

Agriculture and Markets

ARTICLE 3.

Investigation; Practice and Procedure; Violations; Penalties.

- Section 32. Investigations and proceedings.
- 33. Immunity of witnesses.
 - 34. Practice on hearings; attendance and examination of witnesses.
 - 35. Proceedings in court.
 - 36. Orders and service thereof.
 - 36-a. Petition for revocation or modification of rule or order of the commissioner.
 - 37. Review by court.
 - 38. When injunction may be obtained.
 - 38-a. Costs and expenses relating to extraordinary sanitary reinspection services.
 - 39. Penalties for violation of chapter or other laws.
 - 40. Penalty for violation of rule or order.
 - 40-a. Deposit of money.
 - 41. Violation of chapter a misdemeanor.
 - 42. Act of officer or agent deemed act of principal.
 - 43. Evidence.
 - 44. Prosecution for penalties.
 - 45. Disposal of fines and moneys recovered.
 - 45-a. Refunds.
 - 45-b. Unauthorized possession, sale, or exchange of food order stamps issued under food stamp plan.
 - 45-c. Misuse of food commodities donated by the United States.

§ 32. Investigations and proceedings. 1. The commissioner, or any officer of the department when authorized by the commissioner, may investigate and report as to all matters within or pertaining to the powers and jurisdiction of the department, and for the purposes of carrying into effect the provisions of this chapter or of any other law relative to matters within its jurisdiction and the rules of the department.

2. Proceedings may be instituted before the commissioner against a corporation, association or person upon the written complaint of any person or corporation aggrieved complaining of practices in the production, sale, transportation, purchase, storage, marketing and distribution of foods, in violation of any provision of law or the rules of the department or of the terms of an order issued pursuant to law by the commissioner, under the provisions of this chapter or of any other law the enforcement of which is within the jurisdiction of the department, or the rules of the department, made in conformity therewith.

3. Upon the presentation of such complaint the commissioner may cause inquiries to be made as to the matters alleged therein and if such complaint appears to present a sufficient cause for investigation a copy of such complaint shall be forwarded to the person, association or corporation complained of and answer may be made thereto in accordance with the rules of the department.

4. The commissioner shall thereupon cause the charges presented by such complaint to be investigated as herein provided, and such action shall be taken as the facts justify and as may be authorized by law.

§ 33. Immunity of witnesses. In any investigation, hearing or inquiry, conducted pursuant to this chapter or the rules of the department, the commissioner, or his deputy or other officer presiding at such investigation, hearing or inquiry, may confer immunity in accordance with the provisions of section 50.20 of the criminal procedure law.

§ 34. Practice on hearings; attendance and examination of witnesses.

1. The practice on all investigations and hearings conducted or instituted as provided in this chapter shall be governed by the rules of the department, and in all such hearings or investigations where testimony is taken, the commissioner, or other officer conducting the same, shall not be bound by the technical rules of evidence.

2. All subpoenas shall be signed and issued by the commissioner, a deputy commissioner or the counsel of the department.

The fees of witnesses shall be audited and paid in the same manner as other expenses of the department. Whenever a subpoena is issued at the instance of a complainant, respondent or other party to the proceeding, the cost of the service thereof and the fees of the witness shall be borne by the party at whose instance the witness is subpoenaed.

3. If a person subpoenaed to attend before the commissioner or other officer of the department, fails to obey the command of such subpoena, without reasonable cause, or if a person in attendance upon an investigation or hearing shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or paper, when ordered so to do by the officer or officers conducting such an investigation or hearing, or to subscribe and swear to his deposition after it has been correctly reduced to writing, if required so to do, he shall be guilty of a misdemeanor and may be prosecuted therefor in any court of competent criminal jurisdiction.

4. A subpoena issued under this section shall be regulated by the civil practice law and rules.

5. Any person who shall wilfully testify falsely as to any material matter pending in an investigation or proceeding under this chapter shall be guilty of perjury.

§ 35. Proceedings in court. If it appear after an investigation or hearing conducted as herein provided that any person, association or corporation is guilty of a violation of the provisions of this chapter or of any other act the enforcement of which is within the jurisdiction of the department, an action or proceeding may be instituted in a court of competent jurisdiction to recover a penalty for such violation or to compel a compliance with such provisions, or prevent a continuance of such violations.

