BEFORE THE HEARING OFFICER
ALLEGHENY COUNTY HEALTH DEPARTMENT

THE CRACKED EGG, LLC,	)	Docket no.: ACHD-22-023
	)	
Appellant,	)	
	)	
v.	)	
	)	
ALLEGHENY COUNTY HEALTH DEPARTMENT	)	
	)	
Appellee.	)	

MEMORANDUM OPINION

This matter concerns the appeal of a civil penalty that was levied by Appellee Allegheny County Health Department ("ACHD") against Appellant the Cracked Egg, LLC, d/b/a the Crack'd Egg. Appellant owns and operates a restaurant located at 4131 Brownsville Road, Pittsburgh, PA 15227 (the "Facility"). ACHD issued the civil penalty on March 30, 2022, for violations of ACHD Rules and Regulations Article III ("Art. III") – Food Safety relating to operating the Facility without a permit and failing to post a placard indicating that the Facility had been closed by ACHD. Appellant timely filed a Notice of Appeal with this Tribunal on April 26, 2022, pursuant to ACHD Rules and Regulations Article XI ("Art. XI") – Hearings and Appeals. A Hearing was held before this Tribunal on March 23, 2023.

Background

The Allegheny County Health Department is a local health department organized under the Local Health Administrative Law ("LHAL"), P.S. § 12001-12029. § 12010(c) of the LHAL specifically mandates that ACHD "shall prevent or remove conditions which constitute a menace to public health."

On March 6, 2020, then-Governor Tom Wolf issued a Proclamation of Disaster Emergency, formally declaring a state of emergency in the Commonwealth pursuant to the Emergency Management Services Code, 35 Pa. C.S. § 7301(c) in response to the COVID-19 pandemic. Then-Governor Wolf implemented numerous orders to mitigate and stop the spread of COVID-19, including closing non-essential businesses, closing restaurants and bars for in-person dining, limiting the size of gatherings, and directing citizens to stay at home. He renewed the Proclamation on June 3, 2020, August 31, 2020, February 19, 2021, and May 20, 2021. Additionally, on July 1, 2020, then-Secretary of Health Rachel Levine issued a universal face-covering order, and then-Governor Wolf issued a July 16, 2020, order "Directing Targeted Mitigation Measures," which incorporated the universal face-covering order and limited restaurants' capacity to the lesser of twenty-five percent of the fire code stated maximum occupancy for indoor dining or twenty-five persons, including staff.

Art. III governs the issuance of permits to operate food facilities in Allegheny County. At the time relevant to this matter, Art. III § 330 provided that "[o]nly persons who comply with all applicable Department Rules and Regulations, State and Federal Laws shall be entitled to receive and retain such a permit."[1] Art. III § 335.1 also required that:

> B. If the Director finds at any time that conditions warrant or there is an imminent danger to the public health, he shall suspend the health permit and post the food facility with a placard with reads "Closed by Order of the Allegheny County Health Department".
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> C. Placards shall be posted on all customer entrance doors to the food facility so as to be clearly conspicuous to persons entering the facility. Placards shall not be concealed or removed. Removal shall only be at the direction of the Department.
>
> D. It shall be unlawful to operate any food facility with a suspended permit. A suspended permit can only be reinstated after a department inspection has verified the correction of all critical violations.

[1] Art. III has been amended since the time of the events described herein. All references to Art. III are to the provisions that were in effect at that time.

Further, Art. III § 337.1 provided that:

> If the Director finds there is imminent danger to the public health the permit shall immediately be suspended. Any person whose permit has been suspended under this section shall upon written request be entitled to a hearing pursuant to Article XI, "Hearings and Appeals", of the Allegheny County Rules and Regulations. Upon suspension or revocation of a permit, the Director shall immediately post a notice of permit suspension or revocation in plain view at all customer entrances to the premises. Such notice shall not be concealed or removed. Removal shall be only at the direction of the Department. A person whose permit has been suspended shall have the permit reinstated upon completion of the corrective action required by the Director and an inspection verifying such corrections. It shall be unlawful to operate a food facility with a suspended permit.

ACHD filed a Complaint against Appellant in the Allegheny County Court of Common Pleas on September 16, 2020, seeking: (1) judgment that Appellant had violated the Commonwealth's Control Measure Orders and Art. III § 337.1; (2) enjoinment of Appellant from operating until a COVID-19 compliance plan was submitted to and approved by ACHD; and (3) direction that Appellant pay civil penalties to the ACHD Food Safety Fund for violations of ACHD Article XVI – Environmental Health Civil Penalties ("Art. XVI") § 1605 and Art. III § 337.4(D) prior to reopening. *See* Docket GD-20-9809. ACHD also filed a Motion for Preliminary Injunction in the Court of Common Pleas on September 16, 2020, seeking enjoinment of Appellant from violating the August 11, 2020, Enforcement Order. *See id*.

