ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARINGS

WILLEE'S TAVERN II 1822 MIDDLE ROAD, INC., Appellant, v. ALLEGHENY COUNTY HEALTH DEPARTMENT Appellee.	Re: Willee's Tavern II Middle Road, Inc.

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 "Willee's Tavern" or "Appellant").

The appeal was filed on January 8, 2018 and challenges a civil penalty assessed by the Department dated December 8, 2017 (hereinafter "December 8th Penalty Assessment"). The Department assessed a penalty in the amount of $2,600.00 for violations of the Department's Rule and Regulation Article III, Food Safety, ("Article III") observed at Middle Road Inn, 1822 Middle Road, Glenshaw, PA 15116 ("Facility"). Pursuant to § 1105 of the Department's Rule and Regulation Article XI, Hearings and Appeals, ("Article XI"), a full evidentiary hearing was held on November 27, 2018 (hereinafter "Hearing").

In its appeal, Appellant denies that violations itemized in the December 8th Penalty Assessment letter occurred. It further claims that the Department's enforcement action against the Facility, namely the December 8th Penalty Assessment and posting consumer alert signs, was an abuse of discretion, unreasonable, and punitive. The Appellant did not request, and the Department's Director did not unilaterally grant, a stay of the proceedings, therefore, pursuant to Article XI § 1111, the December 8th Penalty Assessment remains in full force and effect.

II. Proposed Findings of Fact.

A. The Department observed violations of Article III on August 11, 12, 14, and 21, 2017.

B. Many of the violations of Article III observed on August 11, 2017 were repeated on subsequent dates.

C. The consumer alert signs at the Facility were covered or concealed on August 12, 2017.

D. Apart from concealing the consumer alert signs, the remaining violations listed on the Department's December 8th Penalty Assessment letter were repeated violations.

E. The repeated violations on the Department's December 8th Penalty Assessment letter were either high- or medium-risk violations.

III. Discussion.

In an administrative appeal of a final agency action of the Department, the Department bears the burden of proof when it assesses a penalty or issues an order. *See* Article XI §

1105.C.7. Therefore, the Department must prove by a preponderance of the evidence that the penalty was properly assessed in light of any violations present at the Facility. *Id*. The preponderance of the evidence standard requires proof "by a greater weight of the evidence" (*Commonwealth v. Roy L. Williams*, 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.

Appellant, Willee's Tavern, is the owner of the Facility. Natalie A. Fezza is the President of Willee's Tavern. The Record demonstrates that Appellant did not introduce any competent testimonial or documentary evidence to rebut any of the Department's claims. *See* Verbatim Transcript of November 27, 2018 Hearing (hereinafter "Tr.") at pp. 7-10. Moreover, Appellant did not submit a statement after the Hearing in support of its claims.

A. <u>The Department observed violations of Article III at the Facility on August 11, 12, 14, and 21, 2017.</u>

Appellant disputes that it violated sections of Article III identified in the December 8th Penalty Assessment letter. *See* Exhibit D3. The Department maintains that the penalty was assessed because of a recurring mix of high- and medium-risk violations of Article III. *See* Tr. at p. 21. The violations observed were: failure to disclose of risk for consuming raw or undercooked foods (§304), cross-contamination not prevented (§303), lack of convenient hand washing sink (§317), and utensils and food contact surfaces not properly cleaned and sanitized: Dish machine not operating; utensil washing sink unable to hold water (§312). *See* Exhibit D3. A penalty was also assessed because the consumer alert signs were concealed. *Id*.

Dean Crystaloski, the Department's Environmental Health Specialist, testified that he inspected the Facility on August 11, 14, and 21, 2017. *See* Exhibits D4-D6; Tr. at pp. 30-31. As the inspection reports demonstrate, and Mr. Crystaloski's testimony supports, he observed that on at least two occasions, the Facility's menu did not inform consumers of the health risk of eating raw or undercooked animal-derived products, cross-contamination of food including raw meat products stored above ready-to-eat products rather than below was observed, the dishwasher for mechanical sanitizing and cleaning was not properly operating, the three-compartment sink for manual cleaning and sanitizing could not hold more than two inches of water which is necessary for immersion, and on three occasions, a convenient handwashing sink was not installed in the food preparation area, which raises concerns of employees' personal hygiene and additional food contamination. *See* Exhibits D4-D6; Tr. at p. 32-34. The handwashing sink was not installed by August 21st, the date of the third inspection. *See* Tr. at p. 35.