§ 36. Orders and service thereof. 1. If it be ascertained after an investigation or hearing conducted as herein provided, that any person, association or corporation has failed to comply with or is guilty of a violation of the provisions of this chapter or of a rule of the department, or of any other general or special law relative to any matter within the jurisdiction of the department, an order may be made by the commissioner, under the seal of the department, compelling a compliance with such law or rule.

2. Every such order shall be served upon every person, association or corporation affected thereby, either by personal delivery of a certified copy thereof, or by mailing a certified copy thereof with postage prepaid to the person affected thereby, or in case of a corporation or association, to an officer or agent thereof, upon whom a summons may be served in accordance with the provisions of the civil practice act.

3. It shall be the duty of the person, association or corporation upon whom such order is so served to notify the department forthwith, in writing, of the receipt of such order, and in the case of an association or corporation such notification must be signed and acknowledged by a person or officer duly authorized by such association or corporation to admit service. Within a time specified in the order, every person, association or corporation upon whom it is served must, if so required in the order, notify the department in like manner whether the terms of the order are accepted and will be obeyed.

4. Every such order shall take effect at a time therein specified, and shall continue in force either for a period to be designated therein or until changed or abrogated by the commissioner.

5. If such hearing is held before a deputy commissioner, a report shall be made upon the termination of the hearing to the commissioner, with recommendation as to the determination which should be made as to the issues raised on such hearing. If the commissioner find upon such report or upon a hearing conducted by him, that the rule or order complained of is reasonable and valid he shall render his decision ratifying or confirming such rule or order; if he find that such rule or order is unreasonable or invalid, he shall revoke or modify it, or substitute a new rule or order in its place. If such modified or new rule or order is substantially different from the rule or order complained of, the parties affected thereby may bring before the commissioner, by a new petition, in the manner above provided, objections to its reasonableness or validity.

6. The decision of the commissioner shall be final, unless within thirty days after its issuance one of the parties shall institute a proceeding for the review thereof, as provided in section thirty-seven.

§ 36-a. Petition for revocation or modification of rule or order of the commissioner. Any person subject to a rule or order of the commissioner, promulgated under the provisions of article four, article four-a, or article twenty-one of this chapter, may file a written petition with the commissioner stating that any such rule or order or provision thereof or any obligation imposed in connection therewith is not in accordance with law and praying for the revocation or modification thereof. He shall thereupon be given an opportunity for a hearing and ruling upon such petition in accordance with the provisions of subdivision five of section thirty-six of this article. The decision of the commissioner shall be final unless within thirty days after its issuance one of the parties shall institute a proceeding for the review thereof, as provided in the next section, provided further that the pendency of any such proceeding shall not impede or prevent the commissioner from taking any action authorized under section thirty-five of this article.

§ 37. Review by court. A decision by the commissioner rendered as provided in the preceding section shall be subject to review in the

manner provided by article seventy-eight of the civil practice law and rules. The pleadings upon which such review proceeding is instituted shall be served upon the commissioner or upon an assistant commissioner, personally, in the manner provided for the personal service of a summons in an action unless a different manner of service is provided in an order to show cause granted by the supreme court.

§ 38. When injunction may be obtained. In an action in the supreme court or county court for the recovery of a penalty or forfeiture incurred for the violation of any of the provisions of this chapter, or of any other law the enforcement of which is within the jurisdiction of the department, or of the rules of the department, an application may be made on the part of the people to the court or any justice thereof or to the county judge if the defendant be a resident of such county for an injunction to restrain the defendant, his agents and employees from the further violation of such provisions. The court or justice to whom such application is made, shall grant such injunction on proof, by affidavit, that the defendant has been guilty of the violations alleged in the complaint, or of a violation of any such provision subsequent to the commencement of the action. No security on the part of the plaintiff shall be required, and costs of the application may be granted or refused in the discretion of the court or justice. If the plaintiff shall recover judgment in the action for any penalty or forfeiture demanded in the complaint, the judgment shall contain a permanent injunction, restraining the defendant, his agents and employees from any further violation of such provision of this chapter or of any other law the enforcement of which is within the jurisdiction of the department or of the rules of the department. Any injunction, order or judgment obtained under this section may be served on the defendant by posting the same upon the outer door of the defendant's usual place of business, or where such violation was or is committed, or in the manner required by the civil practice act, and the rules and practice of the court. Personal service of the injunction shall not be necessary when such service cannot be secured with reasonable diligence, but the service herein provided shall be deemed sufficient in any proceeding for the violation of such injunction.