Appellant filed a Suggestion of Bankruptcy with the Court of Common Pleas on October 7, 2020, indicating that they had filed a Chapter 11 Bankruptcy Petition. Appellant then filed a Notice of Removal from the Court of Common Pleas, removing the matter to the U.S. Bankruptcy Court for the Western District of Pennsylvania. An order was issued by the Bankruptcy Court on January 7, 2021, granting ACHD's Motion for Relief from the Automatic Stay and remanding the matter back to the Court of Common Pleas.

Appellant responded to ACHD's Complaint and Motion for Preliminary Injunction not by denying the underlying factual assertions made by ACHD but by arguing that the various COVID-19 mitigation orders were not enforceable because then-Governor Wolf did not comply with the Commonwealth Documents Law, the Regulatory Review Act, and the Commonwealth Attorneys Act in issuing the orders. Further, Appellant claimed that the COVID-19 mitigation orders, as they applied to Appellant, were a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Lastly, Appellant contended that the passage of the COVID-19 mitigation orders violated the separation of powers doctrine.

A three-day evidentiary hearing regarding ACHD's Motion for Preliminary Injunction was held before the Honorable Judge John T. McVay, Jr., of the Court of Common Pleas from January 27 to 29, 2021. *See* Docket GD-20-9809. In his Order and corresponding Memorandum Opinion dated February 3, 2021, Judge McVay granted ACHD's Motion for Preliminary Injunction and, regarding Appellant's contention that the August 11, 2020, Enforcement Order violated its Substantive Due Process and Equal Protection Rights under the Fourteenth Amendment, found that "the orders of Governor Wolf, Secretary Levine, and the ACHD are constitutional as rationally related to the legitimate government interest of protecting the citizens of Allegheny County from the spread of COVID-19." *Id*.

Appellant appealed the ruling to the Commonwealth Court on February 4, 2021. On July 23, 2021, the Commonwealth Court affirmed the decision of the Court of Common Pleas, finding that Judge McVay's decision to grant the preliminary injunction was neither palpably erroneous nor a misapplication of the law in consideration of the challenges presented by Appellant. *See generally Cnty. of Allegheny v. Cracked Egg*, LLC, 260 A.3d 1105 (Pa. Commw. Ct. 2021), *reargument denied* (Sept. 9, 2021). During the pendency of the appeal to the

Commonwealth Court, voters amended the Pennsylvania Constitution to limit the governor's authority to declare emergencies through executive orders and proclamation. *See* Pa. Const. art. IV, § 20. Then, on June 10, 2021, the Pennsylvania General Assembly passed a concurrent resolution ending then-Governor Wolf's Proclamation of Disaster Emergency. *See* H.R. 106, 2021 Gen. Assemb., Reg. Sess. (Pa. 2021). ACHD subsequently indicated to Appellant that, following the completion of an inspection at the Facility, its permit would be reinstated on July 28, 2021. *See* Appellant's Ex. 13. In consideration of this likely occurrence, the Commonwealth Court noted in its decision affirming the granting of the preliminary injunction that:

> Although the reinstatement of the Permit would seem to render this matter moot, the letter also states that the County reserved the right to seek the imposition of civil penalties, which the County also sought in the underlying Complaint. In addition, Appellant's challenge to the trial court's legal reasoning for granting the preliminary injunction remains. Given the potential imposition of civil penalties, as well as the possibility that such issues may arise again and evade review due to the temporary nature of these types of orders, the Court will not find this appeal moot.

Cracked Egg, 260 A.3d at n. 17.

ACHD issued a Penalty Assessment Letter against Appellant on March 30, 2022, levying a civil penalty in the amount of $13,200. *See* ACHD Ex. K. The Letter specifically cited Appellant for violating Art. III § 335 by either concealing or removing the Closure Placard on August 26, 31, and December 14, 2020. *See id*. Appellant was also cited for violating Art. III § 337 by operating a food facility with a suspended health permit on August 24-28, September 1-4, September 10-11, September 14-17, October 1, December 14, December 30, 2020, and January 25, February 21, March 1, May 10, and June 28, 2021. *See* H.T. at 35: 7-12; *see also* ACHD Ex. K. In assessing the civil penalty, ACHD determined that Appellant had acted "deliberately" and used that determination as a factor in calculating the penalty amount. *See* H.T. at 31: 4-14; *see also* ACHD Ex. J.

Appellant filed a Notice of Appeal with this Tribunal on April 26, 2022. A Hearing was held before this Tribunal on March 23, 2023. Based on the testimony and evidence presented during the Hearing, we make the following findings of fact:

1. In response to several citizens' complaints related to Appellant's employees not wearing facial coverings, a representative of ACHD, Mr. Varangkorn Nakkeow, inspected the Facility on July 1, 2020. At that inspection, Mr. Nakkeow observed several employees interacting with customers while not wearing facial coverings. Mr. Nakkeow spoke with Appellant regarding the need for employees to follow mask usage guidelines and sent a letter to Appellant informing them that they were in violation of Art. III. *See* H.T. at 9: 6-13; *see also* ACHD Ex. A.