Donna Scharding, Program Manager of the Department's Food Safety program, stated that criteria used to determine whether to post a consumer alert at a facility include the risk the violations pose to the public, risk level of the violations, and the history of violations at the facility. *See* Tr. at p. 11. For example, a greater number of high- and medium-risk violations strongly suggest that the consumer alert sign should be posted at the facility. *Id*. Consumer alert signs are typically posted when other methods have been unsuccessful, such as a conference or additional time to correct the violations. *See* Tr. at p. 54. "When [a] food facility fails to meet the requirements [of Article III], and upon inspection has significant critical violations remaining or recurring, the Director is authorized to post the 'Consumer Alert' placard on the food facility." *See* Article III § 335. The consumer alert sign must be "posted on all customer entrance doors to

the food facility so as to be clearly conspicuous to persons entering the facility[,… they] shall not be concealed or removed[, and] [r]emoval shall only be at the direction of the Department" upon finding that the violations have been corrected. *See* Tr. at p. 12, 52. *See also* Article III § 335. Once a consumer alert is posted, the facility is provided ten days to correct all violations before the facility's permit is suspended and the facility is ordered to closed. *See* Tr. at p. 12, 55. *See also* Article III § 335.

On August 11, 2017, nine low-risk, six medium-risk, and five high-risk violations were observed at the Facility. *See* Exhibit D4. Consumer alert signs were posted at the Facility on that day because of the violations observed on that date, the risk those violations posed to the public, the history of repeated violations prior to that date at the Facility, and general food safety concerns. *See* Tr. at p. 44-45. Four yellow consumer alert signs were posted at the Facility, two on both sides of the front door and two on both sides of the side entrance. *See* Tr. at p. 46. During that inspection, Ms. Fezza and Joe Fezza, manager of the Facility, informed the Department that the Facility was holding a funeral luncheon the next day, and therefore, the consumer alerts could not be posted. *See* Tr. at p. 51.

On August 12, 2017, Katherine Costello, the Department's Environmental Health Specialist, drove to the Facility to ensure the consumer alerts were still posted. *See* Tr. at p. 12, 37, 40. Ms. Costello took photographs of the front and side entrances which depicted the consumer alert signs being concealed by paper and a table umbrella, and she immediately emailed these photographs to Department personnel. *See* Exhibits D7-D9; Tr. at pp. 38-39, 41, 43. A consumer alert sign on the front door was concealed with a sign stating, "Plumbing issue 'Basement Water break' Problem Rectified". *See* Exhibits D7-D9; Tr. at pp. 38-39. The inspection reports dated August 11 and 14, 2017 and corresponding letters caution the Facility

that the consumer alert signs cannot be removed or concealed. *See* Exhibits D4-D5; Tr. at p. 32. Mr. Crystaloski testified that a copy of each inspection report was provided to the representative of the Facility at the conclusion of each inspection: the inspection report dated August 11th was provided to Mr. Fezza and the reports dated August 14th and 21st were provided to Mrs. Fezza. *See* Exhibits D4-D6; Tr. at pp. 31-32. Thus, despite being warned, the Appellant deliberately placed consumers at further risk because it deceived the public into thinking that serious food safety concerns did not exist and that their health was not at risk.

The Appellant did not provide any evidence to challenge that the violations itemized on the Department's December 8th Penalty Assessment letter occurred and were subject to enforcement action. Thus, this tribunal can only find that the violations did exist, enforcement action was justified, and any economic loss suffered was a direct result of poor food safety practices by the Facility in violation of Article III.

B. <u>The Department acted within its discretion when it issued the December 8th Penalty Assessment.</u>

The Department complied with relevant regulations and program policy when it assessed a penalty against the Facility.

Pursuant to the Department's Rule and Regulation Article XVI, Environmental Health Civil Penalties, ("Article XVI"), the Department may assess civil penalties for violations of Article III. *See* Article XVI § 1604. The Department may assess a penalty up to $10,000.00 for each violation and an additional penalty up to $2,500.00 for each day of continued or repeated violation, whether or not the violation was willful. *See* Article XVI § 1605. Article XVI does not restrict the Department such that it is only permitted to assess penalties for repeat violations

or higher risk violations only. Moreover, when determining the penalty amount, the Department may consider economic benefit gained by failing to comply with the regulation, willfulness of the violation, the actual and potential harm to the public, frequency and magnitude of the violation, and any other relevant factors. *Id*.

