

**BEFORE THE HEARING OFFICER
ALLEGHENY COUNTY HEALTH DEPARTMENT**

BOB’S DINER ENTERPRISES, INC.,	:	Docket no.: ACHD-22-047
	:	
Appellant,	:	In re: Bob’s Diner
	:	
v.	:	
	:	
ALLEGHENY COUNTY	:	
HEALTH DEPARTMENT,	:	
	:	
Appellee.	:	

MEMORANDUM OPINION

This matter concerns an administrative fine levied by the Allegheny County Health Department (“ACHD”) against Appellant Bob’s Diner Inc., which was represented by Ms. Danè Marshall, its owner, during the proceedings. For the reasons stated hereunder, we find that ACHD acted in accordance with the law and facts in issuing the administrative fine, and we DISMISS Appellant’s Notice of Appeal with prejudice to refile.

Background

Bob’s Diner operates several restaurants in the Pittsburgh area. The facility that was specifically subject to the administrative fine issued by ACHD is located at 1817 McKees Rocks Road, Pittsburgh, PA 15205. *See H.T. at 18: 6-14.* That facility moved from its previous location at 1815 McKees Rocks Road between late 2021 and early 2022. *See id; 45: 17-21.* Photographs posted on Facebook show that Appellant began renovation of the 1817 location as early as October 2021. *See ACHD Ex. F.*

Prior to opening the new facility at the 1817 location, Ms. Marshall had a discussion with a representative of the ACHD Food Safety Division who informed her that the permit for the 1815 location was not transferable to the 1817 location; she was also informed of the need to

obtain a new facility plan for the 1817 location prior to its opening. *See* H.T. at 11: 2-7; *see also* ACHD Ex. A. Appellant then submitted new facility plans to ACHD for approval on February 17, 2022. *See* H.T. at 13: 12-19; *see also* ACHD Ex. A.

On March 10, 2022, ACHD received a complaint¹ detailing an instance of anonymous individuals becoming sick after eating at the 1817 Bob's Diner location on March 9, 2022. *See* H.T. at 18: 4-11; *see also* Ex. B. Thereafter, on March 24, 2022, ACHD conducted an inspection of the 1817 location and found that it was in operation despite no permit being issued or facility plan being approved. *See* H.T. 27: 12-25; 28: 16-20; *see also* ACHD Ex. D. ACHD then issued a permit to Bob's Diner for the 1817 location following the completion of the March 24 inspection. *See* H.T. 23: 14-17.

ACHD issued the administrative fine to Appellant on August 1, 2022, citing violations of ACHD Article III §§ 330 and 334² for opening and operating without a valid food permit and failure to submit plans and specifications for approval prior to construction of a food facility, respectively. *See* ACHD Ex. C. ACHD found that Appellant had acted recklessly in failing to comply with Article III and issued the \$2,000 administrative fine. *See* H.T. at 35: 6-15; *see also* ACHD Ex. E. This finding of recklessness was based on Appellant's experience in the restaurant business in Allegheny County and specific warning from ACHD that a new permit was required prior to the 1817 location opening. *See* H.T. at 35: 6-16.

Appellant filed its Notice of Appeal pursuant to ACHD Article XI §1104 on October 19, 2022. A Hearing was held before the undersigned Hearing Officer on February 14, 2023.

ACHD submitted a Post-Hearing Brief for consideration on April 6, 2023. Appellant did not submit a brief for consideration. The matter is now ripe for disposition by this Tribunal.

¹ Two separate complaints appear in ACHD's Ex. B, but a cursory review shows that it is the same complaint submitted twice.

² The violations are of Article III *as amended* 3/20/17.

Discussion

The only issues that can be considered in a hearing under ACHD Article XI are those raised in an appellant's notice of appeal. *See* ACHD Article XI § 1105(C)(8). In this instance, the only issue raised by Appellant in its Notice of Appeal was that “[w]e did submit a plan review. Submitted to Aaron Burden in February 2022 along with V#1839 which was cashed.” Appellant therefore did not contest the violation of ACHD Article III § 330, which states that “[i]t shall be unlawful for any person to operate a food facility in the County of Allegheny without first obtaining a valid health permit from the Director [of ACHD]” and that “[s]uch permits are not transferable.”³

ACDH Article III § 334.1 requires that:

A. Whenever a food facility is to be constructed, remodeled or altered extensively, or whenever an existing structure is being converted to a food facility, plans and specifications must be submitted to the Food Protection Program for approval prior to construction. Plans and specifications shall include:

1. floor plan drawn to scale
2. completed Plan Review Checklist
3. complete equipment list to include manufacturers' names and model numbers
4. tentative menu items and preparation specifications for HACCP review
5. payment of the appropriate fee established by the Director

C. The Department shall approve such plans when they meet all specifications and the fee has been paid. Whenever plans are disapproved, the Department will respond in writing stating the shortcomings in the plans. Resubmission of such plans shall be required following their revision. No food facilities shall be constructed, extensively remodeled, or converted, except in accordance with plans and specifications approved by the Department.

Here, Appellant began renovating the 1817 location as early as October 2021 but did not submit plans to ACHD for approval until February 17, 2022. Further, the 1817 location was found to be

³ Nevertheless, as detailed in the factual findings above, there is sufficient evidence to sustain ACHD's finding of a violation under § 330 due to the 1817 facility being open during the March 24, 2022, inspection prior to a permit being issued.

open and operational during the March 24, 2022, inspection by ACHD despite the submitted plan not having been approved.

Appellant argued that “[t]here was no construction really happening [at the 1817 location]. It was remodeling. We were moving a facility into a location that had been a food facility. So there was no construction. So that is why I never thought I had to submit a plan review.” H.T. at 42: 6-9. Article III does not provide a definition of what constitutes a “remodeling” of a facility to the extent that a plan would need to be submitted. We therefore defer to ACHD’s interpretation. *See Seeton v. Pennsylvania Game Comm’n*, 594 Pa. 563, 578, 937 A.2d 1028, 1037 (2007) (holding that a reviewing court should defer to an agency’s interpretation of an ambiguous statute). Further, ACHD’s interpretation is reasonable based on the pictures of renovations from October 2021, which are far more substantial than indicated by Appellant during the Hearing.

During the Hearing, Appellant also challenged ACHD’s finding of recklessness in its calculation of the penalty. Again, Article III does not provide a specific, unambiguous definition for recklessness, and we find that, based on Appellant’s experience and communication with ACHD prior to opening the 1817 location, that the finding of recklessness is justified.

Conclusion

For the reasons stated above, we find that Appellant did not submit plans for the renovation of the 1817 Bob’s Diner location in violation of ACHD Article III § 334 and began operating that facility without first obtaining a permit as required by ACHD Article III § 330. We also find that ACHD acted accordingly in assessing the penalty based on reckless conduct. Appellant’s Notice of Appeal is therefore DISMISSED with prejudice to refile.

/s/ 

John F. McGowan, Esquire
Hearing Officer
Allegheny County Health Department

