as a policy matter, the over-price premium should not be recaptured as recommended by Mr. DeSantis. Mr. Pierce testified that doing so would not provide for a way for dealers to recover their costs in minimum prices for the duration of the recapture and that Dean Foods had no fund of money available to account for the recapture. He testified that the money collected in past months had been used to pay expenses and that a reduction in prices to account for the recapture would come out of Dean plants' profits.

14. The Board finds that the $0.20 per hundredweight processor assessment under the Fluid Milk Promotion Order is not a Pennsylvania-specific dealer payment and is not appropriately included in the over-price premium. It is a dealer cost, however, and should be recovered in minimum pricing. Based on the testimony of Mr. DeSantis and Mr. Herbein, we find that the processor assessment should be included in the skim and butterfat values and footnoted to alert users of its presence in those values.

15. As explained in the discussion below, the Board finds and concludes that the over-price premium overpayment cannot be recaptured.

DISCUSSION

Board Staff and Dealers (in this section references to "Dealers" include Dean Foods as a separate interested party) argued extensively in both pre- and post-hearing filings regarding the nature/characterization of the over-price premium overpayment recapture.

Board Staff characterized the recapture as a condition affecting the milk industry and argued that recapture of the overpayment by adjusting minimum prices was an appropriate way to account for that condition. Section 801 of the Milk Marketing Law (31 P.S. sec. 700j-801) provides that the Board, when setting minimum prices, "shall base all prices upon all conditions affecting the milk industry in each milk marketing area . . . ."

Dealers characterized the recapture as unlawful retroactive ratemaking or as an impermissible refund.

We conclude that recapturing the over-price premium overpayment amounts to an impermissible refund and therefore cannot adopt Board Staff's proposal.

On September 3, 1970, the Board issued OGO A-762. That order was appealed to Commonwealth Court. Commonwealth Court sent the order back to the Board with instructions to hold new hearings to correct problems with A-762. The court also ordered that until the Board held new hearings and issued a new order the A-762 prices would remain in effect. Twenty months later, the Board issued the new order (A-770), which lowered minimum prices from what

they were in A-762. The City of Pittsburgh and consumers appealed A-770, claiming that because the dealers were permitted to collect the higher A-762 minimum prices for the twenty-month period between orders, consumers were overcharged resulting in unjust enrichment to the dealers, and that the Board abused its discretion by failing to provide for a refund for the overcharges. The Board filed a motion to dismiss the appeal on the grounds that there was no legal authority for the Board to order refunds to the consumers.

On appeal the court stated that Pennsylvania administrative agencies have only those powers and authority granted to them by the legislature and that regulatory agencies can do no more than the law permits. Since there is no specific statutory authority granted to the Board to grant refunds, the Board could not grant refunds. *City of Pittsburgh, et al. Milk Marketing Board Appeals*, 299 A.2d 197 (Pa. Commw. 1973).

The *Pittsburgh* court did agree with dictum found in *Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania*, 1 A.2d 775 (Pa. 1938) to the extent that "there is no provision . . . for a refunding order, but it may be that the Commission, within its implied powers, could relieve such dealers from loss of unlawful amounts paid, by adjusting future sales to them by the producers." 1 A.2d at 780. The *Pittsburgh* court, however, distinguished *Colteryahn*, noting that in *Colteryahn* the Court was dealing with prices paid by dealers to producers, whose purchases were readily ascertainable, whereas in Pittsburgh (and the instant matter) the issue involves unknown numbers of the consuming public whose purchases are not ascertainable.

The current situation resembles the circumstances in 1973. Dealers now, as then, collected higher minimum prices and consumers were thus overcharged. In contrast to the specifically ascertainable transactions in *Colteryahn*, the transactions we are dealing with now and the court was dealing with in *Pittsburgh* are not specifically ascertainable. The court held that the record in *Pittsburgh* did not support any contention for refunds to milk consumers.

Commonwealth Court was asked to consider consumer refunds again in *Finucane v. Pennsylvania Milk Marketing Board*, 581 A.2d 1023 (Pa. Commw. 1990). In that case Finucane appealed OGO A-862. He raised five issues on appeal, one of which was whether the Board could be required on remand to provide a consumer refund through future adjustments and price orders. The 1990 court stated that this issue was raised in the 1973 case, noting that administrative agencies have only those powers and authority granted to them by the legislature, and concluded that to order the Board to grant refunds in the absence of legislative action would constitute a usurpation by the court of a legislative function. Therefore, the court would not order the Board to grant refunds. The court concluded that consumer refunds should be accomplished through the legislative process. The *Finucane* court framed the issue as whether the Board could be required to provide a consumer refund through future adjustments, and held that the Board could not.

It may be true that the miscalculation of the over-price premium, resulting in minimum prices being higher than they otherwise would have been for a period of time, is a condition affecting the milk industry. However, attempting to address that condition by adjusting future prices appears to amount to a refund as addressed (and disallowed) by Commonwealth Court in

Finucane and *Pittsburgh*. Since the Milk Marketing Law has not been amended since in a manner that would allow the Board to grant refunds through future price adjustments, we conclude that we cannot adopt Staff's proposal to adjust future prices to recapture the over-price premium overpayment.

CONCLUSIONS OF LAW

1. The November 6, 2013, hearing was held pursuant to authority granted to the Board in section 801 of the Milk Marketing Law (Law), 31 P.S. § 700j-801.

2. The hearing was held following adequate notice, and all interested persons were given a reasonable opportunity to be heard.

3. In establishing the attached order, the Board has considered the entire record and has concluded that the adoption of this order is supported by a preponderance of the evidence and is reasonable and appropriate under section 801 of the Law, subject to any revisions or amendments the Board may make in the manner set forth in the Law.

PENNSYLVANIA MILK MARKETING BOARD

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Luke F. Brubaker, Chairman

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Lynda J. Bowman, Consumer Member

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Date: December 3, 2014

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