

2016 WWMA ANNUAL MEETING

**AN OVERVIEW FOR ADMINISTRATORS:
WEIGHTS & MEASURES INSPECTIONS
DUE PROCESS, EVIDENCE &
PACKAGE CONTROL**



NIST
National Institute of
Standards and Technology
U.S. Department of Commerce

LAWS AND METRIC PROGRAM



NIST HB 130 *“Uniform Laws and Regulations in the Areas of Legal Metrology and Engine Fuel Quality”*



NIST HB 133 *“Checking the Net Contents of Packaged Goods”*



Technical assistance to States, Industry, NCWM and Regional W&M Associations.

Training



Metric Program - Promote use of the SI in Trade and Commerce as well as everyday use.

Administrative Inspections, Due Process, Evidence and Package Control

You will be able to provide inspectors an overview about:

- How the Constitution, laws and court decisions impact inspections.
- Evidence, - What it is and how to collect and protect.
- Policies and procedures to follow to ensure good “searches” and “due process.”
- Avoiding some mistakes.
- Implementing some old, but still good, ideas for package control.

ADMINISTRATIVE INSPECTIONS

A THOUSAND TIMES A DAY

WEIGHTS AND MEASURES INSPECTIONS

Must be carried out in accordance with State Constitutions and the 4th Amendment of the U.S. Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

- Search Warrants are typically not required because weights and measures inspections fall under an “Administrative Search” exception to the 4th Amendment.
- This exception developed from a legal cases where government “closely and routinely” regulates business or other activities and where establishing probable cause and obtaining warrants is often impractical.

QUESTIONS A COURT MAY ASK TO DETERMINE IF AN INSPECTION FALLS UNDER THE EXEMPTION

1. Is the business closely or pervasively regulated?
2. Does the regulatory program constitute a “substantial” government interest?
3. Is an unannounced inspection necessary to further the regulatory program and detect violations?
4. Does the enabling law limit the time, place, and scope of inspections to provide a Constitutionally adequate notice and substitute for a search warrant?
5. Does the law/process protect the privacy rights of the business owner if they refuse to consent to an inspection? Is the owner provided an opportunity for appeal and early judicial review?

UNIFORM WEIGHTS AND MEASURES LAW

SECTION 13. SPECIAL POLICE POWERS

When necessary for the enforcement of this Act or regulations promulgated pursuant thereto, the Director is:

- a. Authorized to enter any commercial premises during normal business hours, except that in the event such premises are not open to the public, he/she shall first present his/her credentials and obtain consent before making entry thereto, unless a search warrant has previously been obtained.
- b. Empowered to issue stop use, hold, and removal orders with respect to any weights and measures commercially used, stop sale, hold, and removal orders with respect to any packaged commodities or bulk commodities kept, offered, or exposed for sale.
- c. Empowered to seize, for use as evidence, without formal warrant, any incorrect or unapproved weight, measure, package, or commodity found to be used, retained, offered, or exposed for sale or sold in violation of the provisions of this Act or regulations promulgated pursuant thereto.

- d. Empowered to stop any commercial vehicle and, after presentation of their credentials, inspect the contents, require the person in charge of that vehicle to produce any documents in his possession concerning the contents, and require him to proceed with the vehicle to some specified place for inspection.
- e. With respect to the enforcement of this Act, the Director is hereby vested with special police powers, and is authorized to arrest, without formal warrant, any violator of this Act.

CONSENT

The Supreme Court has said that “one of the specifically established exceptions to the requirements of both a warrant and probable cause is owner consent.”

Do you?

- 1. Require inspectors to contact the person in charge (manager);**
 - 2. Identify themselves and your agency;**
 - 3. State the purpose of the visit and what will be done;**
 - 4. Obtain positive consent.**
 - 5. Obtain additional consent to go beyond a normal inspection.**
- Consent must be freely and positively given. Silence is not consent.

- The person giving consent must have actual or apparent authority to do so.
 - Best practice: Ask the employee on duty if he or she is in charge and has the authority to consent to an inspection. If in doubt, have them contact their supervisor.
- Consent does not give you unlimited access.

