

ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE DECISION

ROCKY'S RESTAURANT,	:	In Re: Rocky's Restaurant
	:	4759 Liberty Avenue
Appellant,	:	Pittsburgh, PA 15224
	:	
v.	:	Docket no. ACHD-20-008
	:	
ALLEGHENY COUNTY HEALTH	:	<u>Copies Sent To:</u>
DEPARTMENT,	:	Emmanuel Mori
	:	Owner, Rocky's Restaurant
Appellee.	:	4759 Liberty Avenue
	:	Pittsburgh, PA 15224
	:	
	:	<i>Counsel for ACHD:</i>
	:	Vijya Patel, Esq.
	:	301 39 th Street, Building 7
	:	Pittsburgh, PA 15201

DECISION AND ORDER OF THE ALLEGHENY COUNTY HEALTH
DEPARTMENT HEARING OFFICER

I. INTRODUCTION

This case concerns a dispute over proper refrigeration at a diner in Bloomfield. Emmanuel Mori ("Mr. Mori") is the owner of Rocky's Restaurant ("Rocky's" or "Appellant"). In January 2020, the Allegheny County Health Department ("ACHD" or the "Department") issued a closure order to Rocky's due to Rocky's years-long use of homestyle refrigerators, rather than commercial ones, in violation of Department regulations.

The Department asserts that the closure order was justified because Rocky's had been using improper refrigerators for at least six years, and that these refrigerators posed a threat to public health. Rocky's contends that the closure order

was inappropriate because the homestyle refrigerators were functional, and posed at most, only a minimal risk to the public.

After reviewing the relevant rules and regulations, as well as the evidence, testimony, and position statements submitted by the parties, this tribunal finds that the Department met its burden of proving by a preponderance of the evidence that the closure order was justified. Rocky's appeal is therefore dismissed.

II. EVIDENCE

The following exhibits were introduced by Appellant Rocky's Restaurant:

- A1: News Article
- A2: Inspection Report

The following exhibits were introduced by the ACHD:

- D1: Email dated February 5, 2020
- D2: Letter dated November 14, 2019
- D3: Letter dated December 16, 2019
- D4: Inspection Report dated June 26, 2014
- D5: Inspection Report dated February 5, 2015
- D6: Inspection Report dated March 10, 2015
- D7: Inspection Report dated August 4, 2015
- D8: Letter dated January 21, 2020
- D9: Email dated February 4, 2020
- D10: Inspection Report dated July 31, 2018
- D11: Inspection Report dated August 14, 2018
- D12: Inspection Report dated August 13, 2019
- D13: Inspection Report dated October 8, 2019
- D14: January 21, 2020 Administrative Consultation

III. STATEMENT OF FACTS

The following facts are established:

- 1) Emmanuel Mori is the owner of Rocky's Restaurant in Pittsburgh's Bloomfield neighborhood. (Hearing Transcript ("H.T.") at 7).
- 2) On June 25, 2014, the Department inspected Rocky's and found multiple food temperature violations of the household fridges at the facility, and the fridges were determined to be inadequate for maintaining temperature during food

service. (H.T. at 26-27; Ex. D4). The Department instructed Rocky's to "[p]rovide enough conveniently located, approved, properly operating refrigeration units to assure the maintenance and cooling of foods at required temperatures." (*Id.*).

- 3) On February 5, 2015 and March 10, 2015, the Department inspected Rocky's and found that the malfunctioning fridge had not been replaced. (H.T. at 27-29; Exs. D5-D6). The Department ordered the facility to replace the homestyle fridge with a NSF commercial unit if it breaks. (*Id.*).
- 4) On August 4, 2015, the Department inspected Rocky's and ordered Rocky's to replace the homestyle fridge with NSF commercial unit if it breaks and "[p]rovide enough conveniently located, approved, properly operating refrigeration units to assure the maintenance and cooling of foods at required temperatures." (H.T. at 29-30; Ex. D7).
- 5) On July 31, 2018 and August 17, 2018, the Department reminded Rocky's to replace the homestyle fridge with NSF commercial unit if it breaks. (H.T. at 37-38; Exs. D10-D11).
- 6) On August 13, 2019, the Department inspected Rocky's and again found multiple food temperature violations of the household fridges at the facility. The fridges were determined to be inadequate for maintaining temperature during food service. (H.T. at 38-39; Ex. D12). Rocky's was again told to "[p]rovide enough conveniently located, approved, properly operating refrigeration units to assure the maintenance and cooling of foods at required temperatures" and "[r]eplace with NSF or equivalent commercial grade equipment." (*Id.*).
- 7) At this time, two homestyle fridges were found to be malfunctioning. (Ex. D12).
- 8) On October 8, 2019, ACHD Inspector Ian Anderson observed the same violations that were cited before regarding the refrigerators' inability to maintain proper temperature. (H.T. at 40; Ex. D13). Due to the recurrent violations, the Department instructed the facility to submit a plan at the time of a conference between the Department and Rocky's regarding the replacement of the household fridges. (*Id.*). At this time, Rocky's used three homestyle fridges, two upstairs and one in the basement. (H.T. at 35-36).
- 9) A pre-suspension hearing was held on December 4, 2019 to review the case history and outstanding violations at Rocky's. (H.T. at 24; Exs. D2-D3).