2. A second inspection was conducted by Mr. Nakkeow on August 5, 2020, where he again observed employees as well as patrons at the Facility failing to comply with the requirement to wear facial coverings. Additionally, patrons seated at the bar in the Facility were not complying with spacing requirements. Further, Appellant did not have a COVID-19 Safety Procedures for Businesses posting visible to the public and did not inform patrons of the need to wear facial coverings or maintain appropriate spacing. Mr. Nakkeow sent another inspection letter to Appellant informing them of their need to comply with Art. III. *See* H.T. at 14: 24 – 15: 5; *see also* ACHD Ex. B.

3. Mr. Nakkeow inspected the Facility for a third time on August 7, 2020, following continued citizens' complaints about violations of COVID-19 measures. He again observed employees and patrons at the Facility failing to wear facial coverings or maintaining appropriate distancing. Mr. Nakkeow had an administrative conference with Appellant regarding the need for compliance with Art. III and the consequences for failing to comply. *See* H.T. at 16: 14-20; 17: 2-12; *see also* ACHD Ex. C.

4. Mr. Nakkeow observed the same conditions at the Facility during his inspection on August 11, 2020. Appellant's health permit was then suspended, and the Facility was ordered to remain closed until the permit was reinstated pursuant to Art. III § 337.1. Appellant was informed in a letter from ACHD Environmental Health Supervisor Ms. Janet Russo that failure to remain closed would result in initiation of enforcement action. Appellant was also informed of the need to post a Closure Placard in plain view at the Facility to indicate that the permit had been suspended. *See* H.T. at 18: 14-19; ACHD Ex. D.

5. Postings on Facebook made by Appellant stated that "We Are Still Coming" and that there would by an Entrepreneurs Against Tyranny ("EAT") event at the Facility on August 24, 2020. *See* H.T. at 23: 20-24; 27: 14-18; *see also* ACHD Ex. E; Ex. F; Ex I.

6. Based on the Facebook posts, ACHD sent a letter to Appellant on August 21, 2020, informing them that opening the Facility as planned would be in violation of Art. III §§ 330.1(B) and 337.1. *See* H.T. 26: 11-21; *see also* ACHD Ex. H.

7. Mr. Costis Angel, a supervisor in the Food Safety Division of ACHD, drove by the Facility to perform a compliance check on August 25, 2020, and observed it open and operating. He saw at least one customer at the front counter and two employees, both not wearing face coverings. The Closure Placard was on the door at this visit. *See* H.T. at 80: 6-14; ACHD Ex. O.

8. Mr. Angel performed another compliance check on August 26, 2020, and again observed the Facility open and operating with multiple customers seated and eating outside. The Closure Placard was also concealed by another sign on this date. *See* H.T. at 81: 10-24; *see also* ACHD Ex. O.

9. Mr. Angel performed a compliance check on August 27, 2020, and again observed the Facility open and operating. The Closure Placard remained concealed. *See* H.T. at 82: 3-13; Ex. O.

10. Mr. Angel observed the Facility open and operating with two customers eating outside during his compliance check on August 28, 2020. *See* H.T. at 82: 15-18; *see also* ACHD Ex. O.

11. At the compliance check on August 31, 2020, Mr. Angel observed the Facility open and operating with one customer and one server, neither of whom was wearing a face covering. The Closure Placard was concealed. *See* H.T. at 82: 19-23; *see also* ACHD Ex. O.

12. Another compliance check was performed by Mr. Angel on September 1, 2020, where he again found the Facility open and operating, and the Closure Placard was concealed. *See* H.T. at 82: 25 – 83: 6; *see also* ACHD Ex. O.

13. Mr. Angel performed a compliance check on September 2, 2020, and the Facility remained open and operating as before. *See* H.T. at 83: 11-16; *see also* ACHD Ex. O.

14. At the September 3, 2020, compliance check Mr. Angel again observed that the Facility was open and operating with several customers sitting at the counter and no Closure Placard posted. *See* H.T. at 83: 18-23; *see also* ACHD Ex. O.

15. Mr. Angel saw the Facility open and operating with no Closure Placard visible at the compliance check on September 4, 2020. He also observed a bread delivery that had been made to the Facility. *See* H.T. at 83: 25 – 84: 15; *see also* ACHD Ex. O.

16. Mr. Angel testified with uncertainty about whether he performed a compliance check on either September 10 or 11, 2020. However, memos he recorded shortly after each inspection show that he performed compliance checks on both days and that he continued to observe the Facility open and operating on both occasions. He also saw Facebook videos showing the Facility open during this time. *See* H.T. at 84: 16 – 85: 6; *see also* ACHD Ex. O.

17. Mr. Angel again observed the Facility open and operating on September 14, 2020. *See* H.T. at 85: 9-11; *see also* ACHD Ex. O.

18. The Facility was open and operating when Mr. Angel performed a compliance check on September 15, 2020. There was one customer at the Facility on that date as well as another bread delivery. The Closure Placard was also not posted. *See* H.T. at 85: 13-16; *see also* ACHD Ex. O.

19. The following day, September 16, 2020, Mr. Angel performed another compliance check and found the Facility open and operating without the Closure Placard posted. *See* H.T. at 85: 24-25; *see also* ACHD Ex. O.