§ 38-a. Costs and expenses relating to extraordinary sanitary reinspection services. 1. (a) The total costs and expenses, in excess of ordinary costs and expenses, incurred by the department in connection with the administration and or enforcement of any provision of this chapter or of any other law the administration and or enforcement of which is within the jurisdiction of the department or any order, rule or regulation relating to sanitary conditions and practices and the protection of the public from the sale of adulterated food administered and or enforced by the division of food inspection services shall be charged to and paid by every establishment requiring extraordinary sanitary reinspection services or other necessary action by the department to correct deficiencies.

(b) "Ordinary costs and expenses" shall mean costs and expenses incurred by the department, in the administration of the provisions of law, orders, rules or regulations enumerated in paragraph (a) of this subdivision, provided the establishments covered thereby have been determined to be in compliance therewith without the need for

extraordinary sanitary reinspection services or any other necessary action by the department to bring about compliance therewith.

(c) "Extraordinary sanitary reinspection services" shall mean those services which occur subsequent to an inspection, a reinspection, an educational session for an establishment relating to sanitation or the opportunity to attend such educational session in the event of an establishment's failure or refusal to attend, notice of a compliance inspection and a determination at the compliance inspection that an establishment is in violation of any law, order, rule or regulation enumerated in paragraph (a) of this subdivision.

2. Costs and expenses that shall be assessed for extraordinary sanitary reinspection services or other necessary action shall include the cost of direct and indirect personal service including but not limited to the cost of salaries and wages, monetary and non-monetary fringe benefits, retirement contributions made and workmen's compensation premiums paid by the state for or on behalf of personnel, the cost of necessary traveling, meals and lodging, the cost of rentals for space occupied in state-owned or state-leased buildings, the cost of maintenance and operation and the cost of all other actual, direct and indirect costs apportioned to the specific division, bureau or other unit and program involved excluding, however, ordinary expenses.

3. Costs and expenses as specified in subdivision two of this section shall be presented to the establishment requiring extraordinary sanitary reinspection services or other necessary action in the form of a copy of an itemized bill therefor as certified by the commissioner, deputy commissioner, or duly authorized employee of the department. Upon receipt of such bill, the establishment shall have the duty to pay and shall pay forthwith such charges to the commissioner.

4. On written demand made within thirty days of the rendition of any bill, the party so charged shall be afforded an opportunity to be heard as to liability hereunder and the amount thereof. Any amounts of such bills not paid within thirty days from the date of determination upon such hearing, or, if none shall be demanded, on the date upon which such payment is due, shall bear interest at a rate of interest prescribed by section five thousand four of the civil practice law and rules.

5. A right of action for the recovery of such costs and expenses as specified in subdivision two of this section may be released, settled or compromised by the department either before or after an action is brought to recover such expenses. The commissioner may in his discretion for good cause shown waive the collection of such expenses or any part thereof.

6. All moneys collected or recovered as costs and expenses as specified in this section shall be the property of the state and paid into the state treasury.

7. The commissioner may promulgate, after public hearing, rules and regulations necessary to supplement and give full effect to this section.

§ 39. Penalties for violation of chapter or other laws. Every person violating any of the provisions of this chapter, or of any other law the enforcement of which is within the jurisdiction of the department shall, except where other penalties are hereinafter prescribed, be subject to a penalty in the sum of not more than six hundred dollars for the first violation, nor more than one thousand two hundred dollars for the second and each subsequent violation and provided further, however, that for a

violation of subdivision thirteen or fifteen of section two hundred of this chapter, the minimum penalty shall be five hundred dollars and the maximum penalty shall be one thousand dollars and that for the second and subsequent offenses such person may also be subject to an administrative order suspending the manufacture and/or sale of such confectionery for a period of time up to three months for each such violation. When such violation consists of the manufacture or production of any prohibited article, each day during which or any part of which such manufacture or production is carried on or continued, shall be deemed a separate violation. When the violation consists of the sale, or the offering or exposing for sale or exchange of any prohibited article or substance, the sale of each one of several packages shall constitute a separate violation, and each day on which any such article or substance is offered or exposed for sale or exchange shall constitute a separate violation. If the sale be of milk and it be in cans, bottles or containers of any kind and if the milk in any one of such containers be adulterated, it shall be deemed a violation whether such vendor be selling all the milk in all of his containers to one person or not. When the use of any such article or substance is prohibited, each day during which or any part of which such article or substance is so used or furnished for use, shall constitute a separate violation, and the furnishing of the same for use to each person to whom the same may be furnished shall constitute a separate violation. When the storage of any article is prohibited beyond a certain period, each day during which or any part of which any article is so stored beyond the period provided for by this chapter, shall constitute a separate violation. A right of action for the recovery of, or a liability for, penalties incurred as provided in this chapter, or in any other law the enforcement of which is within the jurisdiction of the department, may be released, settled or compromised before the matter is referred to the attorney general as provided in section forty-four of this article, and thereafter may be released, settled or compromised by the attorney general, either before or after an action is brought to recover such penalties.

