

**ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARINGS**

MAC AND GOLD TRUCK, LLC,)	
)	
Appellant,)	In re: Mac and Gold Truck LLC
)	Client ID: 201405010001
vs.)	
)	
ALLEGHENY COUNTY HEALTH)	
DEPARTMENT,)	
)	
Appellee.)	

**THE ALLEGHENY COUNTY HEALTH DEPARTMENT'S
POST-HEARING MEMORANDUM**

I. Introduction and Background.

The Allegheny County Health Department (hereinafter “ACHD” or “Department”) files this post-hearing memorandum summarizing and supporting its position in the appeal of the above captioned food facility (hereinafter “Appellant”).

The appeal was filed on June 28, 2017 and challenges an inspection report issued by the Department dated June 19, 2017 (hereinafter “June 19th Report”). Based on previous inspections, the June 19th Report instructed Appellant to use the storage unit located at 100 Hafner Avenue, Pittsburgh, PA 15223 for dry storage and refrigerated packaged foods only. “Packaged” is defined as “bottled, canned, cartoned, bagged, or securely wrapped” in ACHD Rules and Regulations, Article III, Food Storage (hereinafter “Article III”) §338. The Department directed Appellant to cook, cool, clean, collect water, dump wastewater, and other related activities at the Appellant’s commissary located at the Pittsburgh Pickle Co. Pursuant to Section 1105 of Article XI, “Hearings and Appeals”, of the ACHD’s Rules and Regulations (hereinafter “Article XI”), a full evidentiary hearing was held on September 25, 2017 (hereinafter “Hearing”).

In its appeal, Appellant did not deny that he cooked and cooled food at the storage unit and the mobile food unit, and even proposed installing additional equipment at the storage unit to continue cooling food there. Appellant agreed to use the commissary for obtaining water, cleaning, and water disposal, in addition to cooking and cooling pasta. Appellant did not request and the ACHD Director did not unilaterally grant a stay of the proceedings, therefore, pursuant to Article XI § 1111, the ACHD's order found in the June 19th Report remains in full force and effect.

II. Proposed Findings of Fact.

- A. Appellant cooks and cools food at the storage unit. Verbatim Transcript of September 25, 2017 Hearing (hereinafter "Tr.") at p. 10-11.
- B. The storage unit is not an approved commissary. Tr. at p. 25-26.
- C. Appellant's approved commissary is the Pittsburgh Pickle Co. Exhibit D2.
- D. The environment at the storage unit is unsafe for cooking and cooling food. Tr. at p. 33, 41.
- E. Department permitted Appellant to store dry foods and packaged cheese only at the storage unit. Exhibit D1; Tr. at p. 24.
- F. Appellant cooks and cools food on its mobile food unit when unit is indoors.
- G. Department observed elevated internal food temperature and cooling unit ambient air temperature in Appellant's mobile food unit. Exhibits D3, D5-D7.
- H. Appellant does not regularly monitor the internal food temperature of all prepared foods when cooling or maintaining foods. Tr. at p. 17-18.

- I. Appellant does not regularly monitor the ambient air temperature of cooling units on the mobile food truck. Tr. at p. 17-18.

III. Discussion.

In an administrative appeal of a final agency action of the ACHD, the appellant “shall bear the burden of proof and the burden of going forward with respect to all issues.” Article XI § 1105.D.7. Therefore, because this matter revolves around whether Appellant’s use of the storage unit and food truck is acceptable, Appellant must prove by a preponderance of the evidence that his use of these facilities is permitted under Article III. The preponderance of the evidence standard requires proof “by a greater weight of the evidence” (*Commonwealth v. Roy L. Williams*, 557 Pa. 207, 732 A.2d 1167, 1187 (1999)) and is equivalent to a “more likely than not standard” *Com. v. McJett*, 811 A.2d 104, 110 (Pa. Commw. Ct. 2002). Appellant has never disputed the application of Article III or the activities observed by the Department at the storage unit and food truck.

A. The Storage Unit is Not a “Food Facility” as Defined by Article III and May Not Be Used for the Preparation or Handling of Foods.

