

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF AGRICULTURE

In the Matter of the Grade "A" Permit
Suspension of Rose Acres Trust

FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION

Administrative Law Judge Bruce H. Johnson conducted a hearing in this administrative contested case proceeding beginning at 9:30 a.m. on Tuesday, March 1, 2005 and continuing on Wednesday, March 2, 2005, at the Stearns County Courthouse, 725 Courthouse Square, St. Cloud, Minnesota. The hearing record closed on March 2, 2005, when the hearing ended.

Francis Green III, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127, represented the Department of Agriculture (the "Department") at the hearing. The Respondent, Rose Acres Trust (sometimes "Rose Acres"), 22846 – 150th Street, Eden Valley, MN 55329, was not represented by counsel. Rather, Lowell Voigt, the owner or trustee of Rose Acres Trust, represented the Respondent at the hearing.

NOTICES

This Report is only a recommendation to the Commissioner of the Department of Agriculture and is not a final decision. The Commissioner will make his final decision after reviewing this report and the hearing record. In making that decision the Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendation that appear in this report.

Under Minnesota Law,^[1] the Commissioner may not make his final decision until after the parties have had access to this Report for at least ten days. During that time the Commissioner must give any parties adversely affected by this Report an opportunity to file objections to the Report and to present argument supporting their positions. Parties should contact the office of Gene Hugoson, Commissioner of Agriculture, 90 West Plato Boulevard, St. Paul, Minnesota 55107, to find out how to file exceptions or present argument.

The record of this contested case proceeding closes upon the filing of objections to the report with the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date

on which the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision.^[2]

STATEMENT OF THE ISSUES

(1) Whether Rose Acres Trust or its owners, employees, or agents willfully refused to allow an inspector employed by the Department to enter and inspect its dairy farm in violation of Minnesota Statutes, section 31.02(g) and applicable rules;

(2) Whether Rose Acres Trust or its owners, employees, or agents by refusal or physical threat prevented completion of an inspection of its dairy farm by an agent of the Commissioner in violation of Minnesota Statutes, section 32.103;

(3) Whether Rose Acres Trust failed to conform to all applicable Grade A milk standards on September 16, 2004;

(4) Whether Rose Acres Trust committed repeat violations of applicable program rules by violating the same Grade A milk standards during its two most recent inspections; and

(5) Whether any such violations of applicable statutes and rules warrant suspension of Rose Acres Trust's Grade A milk permit.

Based upon the record in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. At all times relevant to this proceeding, Rose Acres Trust owned a dairy farm located near the City of Eden Valley in Meeker County, Minnesota. During those times, Rose Acres Trust was being operated by Lowell Voigt as its owner or trustee. Mr. Voigt's residence address and the address of the dairy farm is 22846 – 150th Street, Eden Valley, MN 55329.

2. For several years before September 16, 2004, Rose Acres Trust participated in the Department's Grade A Milk Program and held a Grade A milk permit.

3. The Grade A Milk Program is a national program that involves voluntary participation by milk producers. The program's standards and requirements are established and promulgated in the form of model rules or regulations for federal and state agencies to consider in regulating the production and processing of milk for direct human consumption. Those model rules are called the Grade "A" Pasteurized Milk Ordinance (PMO). It is a recommended set of standards developed and promulgated by the FDA in conjunction with the National Conference on Interstate Milk Shipments, an organization whose membership is made up of state regulators and representatives

of the various segments of the dairy industry. As a set of “model rules,” the PMO itself only acquires the force of law when it is incorporated by reference into federal or state statutes or rules.^[3]

4. The Food and Drug Administration of the U. S. Department of Health and Human Services (FDA) has adopted PMO standards as the standard for what milk can be introduced into interstate commerce for direct human consumption. From a federal standpoint, the Grade A milk program is voluntary in the sense that producers can decide whether or not to conform to PMO standards. But if they choose not to conform or fail to conform, their milk cannot be offered for sale or introduced in interstate commerce for direct human consumption.^[4]

5. The Minnesota legislature has incorporated the inspection standards set forth in the Grade “A” Pasteurized Milk Ordinance, 2001 Revision,^[5] by reference into Minnesota Statutes, section 32.394, subdivision 4. So, milk for direct human consumption that is not produced in accordance with PMO Standards cannot be offered for sale as Grade A within the state. The Grade A milk program is also voluntary at the state level, in the sense that Minnesota dairy farmers can also choose whether or not to conform to PMO standards. But, again, if they choose not to conform or fail to conform, their milk cannot be offered for sale as Grade A milk within the state.^[6]

6. To ensure that milk that is not produced in accordance with PMO standards does not enter interstate or intrastate commerce labeled as Grade A, the Department employs inspectors, who inspect the dairy farms of those producers who either hold Grade A permits or who are seeking to obtain them. The dairy operations of holders of Grade A permits must be inspected at least every six months.^[7] After making their inspections, the Department’s inspectors determine whether the producer’s compliance with PMO standards is sufficient to allow the producer to retain a Grade A milk permit.^[8]

7. Dairy producers who choose not to conform to Grade A standards or whose Grade A milk permit is suspended can still sell their milk as Grade B milk, which is “manufacturing grade milk,” such as that used in the manufacture of cheese and butter. Grade B milk has lower milk quality, cleanliness, and production standards than Grade A and cannot be marketed for direct human consumption. Because of that, the price that producers can obtain for Grade B milk is significantly lower than the price they can obtain for Grade A milk.^[9]

8. Many of the organizations that process and market Grade A milk for producers employ field staff whose duties include helping producers maintain their Grade A permits. That assistance often includes pre-inspecting a producer’s dairy operation before a scheduled state inspection. Field representatives also pre-inspect the operations of producers who are attempting to regain Grade A permits after the Department has suspended those permits.^[10]

9. Prior to September 28, 2000, no inspector employed by the Department encountered any inspection problems or personal confrontations while conducting inspections of Rose Acres Trust's dairy farm.^[11]

