

Iowa Department of Public Health Inquiry No. 3.

08/10/2008

Thomas Newton, Director
Iowa Department of Public Health
Lucas State Office Building
Des Moines, Iowa 50319-0075

Re: Cumulative record created based on unconfirmed reports.

Director Newton,

As you are aware, the Iowa Department of Public Health adopted and filed rules to implement the Smoke-free Air Act of 2008, House File 2212, on June 27, 2008.

Background: Concerning duties of the health department, 153.8(1) of the rules as published June 27, 2008 state:

“The department shall maintain a system for receiving and investigating complaints against persons who own, operate, manage, or otherwise have custody or control of a place where smoking is prohibited and who fail to comply with the provisions of Iowa Acts, House File 2212.” (Underline added.)

There is no provision in the above mandatory rule to establish or maintain a system to record complaints concerning individual persons who violate the Smoke Free Air Act by smoking in public places where prohibited. However, the business owner is subject to fines, penalties, revocation of licenses or permits, possible statutory fines concerning employee terminations, and abatement costs. The exclusive focus is on business owners.

Concerning review of a complaint by department, 153.8(6) of the rules as published June 27, 2008 state:

“Upon receipt of a complaint, the department or its designee may contact the individual making the complaint to confirm the details of the complaint and obtain any additional information.” (Underline added.)

My layperson’s understanding is that while the establishment of a system to receive and investigate complaints concerning business owners is mandatory the duty of the health department to acquire information that allows confirmation of complaints against business owners is discretionary under the rules.

I also note that the current Web form provided by the health department to file a complaint against a small business owner does not include as required entries information concerning address or telephone number that would allow the department to confirm the identity of the person making the complaint. Under these conditions I believe that all complaints must be considered to be anonymous.

However, despite the above severe deficiencies in the rules that fail to require the health department to even confirm the source and particulars of a complaint that alleges violations of the Smokefree Air Act, business owners face escalating financial penalties based on the cumulative number of complaints in one year. It is also clear that based on the compliance record maintained in the health department’s system small business owners can face suspension or revocation of licenses or permits required to earn their livelihood. In my layperson’s view there is a severe imbalance between the health department’s ability to conduct the most basic task of confirming the source and particulars of a complaint and its inclination to

impose escalating penalties that can ultimately result in loss of one's livelihood. I believe that the health department's rules have been crafted to maximize the number of complaints and to reduce accountability of those filing the complaints. A result of the imbalance is significantly increased and unwarranted risks, costs and expenses to small business owners.

The above deficiencies in the Iowa Department of Health rules become highly relevant to me when an Iowa small business owner confronts the ultimate penalty, loss of license or permit required to operate their business. For example, suspension or revocation of a liquor license is properly an action that requires unique procedures be undertaken by the appropriate regulatory authority. The suspension or revocation is subject to certain evidentiary requirements, including credible proofs that violations have occurred as alleged. Such actions are based in large part on the cumulative compliance record concerning the individual and/or business license holder. It is my lay understanding that the evidence presented from the compliance record must conform to the evidentiary requirements for the penalty of suspension or revocation. A liquor permit or license cannot be suspended or revoked based on unverified allegations by unidentified third parties that the business may have served alcohol to minors on some occasions for which the dates are unknown. In my layperson's view the severe, and I believe fatal, flaw in the Iowa Department of Health's smoking ban enforcement rules is that the credibility and integrity of data or information contained in the department's compliance system fails to conform to the evidentiary standards required to impose the ultimate penalty, loss of permit(s) or license(s) required to earn one's livelihood.

Questions: Based on the above information I ask the following questions from a layperson's perspective:

1. On what lawful basis has the Iowa Department of Public Health concluded in its rules it has drafted to enforce the Smokefree Air Act that it has no affirmative duty to confirm the source or particulars of a complaint that can ultimately lead to loss of a small business owner's livelihood?
2. Why do the health department's rules not require that identity of persons who file complaints with it concerning the Smokefree Air Act be credibly confirmed or provide for required information to do so?
3. Since the penalties authorized under HF 2212 and the health department's rules escalate with the number of alleged violations, under the present rules that do not require complaints be verified as to source or confirmed regarding details how can the Iowa Department of Public Health be assured that it applies the appropriate or lawful cumulative penalty under these conditions?

Please be advised that to state the small business owner is only issued a citation by a health department compliance or other law enforcement person is not, to my mind, a proper or adequate response. First, the recent notices of violation that have been sent to Iowa small businesses are clearly based on complaints that can be anonymous and the first such notice is considered in determining whether a later notice is a "second" notice, for which different enforcement actions apply. Second, the department does not undertake in its rules – in fact, implicitly rejects – any affirmative duty to investigate complaints or to contact the person filing the complaint. Third, even if the health department were inclined to undertake the most basic duties of confirming complaints its source information – the Web form – does not include as required entries information that would make it possible to do so. Regardless of these deficiencies it appears that the Iowa Department of Public Health can and will apply escalating penalties against a small business owner based on the cumulative number of complaints. Under the present rules and their apparent deficiencies such penalties appear to me to be based on evidence that stoops to a level charitably characterized as gossip.

I look forward to your response because the above imbalances of risk imposed on Iowa small business owners as described above raise in my mind serious questions concerning due process.

Finally, please note that this inquiry has been sent by both U.S. Mail and through the health department's Web form. I request a response by both E-Mail and letter from the health department.

Respectfully,

Randy Stanford
Secretary/Treasurer and Director
Iowans for Equal Rights