If an inspector obtains consent to inspect and test a vehicle scale at a feed store does that:

- allow him to search the paperwork on any desk in the scalehouse or just the that on the desk used by the weighmaster?
- the scale pit? a storage room in the scalehouse with an almost closed door?

What should the inspector say if the employee or owner asks “do I have to let you inspect?”

Yes or No?

The inspector should inspect anyway and charge the owner with obstruction if he interferes? Threaten to shut the business down (e.g., “cut those pumps down!”) until she consents? Come back later to see if he can get in by asking another employee?

- This is a rare occurrence.
- When it does occur the inspector should resolve it through education and reasoning. If consent is not given contact a supervisor.
- If this is not successful a search warrant must be obtained.

- “reasonable expectation of privacy.”

- What if you seize a PC used as a scale indicator?
Can you search it without consent (or a warrant)?

<http://www.justice.gov/criminal/cybercrime/docs/ssmanual2009.pdf>

SEARCH AND SEIZURE

DUE PROCESS IN ALL ENFORCEMENT ACTIONS

SEARCH AND SEIZURE

Probable cause requires that you have a reasonable belief, based on a reliable source or other information, that evidence of a crime may be located in the place searched. It is more than a mere suspicion or “educated” guess, but it does not mean that you have enough information to prove guilt.

You cannot justify a illegal search by finding evidence of a crime.

An inspector gets a “gut feeling” that the meat manager in a retail store may be intentionally selling shortweight packages sale over the weekend when inspector typically doesn't work. The inspector goes into the store early one Saturday morning and, without identifying himself or obtaining consent, enters the refrigerated cooler in back of the meat department and finds hundreds of “gross for net” packages labeled for sale.

The search is invalid since the inspector did not have probable cause to search the cooler (and did not obtain consent.)

HOW DO YOU DEVELOP A REASONABLE BELIEF FOR PROBABLE CAUSE?

- Personal observation (senses) of inspector provides a firm basis and inferences are allowed.
- Inspector's specialized training and experience (understanding what may cause something to happen).
- Past inspection history.
- Complaints (especially from multiple consumers).
- Confidential Informants (prior cases and past reliability).
- Corroboration of complaints by investigation (test purchase).
- Observation (reasonable expectation of privacy).
- Reliable and physical evidence (e.g., load cell with signs of tampering).
- Your intuition and experience with similar situations.

OTHER COMMENTS

- Detain people no longer than necessary to accomplish the purpose of the official action (e.g., transients).
- Every inspector must know that failure to provide due process and conduct reasonable search and seizure may violate the Constitution.
- Every inspection must be handled as if it were going to be reviewed in a high court in your state.

FI: act which confines or restrains individual to a bounded area with intent and causation. Physical barrier or force, threats of force, invalid use of legal authority.

DUE PROCESS – 5TH & 14TH AMENDMENTS

“No person shall be... compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

- After taking action give “notice” and provide an opportunity for a “meaningful” hearing that results in a “reasonable’ outcome.
- This requires patience, meaningful listening, and careful judgment to ensure equity between the owners’ property interest and the governments’ police powers.

ACTIONS – “DEPRIVING” A BUSINESS OF ITS PROPERTY AND ABILITY TO CONTINUE TO OPERATE

- Removing a commercial device from use.
- Seizing a device that was not or could not be repaired.
- Issuing a stop-sale or stop-removal order on packaged goods.
- Destroying packages for testing.
- Seizing packages for evidence.

Note: the courts consider 3 other factors: (1) the privacy interest affected; (2) the risk and cost of erroneous deprivation of that interest through the procedures used, and the probable value, if any, of substitute procedures; and (3) the government's interest, including the enforcement function involved and the burdens of using alternative procedures.

NOTICE/UNIFORMITY

- The weights and measures law notifies business owners:
 - of the scope of authority and the powers inspectors have to inspect devices and goods and remove them from use or sale.
 - of the test procedures, tolerances and user requirements for devices and labeling requirements and reasonable variations that apply to packages.
- Here the value of adopting and following NIST Handbooks 44, 130, and 133 is apparent:
 - represent nationally recognized uniform requirements.
 - where appropriate the requirements are “identical” to those in federal laws and regulations.
 - developed through an open process involving industry and other stakeholders as well as the public.