10. Clifford Patrick is a dairy inspector for the Department and has been employed in that capacity since May 2000. Prior to being employed as a dairy inspector for the Department, Mr. Patrick had spent eight years as a field representative of a milk processor and marketer.^[12] Mr. Patrick's regular inspection jurisdiction includes the western one-third of Stearns County and some townships in Todd and Morrison Counties. However, in 2000 the Department assigned Mr. Patrick to conduct inspections at Rose Acres Trust because the state inspector assigned to Meeker County owned a farm in close proximity to Rose Acres, and the Department wished to eliminate any potential conflict of interest.^[13]

11. Mr. Patrick conducted his first dairy inspection of Rose Acres Trust on September 28, 2000.^[14] Neither Mr. Voigt nor any of his family members were present during that inspection, but Gary Dousette, the field representative assigned to Rose Acres Trust by its processor and marketer, accompanied Mr. Patrick. The inspection took about 30 to 45 minutes.^[15]

12. During the course of his inspection, Mr. Patrick noted the following violations of PMO Standards.^[16]

- a. "#5 – White wash barn."
- b. "# 10 - Clean barn walls & ceilings."
- c. "#22 - Repair wall in milkroom by jar & vat."
- d. "#29 - Repair/patch hole (bottom left) by door into barn."
- e. "#30 - Pooled water in milkroom drain. Insure drain works."
- f. "#50 – Replace milk and wash black rubber plug on pipeline hose manifold."
- g. "#55 and #56 – Back wall of bulk tank has fat and protein build-up. (cannot be sanitized.)"
- h. "#76 – Make and mark area for antibiotic storage. Separate lactating and non-lactating drugs and insure all drugs are marked properly."
- i. "77 – Hot and cold water needed at hand sink."
- j. #85 – Make milkhouse doors self-closing."

13. The item that Mr. Patrick noted as #5 and identified as "white wash barn" in his inspection report of September 28, 2000, indicated a failure of Rose Acres Trust

to conform to the PMO standard requiring that a milking barn, stable or parlor “[h]ave walls and ceilings, which are smooth, painted or finished in an approved manner; in good repair and ceiling dust-tight.”^[17] The PMO further provides that that “[I]tem is deemed to be satisfied when ... [w]alls and ceilings are finished with wood, tile, smooth-surfaced concrete, cement plaster, brick, or other equivalent materials with light-colored surfaces ... and such surfaces shall be refinished whenever wear or discoloration is evident.”^[18]

14. Mr. Patrick further observed on September 28, 2000, that Rose Acres Trust’s milking barn had been constructed with masonry block walls and with a rough sawn lumber ceiling, and that it had not been newly whitewashed in two to three years.^[19]

15. Whitewashing involves application of a solution of water and lime to a structure to make the structure white in appearance when the solution dries. Whitewashing differs from painting in that whitewash remains water-soluble after it dries so that applying water to a whitewashed surface will cause the white wash to dissolve in the water and run off the surface. In contrast, paint is not water-soluble when it dries.^[20]

16. There is nothing about whitewashing or painting the walls and ceilings of a milking barn that makes them intrinsically cleaner. Walls and ceilings that have not been recently whitewashed or painted can still be clean in a sanitary sense. Rather, the main reason for whitewashing or painting is to make it easier for inspectors to determine whether the walls and ceilings of the structure are clean.^[21]

17. During his September 28, 2000, inspection, Mr. Patrick noted the presence of two firearms and rounds of ammunition ready to use lying on a counter in Rose Acres Trust’s facility. Mr. Patrick inferred that those articles had been placed there for the purpose of threatening him during his inspection.^[22] But neither Lowell Voigt nor anyone else associated with Rose Acres Trust had left the firearms and ammunition there for the purpose of threatening Mr. Patrick.^[23]

18. As a result of his inspection of September 28, 2000, Mr. Patrick issued a Notice of Intention to Suspend Permit to Rose Acres Trust but scheduled a reinspection for October 16, 2000, to allow Rose Acres to avoid suspension by correcting the deficiencies that had been noted.^[24] Since neither Mr. Voigt nor any other representative of Rose Acres was present during the inspection, Mr. Patrick left the original of the inspection report and notice in the milkhouse.^[25]

19. Mr. Patrick conducted a reinspection of Rose Acres Trust on October 16. During the course of that inspection, he noted the following violations of PMO Standards:^[26]

- a. “#77 – Provide hot & cold water to hand wash sink.”
- b. “#85 – Make door of milkroom to outside – self close & fit tight.”

20. As a result of that reinspection, Mr. Patrick concluded that Rose Acres' overall compliance with PMO standards was sufficient, even though all of the violations of those standards that had been noted on September 28, 2000, had not been corrected. Mr. Patrick therefore rescinded the Notice of Suspension and allowed Rose Acres to retain its Grade A permit.^[27]

21. Mr. Patrick conducted another six-month inspection of Rose Acres Trust on March 29, 2001, again with field representative Gary Dousette in attendance. During the course of that inspection, he noted the following violations of PMO Standards:^[28]

- a. "5 – White wash."
- b. "10/11 – Clean barn walls / Clean outside of pipeline."
- c. "22 – Clean milkroom and paint ceiling and wood. Clean behind wash vats and paint block wall."
- d. "30 - Make water drain in milkroom."
- e. "32 – Clean milkroom floor."
- f. "77 – Provide hot & cold water to hand wash."

22. In his March 29, 2001, inspection report, Mr. Patrick made a notation that the items relating to whitewashing and the hand sink were repeat violations.^[29] But despite the violations he noted, Mr. Patrick concluded that Rose Acres' overall compliance with PMO standards was sufficient, and he took no action to suspend its Grade A milk permit.^[30]

23. Mr. Patrick conducted another six-month inspection of Rose Acres Trust on September 27 2001. During the course of that inspection, he noted the following violations of PMO Standards.^[31]

- a. "5 – White wash barn."
- b. "32 – Clean hoseport."
- c. "77 – Provide hot water to hand wash sink."
- d. "86 – Provide fly control (fly tapes) in milkroom."