The storage unit does not meet the standards required to operate as a food facility and therefore, the storage unit should not be used for the purpose of preparing or handling food.

A “food facility” is “any place, permanent or temporary, where food is prepared, handled, served, sold, or provided to the consumer.” Article III § 338. A food facility must have “smooth durable material such as sealed concrete” and must “be kept clean and maintained in good repair.” Article III §320, Tr. at p. 22. The walls and ceilings of a food facility must be “finished

and sealed to provide a smooth[,] easily cleanable surface.” Article III § 321, Tr. at p. 22. Other requirements for a food facility include sufficient ventilation to prevent exposure to excessive heat, smoke, fumes, dust, and dirt, and the ability to easily clean all fixtures, vent covers, and other attachments. Article III §§ 321 & 323. Article III enumerates additional requirements of a food facility regarding structure, necessary equipment, water supply and disposal in addition to those described above. Moreover, the Department has the discretion to limit the activities a facility may be used for. Tr. at p. 20-21.

“Food preparation” is defined as “thawing, cooking, cooling, heating, reheating, putting together, cutting, slicing, dividing, mixing, portioning, or packaging food for a consumer”. Article III § 338. Pursuant to Article III §304.4(B), food must be kept uncovered when cooling and the cooling process may last up to six hours. The food shall also be placed in an environment protected from food contamination. Article III §304.4(B). In its appeal, Appellant requested that it be permitted to continue cooking and cooling food at the storage unit and the food truck, and proposed installing additional equipment for this purpose.

Appellant testified that he uses the storage unit to prepare food such as grating cheese, heating milk, cooking cheese sauce, and cooking and roasting meats and vegetables. Tr. at p. 10-11. He also cools these items at the storage unit. *Id.* Some of these activities take place on the food truck while it is parked in the storage unit and others take place in the storage unit itself. Tr. at p. 11-12. Appellant also stores food preparation equipment at the storage unit such as the cheese grater. Tr. at p. 12. The usage of shelf space at the storage unit indicates storage of other items. *Id.* Appellant only cooks and cools pasta at the Pittsburgh Pickle Co. Tr. at p. 11, 13.

Katherine Castello, ACHD Environmental Health Specialist II, has visited the storage unit used by Appellant and testified that the cement floor has “cracks and crevices” which suggests that it is not rodent proof. Tr. at p. 33, 41. Additionally, the walls are made of corrugated metal, not a smooth surface, and thus, cannot be easily cleaned. Tr. at p. 41. The walls do not reach the ceiling; therefore, food is not protected from the activities taking place in neighboring storage units and increases the likelihood of food contamination during the food preparation process when the food is exposed to the environment. *Id.*

Additionally, Appellant did not proffer any evidence as to whether his food truck is gas-powered or electric. This distinction is critical. If his food truck is gas powered, then it cannot be used indoors, such as in a storage unit, because the exhaust fumes would contaminate the food. Appellant did not provide any evidence of how the storage unit meets the ventilation requirements in Article III §323. Similarly, Appellant may not operate his generator at the storage unit if it is gas-powered.

Appellant did not provide any evidence demonstrating how the storage unit meets the extensive requirements of a food facility as provided for in Article III for the protection of food during the preparation process. Therefore, this tribunal must affirm the June 19th Report and order Appellant to abstain from using the storage unit for food preparation, and restrict its activities to the storage of non-potentially hazardous foods and packaged cheese.

B. The Storage Unit is Not a “Commissary” as Defined by Article III and May Not Be Used for the Preparation or Handling of Foods.

The definition of “food facility” in Article III includes a commissary. By failing to meet the requirements of a food facility, the storage unit may not be used as a commissary.

A commissary is a food facility that every mobile food unit is required use as the base of its operations. Article III § 327.7; Tr. at p. 20. Article III § 338 defines commissary as a “place in which food, containers, or supplies are kept, handled, prepared, packaged or stored.” This includes, grating, chopping, cooking, holding, and reheating food, and cleaning equipment and disposing wastewater. Article III § 327.7; Tr. at p. 20. The commissary must be constructed and operated in compliance with Article III and must contain all the equipment necessary to prepare and process food for sale from a mobile food unit. Article III § 327.7. A food truck may not use a second location for food preparation without prior approval from the Department. Tr. at p. 20.

