ALLEGHENY COUNTY HEALTH DEPARTMENT

F&Y PROPERTIES, LLC, *Appellant*, v. ALLEGHENY COUNTY HEALTH DEPARTMENT, *Appellee*.	:	In re: 931 Woodward Avenue Apartment ½ McKees Rocks, PA 15136 Docket no. ACHD-21-036 **APPELLEE'S MOTION FOR RECONSIDERATION**

APPELLEE'S MOTION FOR RECONSIDERATION

NOW COMES, the Allegheny County Health Department (hereinafter "ACHD" or the "Department"), by and through its undersigned counsel, and hereby moves this tribunal, through this Motion for Reconsideration of Hearing Officer's March 31, 2022 Decision and Order. In support thereof, the Department submits the following:

1. The Pennsylvania Judicial Code allows courts to "modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such order has been taken or allowed." 42 Pa.C.S.A. § 5505.

2. As of the filing of this Motion, neither party has filed an appeal of the Hearing Officer's order.

I. Hearing Officer does not address the case law cited by ACHD nor does it consider basic legal concepts regarding the Burden of Proof

3. Hearing Officer's analysis of the issue of which party bears the burden in this matter is insufficient, essentially accepting Appellant's assertion that ACHD bears the burden in any and all cases where it assesses a penalty at face value.

4. Hearing Officer's Opinion and Order does not make any legal analysis as to whether the burden shifts when there is no controversy to the underlying violations that prelude a penalty.

5. The central issue was not whether violations occurred giving rise to a penalty. There was no dispute as to whether violations existed. The central issues were whether Appellant was precluded from entry and whether such alleged preclusion, as an affirmative defense, was Appellant's burden to prove and ultimately whether Appellant met that burden.

6. It is a matter of black letter law not only that Appellant's assertion that its tenant refused entry (i.e., impossibility of performance) constitutes an affirmative defense, but that Appellant also bears the burden to show that such performance is in fact impossible.

7. Under the Pennsylvania Rules of Civil Procedure, impossibility of performance is treated as an affirmative defense, thus necessitating the filing of a New Matter in response to a complaint. Pa. R.C.P. 1030.

8. Specifically, Rule 1030 states:

> Except as provided by subdivision (b), all ***affirmative defenses*** including but not limited to the defenses of accord and satisfaction, arbitration and award, consent, discharge in bankruptcy, duress, estoppel, failure of consideration, fair comment, fraud, illegality, immunity from suit, ***impossibility of performance***, justification, laches, license, payment, privilege, release, res judicata, statute of frauds, statute of limitations, truth and waiver shall be pleaded in a responsive pleading under the heading "New Matter". A party may set forth as new matter any other material facts ***which are not merely denials of the averments of the preceding pleading***.

Pa. R.C.P. 1030.

9. Again, as stated in the Department's Post-Hearing Brief, as well as the Hearing Officer's Opinion and Order, it is well-established that "'the burden of proof...rests upon the party who...asserts the affirmative of an issue.'" Thus, "'one alleging a fact...has the burden of establishing it.'" ***V.W. v. Department of Public Welfare***, 51 A.3d 282, 285 (Pa. Cmwlth. 2012).

10. Here, Appellant is making the affirmative assertion that it was prevented from entry on to the property by the tenant. It acknowledges the violations but merely proffers the defense that it was impossible to address because of the tenant. It did not merely deny the violations, it

said that it could not avoid the violation for reasons of its own. This is all to say, if the Department's Enforcement were a complaint, Appellant's Notice of Appeal asserting that it was impossible for it to comply would necessitate the filing of a New Matter wherein the burden would be on the Appellant.

11. It is clear that Appellant did not meet this burden.

12. The issue of which party bears the burden in instances where an Appellant claims impossibility of performance arises often in the context of Department enforcement actions and it is crucial that the law be followed on this point. The problem will always be that the Department will not be in the position to prove the negative of the appellant's assertion. Nor should it. If the appellant puts forth a reason for its non-compliance notwithstanding the validity of the penalty, how could the Department ever meet a burden of disproving some other party's bald assertion.

II. Hearing Officer incorrectly identified exhibits resulting in inaccurate findings of fact

13. Furthermore, the Hearing Officer's finding that "[o]n June 11, 2021, the ACHD reinspected the Property, and found all but three of the violations still remained (Exs. D3, D4)" simply does not comport with the evidence.

14. In fact, Exhibit D-6 shows ***thirteen*** violations remained, whereas Exhibits D-3 and D-4 were sent to the Appellant.

15. It is not clear whether this finding factored into the Hearing Officer's rationale in reducing ACHD's penalty by half, however it is clear that the Hearing Officer erroneously believed that the letters addressed to the Tenant were addressed the Appellant.

16. It is apparent from Section B of the Hearing Officer's Opinion that the severity of violations factored into the tribunal's decision to reduce this penalty (though the exact calculation is not articulated).

17. As such, this factual finding is clearly erroneous and unsupported by the evidence and is not harmless error.

III. Hearing Officer ruled incorrectly on the issue of whether Appellant received adequate notice

18. The Hearing Officer cited the Department mistakenly sending its initial letter apprising Appellant of the underlying violations to the wrong address in justifying the penalty reduction.

19. This decision fails to take into consideration that the initial letter, sent on April 29, set an inspection date of June 3. D—4

20. The subsequent inspection occurred on June 11, one week after the date initially set. Exhibit D-6.

21. In practice, this delayed inspection time lessened the impact of the failed delivery.

22. Furthermore, according to Department policy, there is no obligation to extend a compliance date automatically. H.T. 75:18-20.

23. Finally, since the first letter was only a notice of violation and second letter was only a penalty *warning* letter, Appellant's failure to make the necessary repairs is not excused.

24. As such, the Department's initial failure to include the correct address constitutes a harmless error given the Appellant's constructive notice of the violations

IV. Hearing Officer's reduction of the penalty by half is arbitrary

25. As stated above, certain inaccurate "findings of fact" have resulted in a diminished penalty.

26. However, the extent to which these findings impacted the actual calculation of such penalty was not articulated.

27. As such, the penalty reduction is definitively arbitrary and capricious to the extent it is based upon an inaccurate representation of the record and includes no concrete methodology explaining the reduction.

CONCLUSION

For all of the aforementioned reasons, the Department respectfully requests that this tribunal correct the legal and factual errors contained in Hearing Officer's March 31, 2022 Decision and Order.

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Date: April 4, 2022

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Dismiss was served upon the following counsel of record by electronic mail, on this 4th day of April 2022:

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ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE ORDER

F&Y PROPERTIES, LLC,	:	In re: 931 Woodward Avenue
	:	Apartment ½
Appellant,	:	McKees Rocks, PA 15136
	:	
v.	:	Docket no. ACHD-21-036
	:	
ALLEGHENY COUNTY HEALTH	:	Copies Sent To:
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ORDER

AND NOW, this ____ day of April 2022, upon consideration of Appellee's Motion for Reconsideration, and upon consideration of the legal arguments presented, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

Appellee's Motion for Reconsideration is hereby GRANTED and the penalty levied against Appellant is reinstated in full.

____

Max Slater, Esquire
Administrative Hearing Officer
Allegheny County Health Department