24. In the report of his September 27 2001, inspection, Mr. Patrick again noted that the violations he found during his previous inspection had been repeated.^[32]

25. Lowell Voigt was present during Mr. Patrick's September 27, 2001, inspection. While on the premises, Mr. Patrick moved to open a door in order to trace the route of a water hose. As he attempted to get the door open, Mr. Voigt said to him, "If you open that door, I'll turn the bull loose on you."^[33]

26. The bull to which Mr. Voigt was referring was a five-month old Scottish Highlander calf that weighed about 100 to 150 pounds.^[34] However, Mr. Voigt's remark made Mr. Patrick feel "very uncomfortable," and he stopped trying to open the door he had been trying to open.^[35]

27. As a result of his inspection of September 27, 2001, Mr. Patrick issued a Notice of Intention to Suspend Permit to Rose Acres Trust but scheduled a reinspection for October 9, 2001, to allow Rose Acres to avoid suspension by correcting the violations that had been noted.^[36] Mr. Patrick gave the original of the inspection report and notice to Mr. Voigt.

28. Mr. Patrick conducted a reinspection of Rose Acres Trust on October 30, 2001. Department inspection supervisor Elaine Santi accompanied him. There were no confrontations, and there were no claims that any threats were made during that reinspection.^[37] During the course of that inspection, Mr. Patrick found that two violations of PMO Standards that he had noted on September 27, 2001, had not been corrected—specifically, white washing of the barn walls and ceiling and making the milkroom door a self closing door.^[38]

29. As a result of that reinspection, Mr. Patrick suspended Rose Acres' Grade A milk permit and downgraded it to Grade B for failure to correct repeated violations.^[39] And on November 29, 2001, the Department issued Rose Acres Trust a new certification for Grade B milk.^[40]

30. On September 23, 2002, Mr. Patrick conducted another inspection of the Rose Acres Trust dairy farm for the purpose of determining whether Rose Acres met Grade A milk standards and was therefore eligible to have its permit upgraded from Grade B to Grade A. Richard Langer, the field representative assigned to Rose Acres Trust by its processor, accompanied Mr. Patrick.^[41]

31. During the course of the September 23, 2002, inspection, the only violation of Grade A standards that Mr. Patrick specifically noted was: "#85 – Provide better self closing unit on the milkroom door."^[42] However, Mr. Patrick and Mr. Voigt discussed the possibility of Rose Acres Trust constructing a new milkhouse, free stall, and parlor. No conflict arose during the course of that discussion. Both of them understood that financing for such a project was not yet in place.^[43] But Mr. Patrick understood from the discussion that a lender had already committed to financing the project, that only the details of the financing transaction needed to be arranged, and the construction project was to begin within a month.^[44] Based on the likelihood of imminent reconstruction of Rose Acres' dairy facilities, Mr. Patrick deferred citing Rose Acres' failure to whitewash its barn and provisionally re-approved its Grade A milk permit.^[45]

32. Mr. Patrick conducted another regular inspection of Rose Acres Trust on March 20, 2002, with a field representative in attendance. During the course of that inspection, he noted the following violations of PMO Standards:^[46]

- a. "5 – white wash dairy barn."
- b. "10 – Clean barn walls and ceiling."
- c. "18 – Remove manure from cow yards - maintain bed packs."
- d. "55 – Clean gaskets in jar, tank lid cover."
- e. "62 – Work on cow flanks – Provide more bedding to cows and cattle."
- f. "38/22 – Remove loose paint from milkroom walls. Remove mold from under wash sink."
- g. "85 – Milkhouse door not self closing."

33. Based on his March 20, 2003, inspection, Mr. Patrick concluded that Rose Acres' overall compliance with PMO standards was sufficient, and he took no action to suspend its Grade A milk permit.^[47]

34. Mr. Patrick conducted another regular inspection of Rose Acres Trust on September 25, 2003, with a field representative in attendance. Department inspection supervisor Greg Pittman accompanied him. During the course of that inspection, he noted the following violations of PMO Standards.^[48]

- a. "5 – Whitewash, paint or make the barn walls and ceiling white. Repair holes in barn ceiling."
- b. "50 – Change milk hoses."
- c. "55 – Clean vacuum shutoffs on milker claws."

35. During the course of the September 25, 2003, inspection, Mr. Patrick specifically observed that the barn walls and ceiling, which had once been painted white or some other light color, were showing clear signs of rust and various stains on the painted surfaces.^[49] After completing his inspection, Mr. Patrick took no action to suspend Rose Acres' Grade A milk permit. Rather, he and Mr. Pittman told Lowell Voigt that Rose Acres would be allowed one year in which to have the barn walls and ceiling whitewashed or repainted or to have a new facility built. If neither occurred, Mr. Patrick indicated that Rose Acres' Grade A milk permit would be suspended.^[50] No confrontations or problems occurred between Mr. Patrick and Lowell Voigt during that inspection.^[51]

36. Mr. Patrick conducted another regular inspection of Rose Acres Trust on March 25, 2004. Both Department inspection supervisor Greg Pittman and a processor field representative accompanied him. During the course of that inspection, Mr. Patrick noted the following violations of PMO Standards.^[52]

- a. "5 – Repair barn ceiling. / Whitewash."
- b. "10 – Clean barn walls and ceiling."
- c. "22 – Remove loose paint on milkroom walls."
- d. "55 – Clean vac. shut offs on milker units."
- e. "62 – Work on cow flanks that are dirty."

37. f. "Note: Barn walls and ceiling must be repaired or new parlor needs to be in construction by next inspection."

