

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of DENNIS and LYNNETTE HOCHSTEIN, Hartington, Nebraska,)	Application No. GW-1777/ FC-1267
Complainants,)	
v.)	MOTION TO DISMISS
)	DENIED
BELDEN GRAIN AND FEED INC., of Belden, Nebraska,)	
Respondent.)	Entered: June 14, 2000

BY THE COMMISSION:

O P I N I O N A N D F I N D I N G S

Respondent, Belden Grain and Feed Inc., moves for dismissal of this complaint on the basis that further proceedings against it would cause the respondent to be twice put in jeopardy for the same offense, in violation of the Fifth Amendment of the United States Constitution and also Article I, Section 12 of the Nebraska Constitution. For the reasons set forth below, we find that the proceedings conducted in this complaint are not barred by the Double Jeopardy Clause, and that the respondent's motion should be dismissed.

I.

On May 18, 1999, Belden Grain entered into a settlement agreement with the Nebraska Department of Agriculture ("NDA"). The agreement was a result of a NDA investigation made into Belden Grain's operations for a possible violation of the Nebraska Weights and Measures Act, an investigation sparked by allegations made by the complainants, Dennis and Lynnette Hochstein. The agreement provided for the removal of a Stop Use Order placed on Belden Grain's weigh scale by the NDA if Belden Grain performed certain conditions listed in the agreement. These conditions included a requirement that Belden Grain repair and upgrade its scale, and also that Belden Grain reimburse the NDA \$7,991.62 for the costs sustained by the NDA while conducting the investigation. Belden Grain also agreed to a two-year probationary term during which it agreed to certain provisions related to record keeping.

On February 16, 2000, the District Court of Cedar County entered an order fining Robert Berner, president of Belden Grain, \$100.00 for violating the Weights and Measures Act, Neb. Rev. Stat. § 89-197(1), which states: "It shall be unlawful for any person to: (1) use in commerce any weighing and measuring device which is not correct."

The Hochsteins subsequently brought this complaint against Belden Grain under the Nebraska Grain Warehouse Act, specifically, Neb. Rev. Stat. § 88-535, which compels a warehouse licensee to issue a "lawful scale ticket" to the owner of grain delivered to the warehouse. The remedy sought under this complaint is the suspension or revocation of Belden Grain's warehouse license, pursuant to Neb. Rev. Stat. § 88-546.

Belden Grain now moves for dismissal of this complaint. Belden Grain argues that because an administrative remedy and costs were imposed on it as a result of the NDA investigation, and because of the order and fine entered by the County Court of Cedar County, any further action by this Commission would violate the respondent's constitutional rights.

II.

The double jeopardy clause of the Nebraska Constitution provides no greater protection than that of the U.S. Constitution. State v. Hansen, 249 Neb. 177, 184 (1996). Therefore, our analysis of the issue is made under the Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution.

The United States Supreme Court has interpreted the Double Jeopardy Clause as protecting parties from, among other abuses, multiple punishments for the same offense. United States v. Halper, 490 U.S. 435, 440 (1989). The Double Jeopardy Clause only protects against the imposition of multiple criminal punishments for the same offense. Helvering v. Mitchell, 303 U.S. 391, 399 (1938). In Hudson v. U.S., 522 U.S. 93, 99 (1997), the Supreme Court announced the test to be used when determining if government action constitutes punishment for double jeopardy purposes. Whether the suspension or revocation of Belden Grain's warehouse license under Neb. Rev. Stat. § 88-546 constitutes punishment is dependent on 1) whether the Legislature intended the statutory sanction to be criminal or civil, and 2) whether the statutory sanction is so punitive in purpose or effect as to transform what was clearly intended as a civil sanction into a criminal one. State v. Howell, 254 Neb. 247, 252 (1998).

A.