20. Mr. Angel found the facility open and operating at the compliance check performed on September 17, 2020. He observed multiple customers at the Facility who were not wearing face coverings. The Closure Placard was again not posted. *See* H.T. at 86: 2-5; *see also* ACHD Ex. O.

21. Mr. Angel observed the Facility open and operating at the compliance check on October 13, 2020. *See* H.T. at 86: 22-25; *see also* ACHD Ex. O.

22. On December 14, 2020, Mr. Aaron Burden, the Operations Manager for the Food Safety Program of ACHD, performed an inspection of the Facility. On that date, he observed the Facility open and operating without the Closure Placard posted. Mr. Burden met with Appellant during the visit and informed them of the need to keep the Facility closed even though they had applied to renew their permit. He also reposted the Closure Placard. *See* H.T. at 72: 18 – 73: 8; *see also* ACHD Ex. L.

23. Another inspector for ACHD, Ms. Megan Forry, performed a compliance check of the Facility on December 30, 2020. She found the Facility open and operating with patrons dining at tables inside. She also noted that the Closure Placard was not posted. *See* H.T. at 75: 8-11; *see also* ACHD Ex. M.

24. Both Mr. Angel and Mr. Nakkeow performed compliance checks on January 25, 2021, and both found the Facility open and operating. Mr. Angel noted that the Facility still did not have the Closure Placard posted, and Mr. Nakkeow saw multiple patrons not wearing face coverings. *See* H.T. at 87: 2-14; *see also* ACHD Ex. O.

25. Mr. Nakkeow performed a compliance check on March 1, 2021, where he found the Facility open and operating. Multiple patrons as well as a kitchen employee were seen entering and exiting the Facility. Further, he observed an online streaming video where he heard utensils clanking in the background. *See* H.T. at 88: 18-25; *see also* ACHD Ex. O.

26. In a Facebook video stream posted on May 10, 2021, the Facility can be seen open and operating. *See* H.T. at 89: 14 – 90: 5; *see also* ACHD Ex. O.

27. Appellant's permit was reinstated by ACHD on June 28, 2021, following the rescinding of the COVID-19 mitigation orders. Mr. Burden went to the Facility to perform a final inspection on June 28, 2021, prior to reinstating the permit and found the Facility open and operating when he arrived. The permit was reinstated following that inspection. *See* H.T. at 50: 22 – 51: 3; 76: 2-16; *see also* ACHD Ex. N.

Discussion

In the Notice of Appeal and Post-Hearing Brief, Appellant challenged the imposition of the civil penalty by ACHD on the following grounds:

A. The civil penalty violates the Appellant's constitutional rights.
B. ACHD waived its right to seek the civil penalty in proceedings before the Commonwealth Court of Pennsylvania as well as in proceedings before the United States Bankruptcy Court.
C. The imposition of the civil penalty is barred by the doctrine of collateral estoppel.
D. The civil penalty violates Appellant's due process right to notice.
E. ACHD engaged in selective enforcement.
F. The civil penalty is punitive.
G. There is no factual or legal basis for the imposition of the civil penalty
H. There is no factual or legal basis for the amount of the civil penalty imposed.
I. ACHD's exhibits supporting the civil penalty are hearsay that do not fall under the business records exemption.

We will address each argument in turn.

A. The imposition of the civil penalty by ACHD does not violate Appellant's constitutional right.

As it did before the Court of Common and Pleas and Commonwealth Court, Appellant in this case claims that the imposition of the civil penalty violates its constitutional rights. To any extent that Appellant objects to the civil penalty on the basis that it violates mandatory rule making procedure, the ruling in *Cnty. of Butler v. Wolf*, 486 F. Supp. 3d 883 (W.D. Pa. 2020), or the Due Process or Equal Protection Clauses of the Fourteenth Amendment, we find that these issues have been thoroughly litigated, and Pennsylvania courts have held that the COVID-19 mitigation orders that formed the basis for the Art. III violations under which the civil penalty

was issued did not violate either the Constitution of the United States or Pennsylvania as claimed by Appellant. *See Cnty. of Allegheny v. Cracked Egg*, LLC, 260 A.3d 1105 (Pa. Commw. Ct. 2021), *reargument denied* (Sept. 9, 2021); Docket GD-20-9809.

In its Post-Hearing Brief, Appellant argues that "the imposition of penalties in retaliation constitutes a violation of civil rights, in and of itself." Appellant's Post-Hr'g Br. at 4. The basis for this argument is that the Constitution of Pennsylvania provides that:

> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Pa. Const. art. I, § 11. Appellant further cites to *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 555 (Pa. 2021), *cert. granted*, 212 L. Ed. 2d 605, 142 S. Ct. 2646 (2022), *and vacated and remanded*, No. 21-1168, 2023 WL 4187749 (U.S. June 27, 2023) and *Churchill Cmty. Dev., LP v. Allegheny Cnty. Health Dep't*, 225 A.3d 596, 600 (Pa. Commw. Ct. 2019). Appellant provides no explanation for how these cases support their contention that the imposition of the civil penalty is unconstitutional because it was done in retaliation for Appellant challenging ACHD's Complaint and Motion for Preliminary Injunction in the Court of Common Pleas nor does Appellant provide any pincite to what portion of these cases support their argument. Pennsylvania courts have held that, when asserting an argument based on the Constitution of the United States or Pennsylvania, it is a litigant's responsibility to clearly articulate the basis of their argument. *See Weaver v. Rohrer*, No. 1286 C.D. 2007, 2008 WL 9398659, at *4 (Pa. Commw. Ct. Feb. 25, 2008) (affirming the trial court's dismissal of the appellant's complaint because the appellant did not "explain how exactly the dismissal prior to trial violated the constitutional provisions specified." And that "[i]t is not this Court's function to imagine what

his arguments on this point might be and to make these arguments for him"). We therefore reject Appellant's contention that the imposition of the civil penalty violates the Constitution of Pennsylvania because Appellant failed to articulate a colorable rationale in support of their claim.

However, even after reviewing *Mallory* and *Churchill* and attempting to extract the best argument in favor of Appellant, we still find that the civil penalty was not made in retaliation against Appellant and did not violate either the Constitution of the United States or Pennsylvania. In *Mallory*, a Virginia resident filed an action in Pennsylvania against a Virginia corporation alleging injuries in Virginia and Ohio. *See* 266 A.3d at 547. The plaintiff claimed that Pennsylvania courts had personal jurisdiction over the case based solely on the corporation's registration to do business in the Commonwealth. *See id*. The specific statutory scheme in place at the time of *Mallory* required all foreign corporations to submit to personal jurisdiction in Pennsylvania when registering to do business in the Commonwealth "regardless of the lack of continuous and systematic affiliations within the state that render the corporation essentially at home here." *Id*. The Supreme Court of Pennsylvania found that the registration statute violated the Due Process Clause of the Fourteenth Amendment under the doctrine of "unconstitutional conditions," which provides that the government may not condition a privilege—in the instance of *Mallory*, registering to do business in Pennsylvania—on the relinquishing of a constitutional right—deciding in which state to submit to general personal jurisdiction. *See id*. at 569-70. There is no similarity between the dispute in *Mallory* and the matter *sub judice*. Here, Appellant seems to be claiming that ACHD's act of issuing the civil penalty after Appellant challenged its Complaint in the Court of Common Pleas violates the doctrine of unconstitutional conditions because Appellant was attempting to exercise its constitutional right to due process, and ACHD

then retaliated by issuing the civil penalty. However, unlike the law concerning personal jurisdiction in *Mallory*, there is no indication that any action taken or statute enforced by ACHD placed a condition on Appellant exercising a constitutional right. ACHD, like so many other regulatory agencies, simply pursued various avenues of ensuring compliance with the laws it is tasked with enforcing. Under Appellant's framework, the government would be prevented from seeking any enforcement action against an individual or entity once that individual or entity made a challenge to a previous action taken by the government in court.

Appellant similarly receives no support from *Churchill*. In that case, ACHD imposed a civil penalty against an appellant who failed to follow proper asbestos abatement procedures. *See* 225 A.3d at 600. As a prerequisite for filing an appeal in that case, the appellant was required to prepay the penalty or claim an inability to prepay. *See id*. The appellant claimed an inability to prepay, and this Tribunal conducted a hearing on that claim and found that the appellant had sufficient financial assets to prepay. *See id*. at 601. The appellant then filed an appeal to the Court of Common Pleas, which reversed our finding that the appellant had an ability to prepay. *See id*. at 603. In ACHD's appeal of that ruling, the Commonwealth Court affirmed the Court of Common Pleas and instructed that ACHD must balance a party's right to due process against the purposes of the prepayment requirement, which is to avoid frivolous appeals, aid in prosecutorial efficiency, and reduce potential problems in collecting a penalty following a merits determination. *See id*. at 607. However, the Commonwealth Court affirmed the longstanding precedent that prepayment requirements are constitutional. *See id*. at 610. Further, *Churchill* did not concern the doctrine of unconstitutional conditions nor the imposition of a civil penalty as retaliation for a party exercising their right to an appeal. The only takeaway from that case that is relevant here is the generally recognized principle that a party cannot be

deprived of property without due process. Fortunately, Appellant has been afforded full due process rights in the form of hearings before the Court of Common Pleas and this Tribunal.

B. ACHD did not waive its right to impose the civil penalty.

Appellant next argues that ACHD cannot seek enforcement of the civil penalty because, during oral before the Commonwealth Court on June 7, 2021, then-counsel for ACHD, Vijya Patel, stated that ACHD would waive enforcement of the civil penalty as its concern was compliance with the COVID-19 mitigation orders. *See* Appellant's Post-Hr'g Br. at 5. The only support for this claim provided by Appellant is its own response to interrogatories from ACHD, which was not even admitted into evidence during the Hearing. *See id*. We therefore have no credible evidence supporting Appellant's position that Ms. Patel, acting within her scope of authority for ACHD, agreed to waive the civil penalty. Similarly, Appellant provided no evidence that ACHD waived its right to impose civil penalties during proceedings before the Bankruptcy Court.