§ 40. Penalty for violation of rule or order. Every person, association or corporation and all agents, officers and employees thereof, shall obey every order made as provided in this chapter, so long as such order shall be in force. A person, association or corporation who shall fail by himself, itself or through his or its agents, officers and employees, to obey any order of the commissioner, or who shall violate any rule of the department shall be subject to a penalty not exceeding the sum of four hundred dollars for each and every first offense, and a penalty not exceeding the sum of eight hundred dollars for a second and each subsequent offense. Every violation of such order, or of the rules of the department, shall be a separate and distinct offense, and in case of a continuing violation, every day's continuance thereof shall be a separate and distinct offense.

§ 40-a. Deposit of money. The commissioner is hereby authorized and directed to deposit all money recovered or received by the department in satisfaction of penalties assessed for violations of this chapter and rules and regulations promulgated pursuant thereto to the credit of the general fund.

§ 41. Violation of chapter a misdemeanor. Except as otherwise provided by the penal law, a person who by himself or another violates any of the provisions of this chapter or of any other law the enforcement of which is within the jurisdiction of the department, is guilty of a misdemeanor, and upon conviction shall, except as otherwise provided in this chapter, be punished by a fine of not less than twenty-five dollars, nor more than two hundred dollars, or by imprisonment for not less than one month, nor more than six months, or by both such fine and imprisonment, for the first offense; and by not more than one year's imprisonment for the second offense.

§ 42. Act of officer or agent deemed act of principal. In construing and enforcing the provisions of this chapter relating to penalties, the act of a director, officer, agent or other person acting for or employed by a person, association or corporation subject to the provisions of this chapter and acting within the scope of his employment, shall be deemed the act of such person, association or corporation.

§ 43. Evidence. The doing of anything prohibited by this chapter shall be evidence of the violation of the provisions of this chapter relating to the thing so prohibited, and the omission to do anything directed to be done shall be evidence of a violation of the provisions of the chapter relative to the thing so directed to be done. The intent of any person doing or omitting to do any such act is immaterial in any prosecution for a violation of the provisions of this chapter. Any person who suffers, permits or allows any violation of the provisions of this chapter in any room or building occupied or controlled by him, shall be guilty of such violation and liable accordingly. Any person who shall keep, store or display any article or product, the manufacture or sale of which is prohibited or regulated by this chapter, with other merchandise or stock in his place of business, shall be deemed to have the same in his possession for sale.

Every certificate, duly signed and acknowledged, of a chemist, analyst or other expert employed by the commissioner or any analysis, examination or investigation made by such analyst, chemist or expert with respect to any matter or product which the commissioner has authority to examine or cause to be examined, shall be presumptive evidence of the facts therein stated.

§ 44. Prosecution for penalties. 1. Whenever the commissioner shall know or have reason to believe that any penalty has been incurred by any person for a violation of any of the provisions of this chapter, or of any other law the enforcement of which is within the jurisdiction of the department, or of the rules of the department, or that any sum has been forfeited by reason of any such violation, the commissioner may report the facts to the attorney general who may cause an action or proceeding to be brought in the name of the people for the recovery of the same. Such action may be brought in the county where the defendant resides or the violation, or any part thereof, occurred.

2. In an action for a penalty or forfeiture incurred by reason of the violation of the provisions of this chapter, or of any other law the enforcement of which is within the jurisdiction of the department, or of the rules of the department, when the complaint charges a violation of

any two or more of such provisions, the plaintiff shall not be compelled to elect between the counts under such different provisions but shall be entitled to recover if it is found that a violation of any of such provisions has been committed for which a penalty or forfeiture is imposed.