Our review of the relevant statutes in this complaint, Neb. Rev. Stat. §§ 88-535 and 88-546, lead us to conclude that the Legislature intended the suspension/revocation procedure in § 88-546 to be civil in nature. The fact that the authority to suspend or revoke a license is conferred on the Commission, and does not solely reside with the judicial courts, is evidence that the Legislature intended to provide for a civil sanction. Hudson, 522 U.S. at 103, citing Wong Wing v. United States, 163 U.S. 228, 235

(1896) (holding that quintessential criminal punishments may be imposed only "by a judicial trial").

Furthermore, any appeal of an order of the Commission suspending or revoking a warehouse license is taken pursuant to Neb. Rev. Stat. § 75-137 [Laws 2000], which is analogous to the civil appeals procedure set forth in the Administrative Procedure Act in that it requires exhaustion of administrative remedies before appealing the order to a judicial body. And finally, it is significant that a complaint brought under § 88-535, seeking a suspension or revocation of a warehouse license pursuant to § 88-546, may be brought by "any person". Actions brought by one person against another person are typically civil in nature, while criminal actions are brought in the name of a sovereign authority.

The Legislature's intent is also evident from the existence of criminal penalties in another section of the Grain Warehouse Act. In § 88-543, the Legislature prohibited warehouse licensees from issuing receipts for grain not actually received. A licensee who knowingly and willingly violates this section is guilty of a Class IV felony. By expressly making warehouse licensees criminally punishable for violating § 88-543, the Legislature clearly contemplated making criminal sanctions available for violating certain sections of the Grain Warehouse Act. Yet by limiting the reach of that criminal sanction to only § 88-543, the Legislature clearly intended that all other sanctions available in the Grain Warehouse Act be civil in nature.

B.

In finding that the Legislature intended the suspension or revocation of a warehouse license to be a civil sanction, a presumption is made that the sanction is civil unless it can be proved by the "clearest proof" that the statute is so punitive in purpose or effect as to negate the Legislature's intent. Howell, 254 Neb. at 255.

The U.S. Supreme Court has set forth several factors to consider when determining if a sanction is punitive in purpose or effect. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963). Considering these factors in their totality, we conclude that the suspension or revocation of a warehouse license is not so punitive as to override the Legislature's intent.

First, the "revocation of a privilege voluntarily granted," such as a warehouse license, "is characteristically free of the punitive criminal element," and therefore has not been historically viewed as punishment. Hudson, 522 U.S. at 104. Second, the sanction imposed by § 88-546 does not involve an "affirmative disability or restraint", which the Supreme Court has likened to

imprisonment and not merely the revocation of a license. Id. Third, the sanction imposed by § 88-546 does not require the finding of a particular state of mind of the defendant, as is customary in most punitive sanctions. Finally, the suspension or revocation of a warehouse license promotes goals other than merely the traditional goals of punishment - retribution and deterrence. Suspending or revoking a warehouse license serves the goal of protecting the public from the practices of a possibly unscrupulous warehouse operator and protecting the integrity of state-licensed grain warehouses.

In light of the Kennedy factors and the high standard of "clear proof" that is demanded, we are unable to conclude that suspending or revoking a warehouse license pursuant to § 88-546 is so punitive in purpose or effect as to override the Legislature's intent that such a sanction be civil in nature.

III.

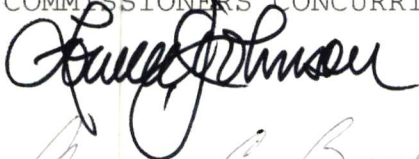
For the foregoing reasons, we find that the proceedings conducted in this complaint are not barred by the Double Jeopardy Clause, and that the respondent's motion should be dismissed.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Respondent's motion to dismiss be, and it is hereby, denied.

MADE AND ENTERED at Lincoln, Nebraska this 14th day of June, 2000.

COMMISSIONERS CONCURRING:



//s//Frank E. Landis

NEBRASKA PUBLIC SERVICE COMMISSION



Chairman

ATTEST:



Executive Director