Additionally, it is not clear from the case cited by Appellant, *In re Paige*, 476 B.R. 867, 870 (Bankr. M.D. Pa. 2012), that Ms. Patel even had the authority to waive the civil penalty in the manner they describe. *Paige*, and the cases it cites internally, deal specifically with an attorney's implied authority to stipulate to the modification of litigation procedures—not their ability to "enter into agreements which involve a waiver of [a] client's substantial rights or the imposition upon him of new liabilities or burdens." *City of Philadelphia v. Schofield*, 375 Pa. 554, 559, 101 A.2d 625, 627 (1954).

C. Collateral estoppel does not apply because there has not been a final judgment on ACHD's effort to seek the civil penalty against Appellant.

Appellant next argues that, because the Court of Common Pleas never imposed a civil penalty, ACHD is barred from now seeking a civil penalty against Appellant due to collateral

estoppel.[2] [3] *See* Appellant's Post-Hr'g Br. at 5-6. However, Pennsylvania courts have held that "[i]t is axiomatic that in order for either collateral estoppel or *res judicata* to apply, the issue or issues must have been actually litigated and determined by a valid and final judgment." *Branham v. Rohm & Haas Co.*, 2011 PA Super 78, 19 A.3d 1094, 1108 (2011) (quoting *County of Berks ex rel. Baldwin v. Pennsylvania Labor Relations Bd.*, 544 Pa. 541, 678 A.2d 355, 359 (1996)). Pennsylvania courts have also held that the granting of a preliminary injunction does not constitute a final judgment on the merits that would prevent a party from brining an additional claim based on the same cause of action. *See Consolidation Coal Co. v. Dist. 5, United Mine Workers of Am.*, 336 Pa. Super. 354, 363, 485 A.2d 1118, 1122 (1984) (holding that "[a] preliminary injunction cannot serve as a judgment on the merits since, by definition, it is a temporary remedy granted until that time when the parties' dispute can be completely resolved"). Therefore, because a final judgment was never entered on ACHD's Complaint filed in the Court of Common Pleas, neither collateral estoppel nor *res judicata* applies to the civil penalties at issue here. We further note that the Complaint filed in the Court of Common Pleas concerned violations ending on August 11, 2020, and there are numerous other cited violations here that would not have been adjudicated by the Court of Common Pleas.

D. The imposition of the civil penalty does not violate Appellant's due process rights.

Appellant next argues that the imposition of the civil penalty by ACHD violates its due process rights because ACHD did not provide advanced notice that Appellant would be subject

[2] Appellant did not raise the issue of collateral estoppel in their Notice of Appeal but presented it to the Tribunal for the first time during its Post-Hearing Brief. We will nevertheless address their claim.

[3] We believe that Appellant intended to base this argument on *res judicata* as opposed to collateral estoppel because the imposition of a civil penalty is a claim and not an issue that is a subset of a claim. Regardless, the same analysis applies under this section because the Court of Common Pleas never rendered a final judgment.

to a civil penalty or indication of the amount of the civil penalty.[4] *See* Appellant's Post-Hr'g Br. at 6. In support of this position, Appellant cites *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). In that case, BMW sold a repainted vehicle to the plaintiff at the price of a new vehicle. *See* 116 S. Ct. at 1593. The plaintiff sued BMW in Alabama court seeking actual damages in the amount of $4,000 and received a favorable verdict from the jury with an additional $4 million in punitive damages against BMW, an amount that was eventually reduced to $2 million by the Supreme Court of Alabama. *See id*. This award was made despite Alabama's Deceptive Trade Practices Act, which set the maximum civil penalty for such a misrepresentation at $2,000. *See id*. at 1603. On appeal, the Supreme Court of the United States found that the award of punitive damages 500 times the amount of actual damages violated BMW's constitutional rights. *See id*. at 1604.

Nowhere in *Gore* is there support for Appellant's position that due process required ACHD to specifically provide notice in the letters sent to Appellant that it was subject to civil penalties. Appellant had sufficient notice of the laws they were required to follow and simply needed to look at ACHD Rules and Regulations Article XVI § 1605, which provides:

> (A) The Director may assess a civil penalty against any person for a violation of any ACHD Article as provided herein.
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> (B) The Director may assess a civil penalty against such person whether or not the violation is willful. The penalty so assessed shall not exceed ten thousand dollars ($10,000.00) plus up to two thousand five hundred dollars ($2,500.00) for each day of continued or repeated violation.
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> (C) Penalty Determination: In determining the amount of civil penalties to be assessed, the Director shall consider the economic benefit gained by such person by failing to comply with the Article, the willfulness of the violation, the actual and potential harm to the public health, safety and welfare and to the environment, the nature, frequency and magnitude of the violation, and any other relevant factors.

[4] Again, this issue was raised for the first time in Appellant's Post-Hearing Brief.

Gore concerns the imposition of punitive damages that are so far beyond the range of what is statutorily permitted that it violates the notice requirement of due process and is therefore not relevant here.

