

**COMMITTEE ON LEGISLATION
MINUTES APRIL 20, 2009**

LEGISLATION MEMBERS IN ATTENDANCE:	Chair: Burton; Legislators: Nonna, Rogowsky, Abinanti, Bronz, Myers and Jenkins
ALSO IN ATTENDANCE:	County Executive: A. Neuman, B. Randolph; County Attorney: E. Cipollo; S. Dolgin-Kmetz Board of Legislators Staff: R. Pezzullo; J. Sold, K. Delgado, C. Gilberti Department of Consumer Protection: G. Brown, J. Gaccione, Others Present: M. Klein, P. Brodhagen, R. Hempson, C. Bell, T. Shelton, G. McKinstry

The Committee on Legislation, meeting with a quorum present, was called to order at 1:59 p.m.

ITEM PRICING LAW

Chairman Burton opened the meeting by reminding the members that the item pricing legislation had been considered at the public hearing conducted at the Board meeting of April 13. During the public hearing, representatives of both the NYPIRG and Consumers Union (collectively, “the advocates”) raised objections to the proposed legislation. Following the meeting, the Department of Consumer Protection (the “DCP”) prepared a memorandum discussing those objections. In addition, the committee staff prepared a chart of the various objections, which incorporated the points made by DCP. The Chairman suggested that the committee discuss each of the points set forth in the chart with Ms. Shelton from NYPIRG, Mr. Bell from Consumers’ Union, and Mr. Brown of the Department of Consumer Protection.

As to the first issue, that the retailers were “buying their way out of compliance,” the consumer advocates conceded that the statements were a bit extreme, but indicated that they were still concerned that retailers would not be motivated to comply with the new law and that the DCP might not have the resources to enforce the alternative compliance scheme provided in the new legislation.

Mr. Brown stated that DCP looked at the experience in the 10 other counties and found that when retailers invested the time and money to achieve the waiver, they actually did a better job of complying than they had under the item pricing regulations. He stated that compliance under the existing item pricing requirements was very spotty, particularly by certain retailers. He further stated that the proposed legislation was not intended to favor the retailers over consumers. Rather, the Department of Consumer Protection concluded that the proposed legislation would benefit consumers by extending the shelf label rule to non-food retailers and by requiring price check scanners where none were required previously. Consumers would be benefited by the more efficient use of retail employees, who could then perform other useful tasks, such as checking the fresh dates in the dairy case more frequently.

The committee continued by discussing the issue raised by the number of items being sampled. Ms. Shelton asserted that she was wrong when she stated in her materials that from 10-50 items would be examined. The minimum number is actually 50 for small stores and 100 for large stores. Mr. Gaccione, the Sealer, reported that the number was mandated by NY State Agriculture and Marketing Law Section 214 as well as the National Institute of Standards and Technology as the appropriate basis statistical sampling for an assessment of this type.

A Member asked whether the inspections were announced. Mr. Brown reported that in general there is no advance notice of any inspection. As to the test with respect to an initial application, a retailer would only know that the Sealer will come within 45 days. Follow-up inspections are not announced. The law already permits inspections at any time. Inspections are actually only done once a year per store unless there has been a complaint.

The members also discussed the number and location of scanners. Ms. Shelton thought that the number was not enough and while the legislation properly required that scanning be made available in a small store, the consumers may not have easy access if the store is busy. Mr. Brown responded that Westchester County is the only county that established a minimum number of scanners in its waiver legislation. As to the Sealer's discretion to require additional scanners, he will consider layout, configuration and other factors in making his decision. The DCP believes that having the discretion to make the decision on additional scanners is preferable to fixing specific requirements in advance that may not fit every scenario. The DCP consulted with the other counties on this and found that the other counties that have adopted similar legislation have not received complaints about the number of available scanners. Some members felt that the stores probably would use good judgment in selecting the number of scanners in the first place.

A lengthy discussion ensued with respect to the standard accuracy measurement of 98% to obtain the waiver. The advocates that the “green light to overprice” assertion was probably too “much spin” on the subject but still asserted that retailers should be encouraged to meet an accuracy test closer to 100%. Mr. Brown responded that the 98% accuracy test is only applicable at the testing phase to see if the scanners are accurate enough to get a waiver; they are encouraged to be 100% accurate. The legislation does not give the retailers the right to have inaccurate pricing on an ongoing basis. The statute requires the retailer refund any overcharge to a consumer. If the Department becomes aware of inaccuracies, it can go back and retest the store. The 98% has been established standard by NY State and by the National Institute on weights and measures and has been used in all 10 counties that have adopted an item pricing waiver law. It is based on statistical assumptions as to what level indicates a high level of accuracy.

Presently, if DCP does an inspection and it finds 5-10% items are mismarked, they issue a fine. There is no present practical method to refund consumers for a single overcharge on an item of goods under the present law. The Sealer stated that overcharges and undercharges break out to be about 50-50. Some members thought that this legislation would encourage the price to be correct more often.