38. On March 25, 2004, the tone of discussions between the Department's inspectors and Lowell Voigt was significantly more tense and confrontational than during most previous discussions. Mr. Voigt accused Mr. Patrick of spreading disease into Rose Acres' calf barn during the September 28, 2003, inspection, allegedly resulting in the death of several calves. Mr. Patrick denied those allegations.^[53]

39. Mr. Patrick did not take action to suspend Rose Acres' Grade A milk permit as a result of the March 25, 2004, inspection.^[54]

40. On March 27, 2004, Mr. Patrick received a statement in the mail demanding payment of \$6,910.00 to Rose Acres Trust as compensation for loss of calves from disease.^[55]

41. In late March or early April 2004, a flyer was circulated to various persons in the vicinity of Eden Valley by persons associated with Rose Acres Trust. The flyer said, "WANTED - Cliff Patrick, dairy inspector for the Minnesota Department of Agriculture Dairy and Meat Division – Spreads disease and wastes tax payers dollars."^[56]

42. By letter dated April 12, 2004, Kevin Elfering, Director of the Department's Dairy, Food & Meat Inspection Division, notified Mr. Voigt and his son, Roger, that neither the Department nor Mr. Patrick bore any responsibility for any loss of calves that Rose Acres may have sustained, that the flyer being circulated about Mr. Patrick unfairly impugned his integrity and was unacceptable, and that all violations cited in Mr. Patrick's March 25, 2004, inspection report would have to be corrected prior to the next inspection or Rose Acres' Grade A milk permit would be suspended.^[57]

43. Mr. Patrick's conducted his most recent inspection of Rose Acres Trust on September 16, 2004. Again, Department inspection supervisor Greg Pittman accompanied him. During the course of that inspection, Mr. Patrick noted the following violations of PMO Standards.^[58]

- a. "5 – Barn walls and ceiling."
- b. "7 – Light out in barn."

- c. “22 – Milkroom walls under wash sink.”
- d. “49 – Pressure washer needs air/vac breaker/water cup in calf pin.”
- e. “50 – Replace gaskets in jar.”
- f. “53 – Replace threads from wash nipple.”
- g. “85 – Milkroom door must be self closing & must fit tight.”
- h. The inspection sheet also noted that some of the violations noted in the previous inspection had been repeated.

44. Because of the results of the inspection conducted on September 16, 2004, Mr. Patrick suspended Rose Acres Trust’s Grade A milk permit effective as of that date and downgraded Rose Acres’ permit to Grade B until all of the violations noted had been corrected. No reinspection was scheduled at that time.^[59]

45. Rose Acres Trust subsequently requested a hearing on its permit suspension, and this contested case proceeding ensued.

46. At all times relevant to this proceeding, the quality of the milk shipped by Rose Acres Trust to its processor, First District, has met PMO standards in terms of both somatic cell count and bacteria count.^[60]

47. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

48. The Memorandum that follows explains the reasons for these Findings of Fact, and to the extent that the Memorandum may contain additional findings of fact, including findings on credibility, the Administrative Law Judge incorporates them into these Findings.

49. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Minnesota law gives the Administrative Law Judge and the Commissioner of Agriculture authority to conduct this contested case proceeding and to make findings, conclusions, and recommendations or a final order, as the case may be.^[61]

2. The Department gave Rose Acres Trust proper and timely notice of the hearing, and it has also fulfilled all procedural requirements of law and rule so that this matter is properly before the Administrative Law Judge.

3. By enacting Minnesota Statutes, section 32.394, subdivision 4, the legislature incorporated the standards for Grade A milk set forth in the PMO into Minnesota law:

In the exercise of the authority to establish requirements for Grade A milk, milk products, and goat milk, the commissioner adopts definitions, standards of identity, and requirements for production and processing contained in the "2001 Grade A Pasteurized Milk Ordinance" and the "1995 Grade A Condensed and Dry Milk Ordinance" of the United States Department of Health and Human Services, in a manner provided for and not in conflict with law.

And in Minnesota Statutes, section 32.397, the legislature made those standards " the only such standards for use in the State of Minnesota." Finally, in Minnesota Statutes, section 32.398, subdivision 1, the legislature required the Commissioner to enforce those standards:

Subdivision 1. **Enforcement.** The commissioner *shall* enforce the provisions of sections 32.391 to 32.398. [Emphasis supplied.]

In this contested case proceeding, the Department has the burden of proving by a preponderance of the evidence facts that establish violations of applicable law.^[62]

4. Section 5 of the PMO provides that:

"[a] dairy farm ... shall be subject to suspension of permit and/or court action, if two (2) successive inspections disclose a violation of the same requirement.

5. The Department established by a preponderance of the evidence that during successive inspections on March 25 and on September 16, 2004, Rose Acres Trust committed a violation of PMO standards by failing to have dairy barn "walls and ceilings, which are smooth, painted or finished in an approved manner; in good repair and ceiling dust-tight."^[63]

6. Section 3 of the PMO provides that:

SUSPENSION OF PERMIT: When any requirement(s) of this Ordinance is violated, the permit holder is subject to the suspension of their (sic) permit.

7. The Department established by a preponderance of the evidence that during an inspection of Rose Acres' dairy farm on September 16, 2004, Rose Acres

committed the following violations PMO Standards that had not been noted in the inspection of March 25, 2004:

a. Failure to insure that “[t]he areas used for milking purposes shall ... [b]e provided with natural and/or artificial light, well distributed, for and and/or night milking.”^[64]

b. Failure to insure that “[t]he walls and ceilings [of the milkhouse] shall be constructed of smooth material; be in good repair; and be well painted, or finished in an equally suitable manner.”^[65]

c. Failure to insure that “[w]ater for the milkhouse and milking operations shall be from a supply properly located, protected and operated and shall be easily accessible, adequate and of a safe, sanitary quality.”^[66]

d. Failure to insure that “[a]ll containers, utensils and equipment shall be in good repair.”^[67]

e. Failure to insure that “[o]uter milkhouse doors are tight and self-closing.”^[68]

8. Minnesota Statutes, section 31.02(g) provides that:

The following acts set out in this section and the causing of such acts within this state are prohibited.

(g) The refusal to permit entry or inspection, or to permit the taking of a sample, or to permit access to or copying of any record as authorized by section 31.04;

9. The Department failed to establish by a preponderance of the evidence that Rose Acres Trust violated Minnesota Statutes, section 31.02(g) during an inspection conducted on September 28, 2000, by allowing firearms and ammunition to remain in open view on its premises.