Ms. Scharding discussed some additional factors the Department considers when assessing a penalty against a food facility. *See* Tr. at p. 14. The factors include the type of food facility and type of food served. *See* Exhibit D2; Tr. at p. 14-15. She explained that a Group 1 facility poses the lowest risk because it primarily serves only packaged food. *See* Tr. at p. 15. A Group 2 facility has very minimal food handling, such as a convenience store with hotdogs and cold sandwiches. *Id*. A Group 3 facility is a food service restaurant that primarily uses multiple ingredients and prepares the food in advance. *See* Tr. at pp. 14-15. A Group 4 facility poses the highest risk because it is a major food processor that has wider distribution than a restaurant. *See* Tr. at p. 15. Once the group is chosen, the Department then reviews the violations to classify them into risk levels. *Id*. The risk levels are Imminent Danger, High Risk, Moderate Risk, Administrative, and Low Risk. *See* Exhibit D2. Each risk level has an associated penalty amount according to the group classification of the facility. *See* Tr. at pp. 15-16. For a Group 3 facility, high risk violations are $600 each, medium risk violations are $400 each, and administrative violations are up to $800 each. *Id*. A penalty is assessed whenever a consumer alert sign is concealed or removed. *See* Tr. at pp. 22, 26. Next, the Department considers additional dates the violations were observed and has the discretion to increase the penalty accordingly. *See* Exhibit D2; Tr. at p. 26. Then, the Department determines whether the violations were Accidental, Negligent, Reckless, or Deliberate. *See* Exhibit D2. Each

willfulness class has an associated penalty. *Id*. Finally, the Department considers the projected cost savings for the facility by failing to comply with Article III. *Id*.

In this case, the Department classified the Facility as Group 3. *See* Exhibit D2; Tr. at pp. 14-15. Then, the Department looked to the violations. Ms. Scharding testified that if the Department conducts an inspection of a facility at its request before the ten-day consumer alert period has concluded because the facility claims all high- and medium-risk violations have been corrected, and the Department finds that the violations have not been corrected, then the Department imposes a fine for recurrent violations. *See* Tr. at p. 22, 28-29. In this case, on August 14, 2017, Ms. Fezza requested a same-day inspection, three days after the consumer alert signs were posted, and she claimed that all high- and medium-risk violations had been corrected. *See* Exhibit D10; Tr. at p. 47-48. The Record demonstrates that many high- and medium-risk violations remained on August 14th. However, despite many violations observed by Mr. Crystaloski on multiple dates, the Department chose to only penalize the Facility for four repeated violations observed on August 14th and the concealment of the consumer alert signs observed on August 12, 2017. *See* Exhibits D2-D6; Tr. at pp. 13-14, 29. These five violations were separated into risk classes, two violations were categorized as high-risk, two violations as medium-risk, and one violation as administrative. *See* Exhibit D2; Tr. at pp. 15-16. For the administrative violation, the Department imposed half of the full penalty allowable. *See* Exhibit D2; Tr. at p. 16. The total at this point is $2,400.00.

The Department did not increase the penalty despite four of the five violations having been observed multiple times. Next, the Department categorized the willfulness of the violations as negligent and assessed an additional $200.00. *See* Exhibit D2. Finally, the Department did not increase the penalty despite the Facility economically benefitting from operating without

proper sanitization, personal hygiene, care for food safety, and misleading the public. *See* Exhibit D11; Tr. at p. 58. As stated, earlier, the Facility hosted a funeral luncheon the same day the consumer alert signs were concealed. Thus, the final amount assessed against the Facility was $2,600.00. As described, the Department complied with the regulations and its standard policy when calculating the penalty against the Facility.

C. <u>The Department was permitted to have assessed a significantly larger penalty against the Facility.</u>

The Appellant claims that the December 8th Penalty Assessment was punitive. However, the Department could have assessed a much higher penalty against the Facility, but instead, it chose to be very lenient. First, the penalty for each risk class could have been higher than the amounts actually imposed because Article XVI § 1605 permits a penalty up to $10,000.00 for each violation of Article III. For example, the Department could have assessed $800.00 for concealing the consumer alert signs but it chose to only impose $400.00. *See* Tr. at p. 16.