Some members stated that they were content that consumers would continue to do a lot of policing of mispriced goods and that blatant errors would not go undetected and that consumers should be educated about the law. Other members continued to believe that the consumers need to have three different opportunities to check the price- at the shelf, on the price sticker and at the register.

Mr. Brown identified a St. Lawrence County law that provides for a super refund if a consumer complained about an overcharge. Chairman Burton asked Mr. Brown to provide a copy to the committee coordinator. The DCP deliberately decided not to opt for such language because it might prompt altercations in store which could not be supervised by the Department.

The members then discussed the issue of shelf labels versus price stickers on items. The consumer advocates believe that the consumers lose something by not having item stickers on the goods. Some members questioned whether the consumers get prompt error correction for mispriced items. Mr. Brown indicated that Westchester’s law applies to all items sold at retail and that contrary to assertions being made, nothing is being taken away from consumers because under the present law most retailers are not complying with the price marking

requirements. The representatives of the retail store industry were invited to comment on error correction. A grocery chain representative commented that consumers typically get a refund immediately from the cashier and for the full price of the item if there is a mistake; their objective was to retain customers without arguing with them.

Mr. Brown stated that, in general, grocery stores do better on accuracy than other stores. The retailers stated that item pricing only adds to the confusion on pricing because of the additional possibility of human error. The scanners and shelf labels are accurate; occasionally consumers move items deliberately. They believe that the number of items checked doesn't matter — statistically the test will always come out the same and the 98% is fair and achievable. They have had $\frac{3}{4}$ million customers using the shelf label/scanner system in Nassau and Suffolk counties without substantial complaints. However, some members continued to be troubled as to the accuracy of the shelf labels and the location of the items notwithstanding that retailers claim that they maintain shelf discipline. Mr. Brown said that the DCP will continue to be checking.

Mr. Brown also noted that Aldi, a discount supermarket no frills chain with 7000 stores worldwide, had called the County Executive to complain that Aldi would not consider opening a store in Westchester County so long as item pricing was in effect.

On the issue of penalties, Ms. Shelton indicated that NYPIRG believes that the penalties were insufficient because the waiver would not easily be revoked and because there wasn't a specific provision on reinspection. NYPIRG would like to require 2, 3 or 4 minimum mandatory re-inspections. Mr. Brown stated that the existing County Consumer Code permits the DCP to reinspect at their discretion. However, with a limited number of resources, the DCP might not have any basis to reinspect a particular retailer, where the DCP have higher priorities such as lead jewelry or outdated food, so he did not believe mandatory minimum reinspections is a good idea.

One member wanted to focus further on the penalty aspect— losing the waiver and forfeiting the fee; a discussion followed on whether the waiver could be lost for a longer period than is currently proposed (12 months).

Mr. Newman stated that County Executive's office has been examining the item pricing proposal for a long time. They waited to examine the experience of the other counties and they did the research. The consumer protection agencies of the other counties have championed their legislation. And the proposed legislation would have the added benefit of enticing new stores to come to the County. In response to the statement by NYPIRG that consumers would suffer a huge loss in grocery

stores if they didn't have items priced in their carts, it was pointed out that in 43 counties in NY there is no item pricing law at all, 10 have waiver legislation and only Westchester, Albany, Dutchess, Putnam and NYC currently have item pricing.

The committee then discussed the technical amendments that had been drafted to deal with two of the points raised by NYPIRG. It was proposed that Section 863.72 be modified to refer to "stock keeping unit" in all instances (instead of "stock keeping unit" in one place and "stock keeping item" in another). In addition, it was proposed that Section 873.72(6) be modified to state that a temporary waiver is revoked if inspection shows an error rate "not to exceed two percent" to make the terms be made consistent with other provisions in the legislation.

Member Bronz moved, seconded by Member Jenkins, to accept these insubstantial changes to the legislation and to present it to the Board for approval at the next Board meeting. The motion was approved by a vote of 6-1, with Legislator Nonna voting to approve without prejudice and Legislator Abinanti voting against.

Member Rogowsky solicited the opinion of the County Executive as to whether the length of time that the revocation would be made should be extended to two years. Mr. Brown said that they structured it to match the legislation of the other counties that had been successful and that such a penalty might be considered to be too onerous.

BOARDS AND COMMISSIONS

Legislator Bronz gave a report from the Sub Committee on Appointments recommending the appointment of Maria DiMeo Calvelli as a member of the Westchester County Human Rights Commission, of Elissa Miller as a member of the Westchester County Youth Board and of Neil J. Sullivan as a member of the Westchester County Planning Board.

Legislator Bronz made a motion, seconded by Legislator Jenkins, to approve the appointments and reappointments of the foregoing individuals. The motion was approved 6-0.

MINUTES

Legislator Jenkins moved, seconded by Legislator Rogowsky to accept the minutes. Motion approved 6-0.

Legislator Jenkins made a motion to adjourn, seconded by Legislator Rogowsky. Motion approved 6-0. The Committee adjourned at 3:59 pm.

AUDIO RECORDING ON FILE FOR REVIEW UPON REQUEST