10. The Department established by a preponderance of the evidence that Rose Acres Trust violated Minnesota Statutes, section 31.02(g) during an inspection conducted on September 27, 2001, by refusing to allow a Department inspector to open a door in order to trace the route of a water hose.

11. Minnesota Statutes, section 32.103(b) provides:

(b) A refusal or physical threat that prevents the completion of an inspection or neglect to obey a lawful direction of the commissioner or the commissioner's agent given while carrying out this section may result in the suspension of the offender's permit or certification. The offender is required to meet with a representative of the offender's plant or marketing organization and a representative of the commissioner within 48 hours

excluding holidays or weekends or the suspension will take effect. A producer may request a hearing before the commissioner or the commissioner's agent if a serious concern exists relative to the retention of the offender's permit or certification to sell milk.

12. By refusing to allow a Department inspector to open a door in order to trace the route of a water hose during an inspection conducted on September 27, 2001, Rose Acres Farms violated the provisions of Minnesota Statutes, section 32.103(b). However, that statute requires the Department to provide an immediate notice of proposed suspension and contemporaneous notice to the producer of a right to a hearing. Since the Department did not take those steps within the time required by the statute, it cannot now suspend Rose Acres' Grade A milk permit based on that particular violation.^[69]

Based upon these Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commissioner AFFIRM the suspension of Rose Acres Trust's Grade A milk permit.

Dated this 22nd day of March 2005.

/s/ Bruce H. Johnson
BRUCE H. JOHNSON
Administrative Law Judge

NOTICE

Under Minnesota law,^{[\[70\]](#)} the Division must serve his final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

I. Suspension of Rose Acres Trust's Grade A Milk Permit for Violations of the Grade A Pasteurized Milk Ordinance.

The National Conference on Interstate Milk Shipments (NCIMS) is a non-profit organization, whose members include the FDA, state milk regulatory agencies, and representatives from the dairy industry that include milk producers, processors, and marketers. Accordingly, the NCIMS itself has no legal standing to regulate milk. Rather it drafts and promulgates the PMO as a model set of standards and enforcement provisions, with the expectation that federal and state will adopt them as law to govern the production, processing, and sale of milk within their respective jurisdictions. In Minnesota Statutes, section 32.394, subdivision 4, the Minnesota Legislature has specifically adopted the 2001 version of the PMO as the law of this state.^[71] In fact, the legislature has gone beyond that and specified that the 2001 version of the PMO shall be the *only standard* for regulating the production, processing, and sale of Grade A milk in this state.^[72] And the legislature has also expressly ordered the Commissioner to enforce the PMO standards.^[73] So, even though some provisions of the PMO might seem unclear or out-of-date, the Commissioner has no choice but to enforce that document as it has been drafted.

The PMO contains two provisions relating to suspension of producers' Grade A milk permits. Section 3 makes a permit *subject to* suspension "[w]hen any requirement of this Ordinance is violated."^[74] The phrase "subject to" means that the Department is not required to suspend a permit when an inspection indicates a violation of PMO standards has occurred. Rather, the PMO gives the Department the *discretion* to decide whether or not to suspend a permit when a violation is found. Section 5 of the PMO speaks to repeated violations. It provides that a dairy farm "shall be subject to suspension of permit and/or court action, if two (2) successive inspections disclose a violation of the same requirement."^[75] Although the suspension provision in Section 5 is also expressed in discretionary terms, other provisions of that section indicate that repeated violations of standards on successive inspections are considered to be more serious than one-time violations, and that section recommends strict enforcement in those cases.^[76]

Finally, with the exception of the provisions dealing with repeat violations in Section 5, the enforcement provisions of the PMO apply only to what has been found in the most recent inspection. In other words, the PMO does not contemplate that a violation committed in an earlier year can be the basis for a suspension in a later year, unless the same violation has been repeated in the most recent inspection. So, a producer's past compliance with PMO standards has no *direct* legal significance unless it relates to repeat violations.^[77] Nevertheless, past compliance can have *indirect* legal significance in a case like this. Since the decision whether to suspend a permit based on violations found in the most recent inspection is discretionary, a producer's

compliance history is a factor that the Department can legitimately consider in deciding whether to exercise that discretion and suspend a permit for a current violation.

A. Repeat violation found in the September 16, 2004, inspection report.

The only violation cited in Mr. Patrick's violation report of September 16, 2004, that was also cited in the report of his previous inspection on March 25, 2004, was Rose Acres' failure to whitewash or paint its dairy barn walls and ceiling.^[78] Although failure to make the milkroom door self-closing with a tight fit was cited in inspection reports from earlier years, it was not noted on the inspection report of March 25, 2004, and it therefore does not meet the PMO's definition of "repeat violation." Rose Acres Trust concedes that the walls and ceiling of its dairy barn had not been whitewashed or repainted in recent years, but it argues that its failure to do so was not a violation of the PMO.

With regard to the walls and ceilings of dairy barns, PMO standard 2r requires that "[t]he areas used for milking purposes shall ... [h]ave walls and ceilings, which are smooth, painted or finished in an approved manner; in good repair; and ceiling dust-tight."^[79] That PMO standard further provides that that "[i]tem is deemed to be satisfied when ... [w]alls and ceilings are finished with ... light colored surfaces ... and such surfaces shall be refinished whenever wear or discoloration is evident."^[80] PMO standard 5r, which pertains only to milkhouses is somewhat more specific. It requires that "[t]he walls and ceilings [of the milkhouse] shall be constructed of smooth material; be in good repair; and be *well painted*,^[81] or finished in an equally suitable manner."^[82] That PMO standard further provides that that "[i]tem is deemed to be satisfied when ... [w]alls and ceilings are constructed of smooth dressed lumber or similar material; well painted with a light-colored washable paint ..."^[83] But that standard relates to "milkhouses," and not the "milking barn" that was the subject of the deficiencies relating to whitewashing in Mr. Patrick's inspection reports. There is nothing in Mr. Patrick's inspection reports that indicates that the walls and ceiling of Rose Acres Trust's milkhouse needed whitewashing.