Note: the USDA adopted NIST Handbook 44 in 2006. In 2008 USDA adopted NIST Handbook 133 for use to test all meat and poultry products packed under its supervision (see: 73 FR 52192, Sept. 9, 2008).

- Most inspectors will never encounter a due process issue, if they receive proper training and supervision.
- An agency may be held accountable if improper actions, (e.g., not following prescribed test procedures or tolerances, shortcuts that don't provide results that are equivalent in accuracy to the adopted procedure); not allowing moisture loss; enforcing labeling requirements on exempted packages; or incorrectly taking a device out of service.
 - *Inspectors used an "undefined discretionary moisture loss allowance failed to provide fair notice to plaintiff. Plaintiff has been denied its right to due process."*
 - *Void-for-Vagueness – a regulation that "fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" (Morales) - "Chilling" in Baltimore.*
- Accountable means: monetary damages, legal fees, damage to working relationship with the business, negative publicity or legislative restrictions.

RECOMMENDATION: THREE STEPS = INFORM– WARN – ACTION

- **1st Inspection - a violation is found and a “notice” is issued.**
 - The details of the violations provided.
 - Devices are “rejected” if out of tolerance, if they do not meet a user requirement or specification. Time is allowed for repair (e.g., 10 days) and the owner is warned that the device will be removed from use. Devices may be removed from service immediately depending on the amount of error ($3 \times T$?) [must be uniform throughout the your program and be publicly announced.]
 - Store packed items are ordered off-sale while packages put-up elsewhere are placed off-sale and notice is given to the retailer (see “Rockland County.”)
 - The owner is provided with information on how to resolve violations appeal any action.

Education takes place at every opportunity. This is critical in cases of lax enforcement in the past.

See 2.6.10. “Model Guidelines for the Administrative Review Process “ in NIST HB 130

“ROCKLAND COUNTY” NOTICE (2003)

1. Rockland County's citations and fines are issued to the retailer who immediately receives notice of a hearing, stating where and when the citation may be disputed. Such notice satisfies due process. See *Chalfy v. Turoff*, 804 F.2d 20, 22 (2d Cir. 1986) (affirming finding of adequate notice where summons stated time and place of hearing to contest fine).
2. The fact that the retailer may ultimately pass along this fine and charge a "business interruption fee" to Kraft is between those two parties.

Grand Union Co. et. al. v. N.Y.C. Consumer Affairs (1984) – U.S.DC upheld city egg net weight regulations that were identical to federal regulations because they did not interfere with interstate commerce. Due process claim dismissed due to the appeal notice given to retailer. Note: this included claims of moisture loss, poor distribution practice (by delivery companies) and consumer tampering.

FOLLOW-UP INSPECTION(S), THEN ACTION

- **2nd Inspection**
 - Were the corrections to devices or packages made?
 - Depending on the results judgment of whether the business operator made an effort or ignored the notice need to be made before further action taken.
 - Devices not repaired are removed from service or packages found incorrect during the first inspection are reinspected and appropriate action taken depending on the results.
 - If the violations are found a “warning” that legal action may be taken if violations continue on future inspections. Only for repeated violations.
 - In some situations it is best to compartmentalize the violations.
 - The owner is provided with information on how to appeal any action.

Was the scale company at fault? Did the scale owner tell the scale technician to only do what it takes to get it to pass? Are store employees determining and rounding tare correctly?

WHAT IF THERE IS SOME IMPROVEMENT FOUND BUT NOT FULL COMPLIANCE ON 3RD INSPECTION?

- **Field or Office Hearing**

A supervisor reviews case history and participates in the field hearing to ensure that expectations are understood and that there have not been any miscommunications.

Assistance is provided and a final warning is issued.

- **Final Notice**

Warning Letter to highest level in company or corporation.

Void-for-Vagueness – a regulation that “fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits” (Morales)

Violations: Strict Liability v. Proving “Intent” – 6 Months

Hearings force you to review your case and may reveal significant errors in the evidence and may other let you identify other facts to be addressed before preceding.