Apart from meeting the requirements of Article III, a commissary must permit the food truck to use its facility for all of its business needs. Tr. at p. 25. The Department did not receive any such statement from Store Express, the owner of the storage unit, reflecting that the storage facility was suitable as a commissary. Tr. at p. 25-26. The Department did receive a statement from the Pittsburgh Pickle Co., and signed by Appellant, indicating that it will provide services for water supply, waste water disposal, ware washing facilities, mobile cleaning facilities, facilities for food preparation, garbage disposal, food storage, supply chemical storage, and refrigeration. Exhibit D2. Appellant did not refute that these services were provided to him by Pittsburgh Pickle Co. Moreover, Appellant’s proprietor testified that he has access to a walk-in refrigeration unit at the Pittsburgh Pickle Co. and that it is “more than enough space”. Tr. at p. 13. Instead, the fact that Appellant cooks and cools on the food truck when it is parked at the storage unit indicates that the storage unit does not meet the standard required of a commissary, to have the necessary equipment to prepare and process food for sale from a mobile food unit. Appellant’s proprietor testified that the only equipment at the storage unit is a cheese grater, refrigerator, freezer, and shelf space. Tr. at p. 12. Appellant did not mention items such as stove,

handwashing sink, ware-washing sink, toilet room, and storage facilities which would be required under Article III to meet its business needs. Tr. at p. 22.

The storage unit may not be used as a commissary because it does not meet the requirements of a “food facility” and does not have all the necessary equipment to prepare and process food. Thus, Appellant must only use Pittsburgh Pickle Co. as the base of its operations for food preparation and may only store non-potentially hazardous foods and packaged cheese at the storage unit.

C. Food and Ambient Air Temperature Violations Could Have Been Prevented if Appellant Properly Cooled Foods, Completed Cooling Charts Regularly to Track Temperature, and Recorded Cold-Holding and Ambient Air Temperatures.

Article III §338 provides a lengthy definition of “potentially hazardous food,” but it can be summarized as food that must be maintained in such a way to prevent bacterial growth. Tr. at p. 21. Food that is cooked is potentially hazardous, such as meats, vegetables, and pasta. Tr. at p. 21. Article III stipulates requirements for food preparation including that potentially hazardous food must be kept at 41°F or less. Article III §304; Tr. at p. 21. Moreover, Article III provides specific timeframes and temperatures all potentially hazardous foods must be cooled to, and requires temperature monitoring and recording of the cooling process on cooling charts at all times. Article III § 304.4. For example, prepared foods that require refrigeration must be rapidly cooled to an internal temperature of 41°F or below before transferring to a cooling unit such as a fridge. Article III §304.4. Article III §§ 303 and 304 provides additional guidance and requirements regarding temperatures that prepared foods must be cooled and refrigerated at.

Appellant admitted that he does not regularly use cooling charts and thermometers to track the temperature of prepared foods. Tr. at p. 17-18. This is a clear violation of Article III § 304.4(B) and the Department has observed potentially hazardous foods such as prepared pasta, cheese, meats, fries, and other toppings above 41°F during multiple inspections. Exhibits D3, D5-D7; Tr. at p. 30, 35-36. Moreover, mobile food units are particularly susceptible to violations regarding food holding temperatures because the truck space does not allow enough ventilation and cooking in a small, enclosed area elevates the ambient air temperature which can raise the internal food temperature. Tr. at p. 28. Refrigeration has difficulty working when the temperature inside the truck is elevated and the Department has noted the ambient air temperature inside that truck was 90-95°F on one occasion. Exhibit D3; Tr. at p. 28-30. Additionally, to maintain foods at 41°F, the cooling units must be operating at 37-38°F. Tr. at p. 30.

The ambient air temperature of the refrigerator in the truck and the prepared food stored inside it has been recorded above 41°F during two inspections. Exhibits D3 & D7; Tr. at p. 29-30, 36. This indicates the temperature of the fridge was not monitored. During one inspection, the temperature of potentially hazardous foods in the fridge was recorded to be above 41°F when the ambient air temperature of the unit was below 41°F which suggests that the food was not cooled to or below 41°F before storage. Exhibit D6; Tr. at p. 36.