Rose Acres Trust argues that whitewashing or painting its dairy barn will not make its barn cleaner, nor will it affect the sanitary quality of its milk. But that argument misses the point. None of the PMO requirements for dairy barns contained in Item 2r directly relate to cleanliness or the sanitary quality of milk. The PMO directly addresses the cleanliness of dairy barns in Item 3r^[84] and the sanitary standards for milk in Section 7.^[85] Rather, light-colored walls and ceilings without evidence of excessive wear or discoloration are required in dairy barns because those light colors make it easier for field representatives, inspectors, or producers themselves to determine whether the walls and ceiling are clean. That is apparent from a reading of Item 3r as a whole.

To reiterate, although the PMO standard applicable to dairy barns does not specifically talk about whitewashing or painting, it does require dairy barn walls and ceilings to be light in color and to "be refinished whenever wear or discoloration is evident." And in that regard, the PMO does not establish a completely objective standard by which to measure compliance. Rather, it clearly leaves a great deal to an

individual inspector's judgment. For example, how light must a surface be to meet the "light-colored" standard? And how much wear or discoloration must be "evident" on a wall or ceiling to warrant refinishing? Judgments of that type are necessarily subjective, and the answers to those questions probably vary to some extent from inspector to inspector. But it is not irrational to allow inspectors leeway in making those determinations. For example, it might be easier for an experienced inspector to make an accurate determination of dairy barn cleanliness, despite some evidence of wear and discoloration, than it would be for a less experienced inspector. And an approach to regulation that eliminated that leeway could very well be even more burdensome to producers. For example, the PMO could simply require that all dairy barns be whitewashed or repainted every year. That would probably cure the problem of differing interpretations by inspectors, but it is likely make compliance much more burdensome and expensive for producers. The ALJ also notes the PMO clearly allows dairy farmers room to determine how to comply once a deficiency is found. For example, they can whitewash the surfaces, repaint them, or install pre-finished construction materials that are light in color, whichever best suits their needs and resources. In summary, the ALJ concludes that the PMO was designed to give inspectors a reasonable degree of flexibility both in determining compliance with the standard and in determining the best way to bring a facility back into compliance.

So, the question of compliance, as it relates to maintenance of the walls and ceiling of Rose Acre's dairy barn, is whether the surfaces are now so worn and discolored that they are out of compliance with the standard. Mr. Patrick found that they were so worn and discolored to be out of compliance. And although there is necessarily an element of subjectivity in making such determination, it is a judgment call that the PMO gives Mr. Patrick authority and discretion to make. But in this particular case, it is unnecessary to rely completely on Mr. Patrick's verbal descriptions of the condition of the dairy barn walls and ceiling. During their September 25, 2003, inspection, Mr. Patrick and inspection supervisor, Greg Pittman, took photographs of the walls and ceiling of Rose Acres' dairy barn.^[86] Those photographs show perceptible wear, staining, and discoloration of the walls and ceiling and corroborated their testimony. The evidence established that the conditions depicted in those photographs had not improved by March 27, 2004, or by September 16, 2004. It is possible, as Rose Acres asserts, that other inspectors might not have found that those conditions would have interfered with their ability to determine how clean the barn was. But the PMO requirement is not expressed in those terms. It effectively gives the inspector who is conducting the inspection the authority to make that judgment call, and Mr. Patrick was therefore acting within his authority when he arrived at that conclusion.

B. Other violations found in the September 16, 2004, inspection report.

Mr. Patrick's inspection report of September 16, 2004, recorded five other violations of PMO standards. As previously noted, any violation of the standards makes a Grade A milk permit *subject to* suspension. However, Mr. Voigt indicated that Rose Acres was not taking issue with those other five violations and expressly indicated a willingness to correct them prior to a reinspection. Moreover, Mr. Patrick did not indicate at the hearing whether any of those other five violations, either singly or in

combination, would have caused him to proceed with suspending Rose Acres' permit without allowing time for their correction and a reinspection.

II. Refusal to Allow Completion of an Inspection.

Minnesota Statutes section 31.02(g) provides that refusal to permit an authorized inspection by a Department inspector is grounds for suspending a Grade A milk permit. And Minnesota Statutes, section 32.103(b) provides that a refusal or physical threat that prevents completion of an inspection is grounds for suspension of a permit.

The Department introduced evidence that during Mr. Patrick's first inspection of Rose Acres Trust's dairy farm on September 28, 2000, he observed firearms and ammunition positioned on a counter in a way that appeared to him to be a threat against him. But the evidence failed to substantiate that placement of the firearms and ammunition was intended as a threat. First of all, Mr. Voigt testified that he used firearms in the dairy operation in order to rid the premises of vermin, that the firearms and ammunition were there for that purpose, and that their presence was not intended as a threat against a Department inspector. In Mr. Patrick's testimony, he conceded that dairy farmers routinely used firearms to rid their facilities of vermin. Additionally, the evidence established that neither Mr. Voigt nor anyone else associated with Rose Acres Trust was present when Mr. Patrick made his September 28, 2000, inspection. So, there was no one there to prevent the inspection by refusal. Moreover, the evidence established that the presence of the firearms and ammunition did not prevent Mr. Patrick from completing his inspection. Finally, Mr. Patrick testified that the Department hired him as an inspector in May 2000, which indicated that his September 2000 inspection was the first he made of Rose Acres' dairy farm. There was no evidence of conflict between the Voigts and previous inspectors or of pre-existing ill will between Mr. Patrick and the Voigts. In short, there is no evidence in the record that supports a claim that the presence of the firearms and ammunition was intended as a threat.^[87]