- 10) At the pre-suspension hearing, Mr. Mori was instructed to replace the malfunctioning homestyle fridge with a commercial fridge that is NSF-approved. (H.T. at 25-26; Ex. D3)
- 11) At the pre-suspension hearing, Mr. Mori was told that the follow-up inspection would take place on January 21, 2020, and if the violations were not corrected by that date, Rocky's health permit would be suspended and the facility would be ordered to close. (H.T. at 26; Ex. D3).
- 12) When the Department inspected Rocky's on January 21, 2020, the Department found that the homestyle fridge had not been replaced with a commercial, NSF or equivalent-approved unit. (H.T. at 41-42; Ex. D14).
- 13) On January 21, 2020, the Department issued a closure order to Rocky's for failure to replace broken homestyle refrigerators at the facility pursuant to the deadline discussed at the pre-suspension hearing on December 4, 2019. (H.T. at 33, 41-42; Exs. D2-D3, D8, D14).
- 14) On December 1, 2020, an administrative hearing in this matter was held.

IV. DISCUSSION

A. Burden of Proof

Under Article XI § 1105.C.7 of the ACHD's Rules and Regulations, the ACHD bears the burden of proof in an administrative appeal when it issues an order. To prevail in its appeal, the ACHD must prove by a preponderance of the evidence that the penalty was properly levied in light of the violations present at Rocky's.

B. Relevant Regulation

The regulation at issue in this case is Section 309 of ACHD Rules and Regulations, Article III ("Food Safety"), which provides, in relevant part:

"All equipment and utensils must conform to National Sanitation Foundation (NSF) Standards or other equivalent standards in food industries where NSF Standards do not apply. These standards are on file at the Allegheny County Health Department."

C. Arguments

1. Seriousness of the Violations

Rocky's contends that it was "closed for 18 days because of a refrigerator that kept perfect temperatures," and that the refrigerator-related violation posed only a low health risk. (*Rocky's Brief* at ¶¶ 3-4). The Department responds, "[T]he broken fridges have a direct impact on the temperature of foods," and "they were found to be malfunctioning repeatedly." (*ACHD Brief* at 4).

This tribunal finds that the ACHD has the better argument here. At the hearing, Mr. Mori admitted that he knew if the homestyle fridges were to break down, he was to replace them with commercial units that were approved by the National Sanitation Foundation ("NSF"). (H.T. at 7, 17-18). He also admitted that he did not do this because when one homestyle fridge broke down, he replaced it with another homestyle fridge. (H.T. at 7, 42). As explained at the hearing by Donna Scharding ("Ms. Scharding"), ACHD's Food Safety Program Manager, the NSF is an organization that develops standards for equipment. (H.T. at 23). "Normal use" under commercial conditions means using the refrigerator repeatedly throughout the day as opposed to use in a home. (*Id.*). In other words, having NSF-approved refrigerators is important because commercial refrigerators are used with greater frequency than household ones. The record indicates that Mr. Mori was aware of the violations at issue, but did not properly address them.

2. Opportunities to Correct the Violations

The ACHD additionally argues that Rocky's has had multiple opportunities to correct the refrigerator issues, but failed to do so. The Department contends, "The violation began in 2014 and despite constant notice and opportunity to comply over a span of 6 years, Rocky's deliberately chose not to." (*ACHD Brief* at 4).

Mr. Mori responded at the hearing that they could not find an NSF-approved refrigerator that would fit in the doorway of Rocky's. (H.T. at 8). Ms. Scharding noted, however, that there were NSF-approved refrigerators that could fit through the 29-inch doorway at Rocky's, and that Rocky's finally installed one in February of 2020. (H.T. at 23).

This tribunal agrees with the ACHD. The record shows that the Department inspected Rocky's Restaurant no fewer than eight times between 2014 and 2019, and notified Appellant of the need for an NSF-approved refrigerator. (Exs. D4-D7, D10-D13). The bottom line is that Rocky's had *six years* to fix the problem at hand, and failed to do so.

V. CONCLUSION

This tribunal finds that the ACHD has met its burden of proving by a preponderance of the evidence that the closure order was justified. Appellant's appeal is therefore **DISMISSED**. This decision may be appealed to the Court of Common Pleas of Allegheny County, Pennsylvania.

Max Slater

Max Slater, Esq.
Administrative Hearing Officer
Allegheny County Health Department

Dated: March 5, 2021