3. If the defendant in such an action shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for a violation of a rule or order of the department, the defendant was actually and in good faith prosecuting a suit, action or proceeding before the department or in the courts to set aside such rule or order, the court shall remit the penalties or forfeitures incurred during the pendency of such action or proceeding.

§ 45. Disposal of fines and moneys recovered. Except as otherwise provided in this chapter, all moneys recovered, either as fines, penalties, forfeitures or otherwise, for the violation of any of the provisions of this chapter, or of any other law the enforcement of which is within the jurisdiction of the department, or of the rules of the department, and all bail forfeited by persons charged with such violations, shall be the property of the state. Moneys so recovered by town justices shall be paid to the state comptroller in accordance with the provisions of section twenty-seven of the town law and moneys so recovered by village justices shall be paid to the state comptroller in accordance with the provisions of section 4-410 of the village law. The same disposal shall be made of all moneys recovered upon any bond given by any officer by virtue of the provisions of this chapter. Provided, however, that any such moneys collected as fines, penalties or forfeitures as a result of a prosecution for a violation of any of the provisions of article sixteen and sixteen-a of this chapter and all bail forfeited by persons charged with such violations shall be the property of the county or city, as the case may be, in which the alleged offense was prosecuted and shall be paid to the treasurer, or corresponding fiscal officer, of such county or city, except that any such moneys and any such bail forfeitures, collected by the town justices or by village justices shall be paid to the state comptroller in accordance with section twenty-seven of the town law and section 4-410 of the village law, respectively.

§ 45-a. Refunds. 1. Moneys heretofore or hereafter received by the department pursuant to this chapter may, within one year from the receipt thereof, be refunded to the party for whose account same were received, on proof satisfactory to the commissioner that:

- a. Such moneys were in excess of the amount required by law.
- b. The license for which application was made has been refused by the commissioner.

c. Such moneys were received as payment for services or materials and such services have not been rendered or such materials furnished.

d. Such moneys were received as rental or concession fees and the applicant for such concession or lease has, by acts or omissions of the department, been deprived of the use of the leased premises or has been prevented from operation of the concession for the whole or a portion of the term of such lease or concession agreement; provided, however, that no such refund shall be for a greater proportion of the total rental or concession fee than the period of such loss of use bears to the period

of such lease or concession agreement.

2. Such refunds shall, upon approval by the commissioner and after audit by the comptroller, be paid from any moneys in the custody of the department received as license fees, sales of materials, fees for services or for rentals, or fees for grants of concessions.

3. Whenever any person, firm, corporation or cooperative association has filed with the commissioner any surety bond or other security and fails to perform the conditions for which such surety bond or security was pledged, the commissioner may, after audit by the comptroller, distribute any proceeds therefrom in the manner provided by this chapter.

4. When the conditions under which any security (other than a surety bond) filed with the commissioner have been fully discharged, the commissioner may return such security to the person filing the same, together with any interest or income which may have accrued thereon; and the commissioner may also, from time to time and after audit by the comptroller, pay to the depositor any intermediate interest or income accruing from such security.

5. Nothing contained in this section shall in any way supersede, alter or amend the provisions of section thirty-one-c of this chapter.

§ 45-b. Unauthorized possession, sale, or exchange of food order stamps issued under food stamp plan. Any person, other than a person authorized by the regulations and conditions prescribed by the secretary of agriculture of the United States governing the food stamp plan, who shall have in his possession, or who shall purchase sell or exchange any food stamps, books, book covers or any other instruments or documents relating to food stamps, for money or for any article or articles other than those foods authorized by the regulations and conditions prescribed by the secretary of agriculture of the United States governing the food stamp plan, or for food the value of which is less than the face amount of such food stamps, or in any other manner in violation of the regulations and conditions prescribed by the secretary of agriculture of the United States governing the food stamp plan, shall be guilty of a misdemeanor. As used herein, the word "person" shall mean any individual, partnership, corporation, or association, whether or not such individual, partnership, corporation or association is eligible to participate or is participating in the food stamp plan.

§ 45-c. Misuse of food commodities donated by the United States. Any person who shall wilfully sell or make any other unauthorized disposition of any food commodity donated under any program of the United States government or whoever, not being an authorized recipient thereof, willfully converts to his own use or benefit any such food commodity shall be guilty of a misdemeanor.