Mr. Patrick conducted another inspection of Rose Acres' dairy farm a year later on September 27, 2001. During that inspection he began to open a door while tracing a water hose. The evidence established that at that point, Mr. Voigt said, "If you open that door, I'll turn the bull loose on you."^[88] Rose Acres introduced evidence that the bull in question was a gentle, 5-1/2-month-old calf, and that Mr. Voigt's statement was not intended as a physical threat toward Mr. Patrick. On the other hand, Mr. Patrick testified that because of an experience he had had as a child, he took it to be a serious threat. In other words, both parties to the incidents have different subjective interpretations of what was intended. But it is unnecessary to determine whether the physical threat provision Minnesota Statutes, section 32.103(b) applies because that statute also prohibits "a refusal," and, at a minimum, Mr. Voigt's statement was intended as a refusal to allow Mr. Patrick to open the door in question and to complete that part of his inspection. That refusal also constitutes a violation of Minnesota Statutes section 31.02(g), which makes refusal to permit inspection grounds for suspension.^[89]

III. Remedy

The PMO gives the Commissioner the authority and discretion to suspend a Grade A milk permit for any violation of PMO standards and emphasizes that suspension may be particularly warranted where violations are repeated violations in successive inspections. So, the Department could suspend the permit on those bases alone. The ALJ has also concluded that Rose Acres violated Minnesota Statutes, section 31.02(g) by refusing to allow an inspector to complete an inspection, and that violation is also a basis for suspension. In short, because there was a basis in fact and law for suspending Rose Acres' permit, the ALJ has recommended that the Commissioner affirm the suspension. However, those conclusions and that recommendation will not necessarily put this matter to rest. Minnesota Statutes, section 32.394, subdivision 6, provides, among other things, that:

Any person desiring to secure such permit shall make application therefor on a form provided by the commissioner, and before a permit is issued the commissioner shall determine that the applicant is competent and qualified to perform such field service.

In fact, Mr. Patrick's inspection report of September 16, 2004, expressly states that Rose Acres' Grade A milk permit has only been suspended and downgraded to Grade B until all of the violations cited in that inspection report have been corrected.^[90] And at the hearing, the Department indicated that that is the only relief it is seeking against Rose Acres. So, there is nothing to prevent Rose Acres from reapplying for a Grade A milk permit anytime it believes that the violations have been corrected and that it is again in sufficient compliance with Grade A standards.

At the hearing, the Department's representative, Dr. Nicole Neeser, indicated that the Department would welcome any insights that the ALJ might have that might help put to rest the underlying controversy that has resulted in this hearing. One clear insight is that the pattern of escalating conflict that has characterized relationships between Rose Acres and the Department needs to end. Conflict will not serve to bring closure to this dispute. Second, it appears to the ALJ that the parties do have some common interests. The evidence established that Rose Acres has unsuccessfully sought financing to construct a new dairy barn. It appears that a new dairy barn that conformed to PMO standards would finally put this matter to rest. But the evidence also established that price for Grade B milk is significantly lower than the price for Grade A milk, and continued suspension of Rose Acres' Grade A permit is likely to have a negative effect on any lender's decision about financing for a new dairy barn. So, if a new dairy barn is Rose Acres' ultimate goal, it would be in its interest to do what needs to be done to obtain recertification as a Grade A producer. That appears to coincide with the Department's interest, since the Department indicated that it did not desire a result that reduced the number of Grade A milk producers in the state.

In the short term, a question that appears important for resolution of this matter is whether or not the existing dairy barn can be brought up to Grade A standards and maintained at that level until either a new barn is built or indefinitely, if a new barn is not built. The evidence indicated that although the existing barn may need some minor structural repairs from time to time, it is structurally capable of being brought up to and

maintained at Grade A standards. And during his testimony, Mr. Voigt indicated a willingness to correct any deficiencies noted in Rose Acres' September 16, 2004, inspection save one—namely, whitewashing or repainting of the dairy barn's ceiling and walls. The ALJ has concluded that the PMO does not delineate specific, objective standards for determining when the interiors of dairy barns are in need of whitewashing or repainting, but that the law leaves that judgment up to individual inspectors. Moreover, it is the ALJ's view that attempting to legislate more specific, objective standards for that could possibly prove to be more of a burden than a blessing by prescribing "one size that must fit all," regardless of individual conditions on dairy farms. And the ALJ will not recommend, and Rose Acres should not reasonably expect, the Department to limit its lawful discretion in conducting inspections. Frankly, given the history of this matter and the parties' positions, it is difficult for the ALJ to offer much more in the way of insights that might help the parties resolve the underlying controversy. However, one concern of Rose Acres might be that if it proceeded to whitewash or paint its dairy barn now, how often it might be required to whitewash and paint its dairy barn again in future years. If that is a major concern, it might be helpful if the Department were able to articulate more clearly and precisely the criteria that would be germane in determining when the walls and ceilings might have to be refinished again in the future.

B. H. J,

^[1] Minnesota Statutes, section 14.61. (Unless otherwise specified, all references to Minnesota Statutes are to the 2002 edition.)

^[2] See Minn. Stat., § 14.62, subd. 2a.

^[3] *Id.*; Exhibits 16 and 17.

^[4] Testimony of Kevin Elfering.

^[5] There is a 2003 revision of the PMO, but Minnesota statutes specifically refer to the 2001 revision. So, the 2001 version is still the law in Minnesota.

^[6] *Id.*; testimony of Kevin Elfering.

^[7] Testimony of Clifford Patrick; Exhibit 17 at pp. 12-13.

^[8] Testimony of Clifford Patrick. Mr. Patrick testified that even when some violations are found, the inspector may allow the producer to retain a Grade A permit if overall compliance is sufficient. He further indicated that Department leaves the decision of whether or not compliance is "sufficient" to the judgment and discretion of individual inspectors.

^[9] Testimony of Clifford Patrick, Kevin Elfering, and Lowell Voigt.

^[10] Testimony of Harold Shepersky.

^[11] Testimony of Elaine Santi.

^[12] Testimony of Clifford Patrick.

^[13] *Id.*

^[14] Since the PMO requires inspections every six months and since Mr. Patrick began working as an inspector for the Department four months earlier in May 2000, this would most probably have been Mr. Patrick's first inspection of Rose Acres Trust.