EXAMPLES:

Legal Action including:

- Citations
- Civil Penalties
- Injunction
- Criminal Penalties

Statute of Limitations – Varies from 0 to 2 years

Stew Leonard – Equal Protection Claim Failed

The image features a white background with a diagonal split. The bottom-left portion is divided into two overlapping triangles: a light blue one on top and a darker teal one below it. The rest of the bottom half is a solid orange triangle. The word "EVIDENCE" is printed in black, bold, uppercase letters, rotated 45 degrees counter-clockwise, and positioned in the white area.

EVIDENCE

EVIDENCE

- Detailed reports of device or package test results.
- Devices, packages and other artifacts.
- Engine fuel and motor oil samples.
- Business documents, receipts.
- Audio, Video and Photographs.
- Admissions and statements.
- Other records of repair, inspection and investigation.
- Observation.

Evidence is collected with the senses. Being alert and observant is a required skill for inspectors.

EVIDENCE

- Direct Evidence – proves the point without any inference – Watching the defendant weigh the package without deducting tare.
- Indirect or Circumstantial – the security seal was broken and the meter delivered less fuel than indicated.
- Testimonial, Documentary or Real.
 - Given under oath.
 - In the form of writing.
 - Real or firsthand impression to the trier of fact (test measure with damage, weight missing a lead seal and adjustment)

May be admitted to prove one element but not another.

EVIDENCE

RELEVANT EVIDENCE

Means evidence having any tendency to make the existence of any fact that is of consequence to make the determination of the action more probable or less probable than it would be without the evidence.

ADMISSIBILITY

- It is always admissible.
- It must always relate to the time, event or defendant.
- Evidence that is prejudicial, confusing, cumulative, not relevant or that was obtained illegally is not admissible.

- What element is this being used to prove?
- Evidence obtained without a valid search warrant (or under the exception) may be excluded from the case.

EVIDENCE

EXCLUSIONARY RULE

- Evidence, no matter how important it is to your case, may be excluded if it was obtained in any way that violates the Constitutional rights of the defendant.

PRESERVATION

- Evidence that appears favorable to a defendant or that he or she would be unable to replace should never be discarded or destroyed.

Evidence is usually authenticated by testimony but many public documents are self-authenticating.

HEARSAY

STATEMENT

An oral or written assertion or nonverbal conduct of a person if it is intended as an assertion.

HEARSAY

Is an out of court statement, ... offered into evidence to prove the truth of the matter asserted.

Generally considered unreliable but there are exceptions.

EXCEPTIONS:

- A statement by:
 - the defendant, or a person authorized by the defendant to make the statement.
 - an employee made within the scope of employment or agency.
 - a co-conspirator.
- Present sense impression describing an event or condition made with the declarant was perceiving the event or condition or immediately thereafter.
- Excited utterance made while the declarant was under stress or excitement.
- A statement of the declarant's state of mind, emotion, intent or plan.
- Records of regularly conducted business activities, made at or near the time of occurrence, by a person with knowledge of the activity, and the record was made in the course of regular business practice.

CHAIN OF CUSTODY

When evidence is seized a record of the action should be created that provides:

- Time and place where found and by whom.
- Sufficient description of item to distinguish it from other items.
- Location where collected.
- The location where it was stored and conditions of storage.

- **Protect Evidence:** All evidence should be considered fragile so any mishandling (e.g., temperature, humidity) could destroy its value in the investigation. If the evidence is tampered with or not in the same condition as when it was first taken near the time of a suspected violation, the evidence may still be used, however, its value as evidence to prove the violation could be diminished.

- **Transfer:** A record must be kept documenting the transfer of evidence from one person to another. It is the responsibility of each person in the chain to ensure that a complete and accurate record is maintained, including: the name of the person from whom he/she obtained the evidence; Date and time he/she came into possession of the evidence; Where and how it was stored, and what steps were taken to protect the evidence; and, if transferred again, the name of the person to whom it was transferred and the date and time of that transfer.

RESOURCES

<http://www.nist.gov/pml/wmd/>

NIST Handbook 130 & 133

David Sefcik - david.sefcik@nist.gov or 301-975-4868

Lisa Warfield - lisa.warfield@nist.gov or 301-975-3308

Metric Program - Resources & Information

Elizabeth Gentry – elizabeth.gentry@nist.gov or 301-975-3690