E. ACHD did not engage in selective enforcement against Appellant.

In their Notice of Appeal, Appellant claims that ACHD engaged in selective enforcement when it issued the civil penalty. Appellant did not address this claim during the Hearing or their Post-Hearing Brief and presented no evidence of "intentional and purposeful discrimination" against them that would be required to sustain a claim of selective enforcement under the Equal Protection Clause of the Fourteenth Amendment. *See Gnarra v. Dep't of Lab. & Indus. Indus. Bd*., 658 A.2d 844, 847 (Pa. Commw. Ct. 1995). Further, ACHD presented credible testimony showing that they had also taken enforcement actions against other facilities for similar violations of COVID-19 mitigation orders. *See* H.T. at 36: 6-14.

F. Pennsylvania law does not prohibit the imposition of civil penalties for punitive purposes.

Appellant next requests that the civil penalty be overturned on the basis that the COVID-19 mitigation orders, specifically the universal mask mandate, were rescinded on June 28, 2021.[5] *See* Appellant's Post-Hr'g Br. at 7. Appellant contends that, under Pennsylvania law, civil penalties may only be "imposed to induce compliance with an order or to deter future violation" and that Appellant can no longer be compelled to comply with rescinded masking order. *Id*. In support of this position, Appellant cites to *HIKO Energy, LLC v. Pennsylvania Pub. Util. Comm'n*, 653 Pa. 1, 209 A.3d 246 (2019) and *Com., Dep't of Env't Res. v. Pennsylvania Power Co.*, 490 Pa. 399, 416 A.2d 995 (1980).

[5] This argument is also presented to the Tribunal for the first time during Appellant's Post-Hearing Brief.

First, we note that the civil penalty was not levied against Appellant for failing to comply with the COVID-19 mitigation orders but for operating the Facility without a permit and failing to properly post the Closure Placard as required by Art. III. Therefore, even if we accepted their argument, the civil penalty could still be imposed to ensure compliance with Art. III and deter future violations.

Regardless, we do not accept Appellant's argument and find no support for its merits in the cited cases. *HIKO* concerns the imposition of a $1.8 million penalty by the Pennsylvania Utility Commission ("PUC"), the largest in its history at the time, against HIKO Energy. *See* 209 A.3d at 253. In adjudicating HIKO Energy's appeal of the penalty in that case, the Supreme Court of Pennsylvania never addressed whether the PUC was prohibited from issuing a penalty for punitive purposes. *See id*. at 258. Our Supreme Court did address whether the penalty was issued by the PUC as retaliation for HIKO Energy's decision to litigate the matter as opposed to accept a settlement. *See id*. at 263-66. However, this is a separate argument than what is presented by Appellant in this section, and, even if it was the same argument articulated by Appellant here, the Supreme Court in *HIKO* sustained the penalty and ruled that "[l]itigation brings with it inherent risks and uncertainties not associated with settlement." *Id*. at 266.

Pennsylvania Power Co. is similarly not on point regarding Appellant's position. In that case, the Pennsylvania Department of Environmental Resources ("DER") promulgated regulations regarding the emission of sulfur dioxide that, at the time, were impossible to comply with given the existing technology. *See* 416 A.2d at 996-97. DER imposed a penalty against the Pennsylvania Power Co. ("PPC") for failing to comply with the regulation. *See id*. at 997. The PPC challenged the action of the DER on the basis that the Constitution prohibits the imposition of civil penalties for failure to comply with standards that are "technologically impossible" to

meet. In its discussion of the constitutional validity of the penalty, the Supreme Court of Pennsylvania stated that "[t]he imposition of the civil penalties, with which we are here concerned, was not imposed as punishment for a willful disregard of an agency or court order, but rather as an incentive to urge the development of procedures that will eventually eliminate the pollutant." *Id*. at 1001. Nowhere did the Supreme Court say that an administrative agency could not impose a penalty after the law for which the underlying action violated was no longer in effect. They were instead discussing a situation where compliance with the regulation itself was impossible. Therefore, like *HIKO*, *Pennsylvania Power Co.* carries no weight in this matter.

G. ACHD proved by a preponderance of the evidence that Appellant committed all the cited violations except for the one on October 1, 2020.

Art. XI § 1105(C)(7) states that "[i]t shall generally be the burden of the party asserting the affirmative of the issue to establish it by a preponderance of the evidence." That section further specifies that ACHD bears the burden of proof when it assesses civil penalties. Art. XI § 1105(C)(7)(a)(i). ACHD therefore had the burden of proving that Appellant committed each cited violation by a preponderance of the evidence. However, the preponderance of the evidence standard is a low threshold and has been characterized by Pennsylvania courts as a "more likely than not inquiry." *Popowsky v. Pa. Pub. Util. Comm'n*, 594 Pa. 583, 937 A.2d 1040, 1055 n.18 (2007).

Appellant challenges the penalties on the basis that ACHD did not meet its evidentiary burden for the finding of a violation on several of the days for which a penalty was issued. *See* Appellant's Post-Hr'g Br. at 7. Appellant specifically draws our attention to the violations for March 1, May 10, and June 28, 2021. *See id*. As expressed in our findings of fact, the Facility was open and operating on all three of those dates. *See supra* at 5-8.