^[15] Testimony of Clifford Patrick and Lowell Voigt.

- [\[16\]](#) Exhibit 1.
- [\[17\]](#) Exhibit 16, Item 2r; testimony of Clifford Patrick.
- [\[18\]](#) Exhibit 16 at p. 3.
- [\[19\]](#) Testimony of Clifford Patrick.
- [\[20\]](#) Testimony of Clifford Patrick, Elaine Santi, and Lowell Voigt.
- [\[21\]](#) Testimony of Clifford Patrick.
- [\[22\]](#) Testimony of Clifford Patrick
- [\[23\]](#) Testimony of Lowell Voigt. See discussion in Part II of the Memorandum that follows.
- [\[24\]](#) Exhibit 1; testimony of Clifford Patrick.
- [\[25\]](#) Testimony of Clifford Patrick.
- [\[26\]](#) Exhibit 2.
- [\[27\]](#) Testimony of Clifford Patrick.
- [\[28\]](#) Exhibit 3.
- [\[29\]](#) Exhibit 3.
- [\[30\]](#) Testimony of Clifford Patrick.
- [\[31\]](#) Exhibit 4.
- [\[32\]](#) *Id.*
- [\[33\]](#) Testimony of Clifford Patrick.
- [\[34\]](#) Testimony of Karen Morse.
- [\[35\]](#) Testimony of Clifford Patrick.
- [\[36\]](#) Exhibit 4; testimony of Clifford Patrick.
- [\[37\]](#) Testimony of Elaine Santi.
- [\[38\]](#) Testimony of Clifford Patrick
- [\[39\]](#) *Id.*; Exhibit 5.
- [\[40\]](#) Exhibit 6; testimony of Clifford Patrick
- [\[41\]](#) Exhibit 7; testimony of Clifford Patrick.
- [\[42\]](#) *Id.*
- [\[43\]](#) Testimony of Clifford Patrick and Lowell Voigt.
- [\[44\]](#) Testimony of Clifford Patrick; Exhibit 7.
- [\[45\]](#) Testimony of Clifford Patrick.
- [\[46\]](#) Exhibit 8.
- [\[47\]](#) Testimony of Clifford Patrick.
- [\[48\]](#) Exhibit 9.
- [\[49\]](#) Exhibit 9; testimony of Clifford Patrick and Greg Pittman.
- [\[50\]](#) Testimony of Clifford Patrick and Greg Pittman.
- [\[51\]](#) Exhibit B.
- [\[52\]](#) Exhibit 10.
- [\[53\]](#) Testimony of Clifford Patrick and Greg Pittman.
- [\[54\]](#) *Id.*
- [\[55\]](#) Exhibit 11; testimony of Clifford Patrick.
- [\[56\]](#) Exhibit 11; testimony of Clifford Patrick.
- [\[57\]](#) Exhibit 13; testimony of Kevin Elfering.
- [\[58\]](#) Exhibit 14.
- [\[59\]](#) *Id.*; testimony of Clifford Patrick.

[60] Testimony of Harold Shepersky; Exhibit E.

[61] Minnesota Statutes, sections 14.50, 14.57, 14.69, and 32.394, subdivision. 5.

[62] Minnesota Rules, part 1400.7300, subpart 5.

[63] PMO, Item 2r; see Exhibit 14 – Item 5 and Exhibit 17; See discussion in Part I-A of the Memorandum that follows.

[64] PMO, Item 2r; see Exhibit 14 – Item 7 and Exhibit 17.

[65] PMO, Item 5r; see Exhibit 14 – Item 49 and Exhibit 17.

[66] PMO, Item 8r; see Exhibit 14 – Item 49 and Exhibit 17.

[67] PMO, Item 9r; see Exhibit 14 – Items 50 and 53 and Exhibit 17.

[68] PMO, Item 19r; see Exhibit 14 – Item 85 and Exhibit 17.

[69] See discussion in Part __ of the Memorandum that follows.

[70] Minnesota Statutes, section 14.62, subdivision 1.

[71] The evidence established that the NCIMS meets and drafts a new version of the PMO every two years, and that the current version is the 2003 version. However, since the legislation specifically refers to the 2001 version in Minnesota Statutes, section 32.394, subdivision 4, the older version will continue to be the law in this state unless and until the legislature updates the statute.

[72] Minnesota Statutes, section 32.397.

[73] Minnesota Statutes, section 32.398, subdivision 1.

[74] Exhibit 17 at p. 7.

[75] Exhibit 17 at p.13.

[76] *Id.*

[77] However, past-noncompliance can be the basis for suspension under Minnesota Statutes, section 31.02(g) for refusal to permit an authorized inspection because that is an independent statute that is not connected with compliance with PMO standards.

[78] Exhibit 14, testimony of Clifford Patrick.

[79] Exhibit 16 at p. 2.

[80] Exhibit 16 at p. 3.

[81] Emphasis supplied.

[82] Exhibit 16 at p. 6.

[83] Exhibit 16 at p. 7.

[84] Exhibit 16 at pp. 4-5.

[85] Exhibit 17 at pp. 21-23.

[86] Exhibit 9.

[87] There is evidence of personal conflict between Lowell Voigt and Mr. Patrick after that first inspection. But evidence of later conflict does not support the existence of such a conflict on September 28, 2000.

[88] Finding No. 25.

[89] The Department also introduced evidence establishing that persons associated with Rose Acres Trust were responsible for circulating a flyer in the form of a “wanted poster” that contained a picture of Mr. Patrick and said, “WANTED - Cliff Patrick, dairy inspector for the Minnesota Department of Agriculture Dairy and Meat Division – Spreads disease and wastes tax payers dollars.” But that flyer contained no threat against Mr. Patrick, express or implied, and, however inappropriate, appears to have been an effort at sarcastic humor at Mr. Patrick’s expense. The ALJ notes that the flyer has only served to complicate and impede a reasonable solution to the underlying issues in this case.

[90] Exhibit 14.