Second, the Department chose not to assess a first-offense penalty or repeat penalty pursuant to amounts provided by Article XVI § 1605 for any of the violations observed on August 11 and 21, 2017, or for every violation observed on August 14, 2017. *See* Exhibits D2-D6; Tr. at p. 21. For example, the Facility had a history of operating without a certified Food Protection Manager since 2013 and this was cited by Mr. Crystaloski on all three of his inspections, however, the Facility was not issued a penalty for this violation. *See* Exhibits D2-D6; Tr. at p. 16-17, 35.

Third, the Department could have assessed a higher penalty by finding that the willfulness of the Facility was Reckless or Deliberate. Clearly, concealing consumer alert signs

and misleading the public as to the risk they bear was a deliberate violation when the Facility had been previously warned to not cover or conceal the signs. Moreover, repeated violations can arguably be classified at the very least as reckless, especially if the Facility has a history of similar violations.

Fourth, the Department could have suspended the Facility's permit on the tenth day after posting the consumer alert signs, thereby making it inoperable, because all the violations had not been corrected. *See* Exhibit D6; Tr. at p. 35. *See also* Article III § 335. In this case, the lack of a handwashing sink in the food preparation area and certified food protection managers were remaining on August 21, 2017.

Finally, the Department could have also pursued a criminal penalty against the Facility or Joe Fezza directly for interfering with the Department's duty by behaving in a threatening manner towards Barbara Murray, the Department's Operations Manager, on August 14, 2017. *See* Tr. at p. 60. *See also* Article III § 337.4. Mr. Fezza's behavior prompted the Department to arrange a second Department staff member to accompany the inspector on subsequent inspections of the Facility to ensure safety of its personnel. *See* Tr. at p. 60.

Thus, despite having the authority to impose significantly larger penalty amounts for each violation observed, totaling in excess of $200,000.00, close the Facility, and pursue criminal penalties, the Department imposed a negligible fine of $2,600.00 and permitted the Facility to operate.

D. <u>The Department did not abuse its discretion or arbitrarily enforce against the Facility by issuing the December 8th Penalty Assessment and posting consumer alert signs.</u>

Lastly, the Appellant claims that posting the consumer alert signs and assessing a penalty were arbitrary enforcement actions and resulted in economic loss. To support its claim of arbitrary enforcement action, the Facility compared the Department's enforcement action it experienced to that of other facilities in Allegheny County without attempting to draw any similarity between the facilities and the Facility regarding group classification and risk to the public specific violations posed. *See* Tr. at pp. 26-27. Ms. Scharding maintained that it is unlikely for the Department to impose identical enforcement actions upon any two facilities because many different factors are considered, such as type of facility, risk level to the public, and history of the facility. *See* Tr. at p. 14, 19, 27. Furthermore, Ms. Scharding reviews all penalty recommendations to ensure they are standard and uniform. *See* Tr. at p. 28. Ironically, it was the discretion provided to the Department that allowed it to impose a very low fine and permit the Facility to operate. *See* Exhibit D2; Tr. at p. 18-19, 21.

Next, the Facility made entirely unsupported claims that it suffered loss of profits totaling $150,000.00 as well as money spent to bring the Facility into compliance. *See* Tr. at p. 6. Surely, the Facility should not be rewarded for operating out of compliance, deliberately violating Article III, misleading the public, and creating and continuing to operate in an environment that placed the food and consumers at serious risk. Any potential economic loss due to enforcement action and expenditures to bring the Facility into compliance is an expected consequence for any noncompliant facility that is subjected to Article III.

IV. **Findings of Law.**

A. The Department was authorized to enforce against the Facility for violations of Article III observed at the Facility on August 12 and 14, 2017.

B. The Department's enforcement action against the Facility was not an abuse of discretion.

C. The Department's enforcement action against the Facility was not punitive.

D. The Department's enforcement action against the Facility was not arbitrary.

E. The Department's enforcement action against the Facility was not unreasonable.

F. The Department's enforcement against the Facility was very modest compared to what it was permitted to do.

G. The Facility economically benefitted by operating while failing to comply with Article III.

H. The Facility's work practices and violations posed an actual and potential health risk to the public.

I. The Facility deliberately concealed the consumer alert signs.

V. **Conclusion.**

This case arises from the Appellant's displeasure of having been caught operating while in violation of Article III. As the Record demonstrates, not only did the violations exist, but the enforcement action against the Facility was consistent and very modest. Since Appellant failed to present any evidence challenging the presence of the violations at the Facility and arbitrary and punitive enforcement action, the Department asserts that the appeal should be dismissed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2019, I served a true and correct copy of the Post-Hearing Memorandum on the following individual by electronic mail, PDF as follows:

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