Appellant attempted to rebut ACHD's evidence that the Facility was open and operating without a permit on March 1 by eliciting testimony that no one from ACHD directly observed food being served on that date. *See* H.T. at 53: 15 – 55: 18. However, ACHD was not required to have seen food being served on each occasion to show that the Facility was operating by a preponderance of the evidence; we can sufficiently infer that the Facility was operating based on the observation of patrons and kitchen staff entering and exiting the Facility and hearing utensils clanking in the background in the Facebook video.

Appellant also cross-examined Mr. Angel in an effort to show that the Facility was not found open and operating on May 10, 2021. *See id*. at 93: 14 – 94: 7. This line of questioning concerned a memorandum that was created by Mr. Angel on May 10, 2021. *See* ACHD Ex. O. The memorandum reflected two inspections: one performed on May 1, 2021, and the other on May 10, 2021. Based on his line of questioning, counsel for Appellant mistakenly believed that the memorandum only covered the inspection on May 1.

Lastly, Appellant contends that ACHD acted improperly by assessing a civil penalty for June 28, 2021, because ACHD informed Appellant that its permit would be reinstated on that date. However, as clearly articulated by ACHD's Food Safety Program Manager, Amanda Mator, the permit would not be reinstated until the completion of a final inspection on June 28. *See* H.T. at 50: 20 – 51: 3. As we found, Mr. Burden went to the Facility to perform the final inspection on June 28 before reinstating the permit and discovered it open and operating upon his arrival.

While we find that ACHD met its evidentiary burden for March 1, May 10, and June 28, 2021, despite Appellant's claim to the contrary, we see no evidence supporting ACHD's issuance of a civil penalty for a violation on October 1, 2020, as cited in the Penalty Assessment

Letter. *See* ACHD Ex. K. ACHD showed evidence that the Facility was operating without a permit on October 13, 2020, but that was not one of the cited dates. *See* ACHD Ex. O.

H. ACHD acted in accordance with the law when it determined the amount of the civil penalty.

"[A]n administrative agency's interpretation of a statute is given controlling weight unless it is clearly erroneous." *Est. of Deckard v. Pennsylvania Liquor Control Bd*., 121 A.3d 1173, 1177 (Pa. Commw. Ct. 2015) (quoting *Pennsylvania Liquor Control Board v. Richard E. Craft, American Legion Home Corporation*, 553 Pa. 99, 718 A.2d 276, 278 (1998)).

As we noted previously, Art. XVI § 1605 concerns the amount of a civil penalty that can be issued and sets the maximum amount for a penalty at $10,000 with an additional $2,500 for each day a party is in violation thereafter. That section further requires ACHD to consider "the willfulness of the violation, the actual and potential harm to the public health, safety and welfare and to the environment, the nature, frequency and magnitude of the violation, and any other relevant factors." Art. XVI § § 1605(c).

In this instance, we find no error in ACHD's interpretation of Art. III and XVI when it imposed the civil penalty against Appellant. ACHD imposed a total penalty of $13,200 for Appellant having been open and operating without a permit on twenty-four days and not having the Closure Placard posted on three days. *See* H.T. at 29: 7-18; *see also* ACHD Ex. J. Therefore, given the number of days on which Appellant was found to be in violation of Art. III, the civil penalty could have been substantially greater than what was imposed. Additionally, ACHD appropriately considered Appellant's level of willfulness in failing to comply with Art. III and found that they had acted deliberately based on repeated efforts by ACHD informing them of the need to comply. *See* H.T. at 31: 4-14; *see also* ACHD Ex. J.

I. The evidence admitted by ACHD qualifies under the public records exception to the rule against hearsay.

Appellant objected on the record to the admission of an inspection letter that was sent by ACHD on August 5, 2020. *See* H.T. at 12: 10-12. However, that document—along with all the other exhibits presented by ACHD—was admitted under the public records exception to the rule against hearsay, which permits admission of a record of public office if: "(A) the record describes the facts of the action taken or matter observed; (B) the recording of this action or matter observed was an official public duty; and (C) the opponent does not show that the source of the information or other circumstances indicate a lack of trustworthiness." Pa.R.E. 803(8). The exhibits presented by ACHD meet each of these criteria and were duly admitted for consideration by the Tribunal. *See Pennsylvania Game Comm'n v. State Civ. Serv. Comm'n (Wheeland)*, 219 A.3d 1257, 1267 (Pa. Commw. Ct. 2019).

In its Post-Hearing Brief, Appellant argues that the exhibits do not qualify under the business records exception to the rule against hearsay. *See* Appellant's Post-Hr'g Br. at 8-9. However, this is a plain misstatement of the rule under which the exhibits were admitted.

Conclusion

For the reasons stated above, we find that ACHD acted in accordance with the law and facts when it assessed the civil penalty against Appellant for all the cited violations except operating the Facility without a valid permit on October 1, 2020.

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