These violations could have been prevented if Appellant complied with Article III §§ 303.3 and 304.4. Exhibits D3, D5-D7. Appellant must complete cooling charts to ensure foods are cooled fast enough and reach an internal temperature of 41°F or below in an appropriate amount of time before storing them in cooling units such as a fridge. Tr. at p. 39. Moreover, Appellant must record the ambient air temperature of all cooling units to ensure immediate

corrective action is taken if it is found to be above 41°F. Tr. at p. 38-39. Because Appellant uses the cooling unit on the food truck regularly for storage, he should record the internal temperature of the food stored and the ambient air temperature inside the cooling unit daily. Tr. at p. 39.

Appellant also uses a deli prep unit¹ to cool foods and maintain temperatures below 41°F. However, items such as cheese, meats, and sliced tomatoes stored in the deli prep unit were found to be above 41°F suggesting that it is incapable of maintaining a temperature at or below 41°F. Exhibits D3 & D7; Tr. at p. 29-30, 36-37. The Appellant could have observed the inadequacy of this unit if it regularly recorded the ambient air temperature of the unit and the food. Tr. at p. 38. This leaves the fridge as the only approved unit on the truck to maintain the cold holding temperature of foods.

Ms. Castello testified that the fridge on the food truck is not large enough to hold the volume of potentially hazardous foods Appellant currently prepares. Tr. at p. 38. Moreover, the truck does not have the space for an additional fridge. Tr. at p. 37. Therefore, Appellant must reduce the volume of food it prepares to ensure all the food is properly stored in the fridge on the truck during operations.

IV. Findings of Law.

- A. The storage unit does not meet the standards required of a food facility as stipulated by Article III.
- B. Food shall not be prepared at the storage unit, as defined by Article III.

¹ Also referred to preparation unit, pizza unit, and half refrigerator in the exhibits and Transcript. Tr. at p. 15, 37.

- C. Prepared food shall not be stored at the storage unit.
- D. Appellant shall not clean, dump wastewater, or collect water at the storage unit.
- E. The storage unit does not contain all the equipment necessary to prepare and process food for sale from Appellant's mobile food unit.
- F. The storage unit shall not be used as a commissary.
- G. Appellant may only store dry foods and packaged cheese, as defined by Article III, at the storage unit.
- H. Appellant is authorized to prepare food at a fully equipped and permitted commissary only.
- I. The Pittsburgh Pickle Co. is a fully equipped and permitted commissary.
- J. All advance food preparation needs, such as cooking and cooling, shall be accomplished at the Pittsburgh Pickle Co., as defined by Article III.
- K. Appellant may only cook enough food to serve a customer on the mobile food unit.
- L. Appellant may not cool prepared foods on the food truck.
- M. Appellant shall not operate a mobile food unit indoors.
- N. Appellant shall cool prepared foods to 41°F or below before storing in cooling units.
- O. Appellant shall record the ambient air temperature inside the fridge on the food truck and the prepared foods stored inside it daily.
- P. Appellant shall regularly use a cooling chart to monitor the temperature of all prepared foods during the cooling process.

- Q. Appellant must not store potentially hazardous foods in volumes greater than the space provided for in the refrigerator on the mobile food unit.
- R. Appellant must fully comply with all Article III requirements within ten days of this tribunal's order.

V. Conclusion.

This case arises from the Appellant's failure to comply with permitted activities at the storage unit and Article III provisions. Appellant has failed to demonstrate how the storage unit is a safe facility for food preparation. Moreover, Appellant has admitted that it does not regularly monitor the temperature of foods when it is cooling or when it is stored in the refrigerator on the food truck in clear violation of Article III provisions. Therefore, since the Appellant failed to meet its burden of proof, the ACHD asserts that its appeal should be dismissed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2017, I served a true and correct copy of the Post-Hearing Memorandum on the following individual by first class mail, postage paid, and addressed as follows:

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