

ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARING

WILLEE'S TAVERN II, 1822	:	In re: Willee's Tavern II
MIDDLE ROAD, INC.,	:	1822 Middle Road, Inc.
	:	
Appellant,	:	Docket No. ACHD-18-001
	:	
v.	:	<u>Copies Sent To:</u>
	:	<i>Counsel for Willee's Tavern II:</i>
ALLEGHENY COUNTY HEALTH	:	Catherine Conley, Esq.
DEPARTMENT,	:	215 57 th Street
	:	Pittsburgh, PA 15201
Appellee.	:	
	:	<i>Counsel for Allegheny County Health</i>
	:	<i>Department:</i>
	:	Vijya Patel, Esq.
	:	301 39 th Street, Building 7
	:	Pittsburgh, PA 15201

**DECISION AND ORDER OF THE ALLEGHENY COUNTY HEALTH
DEPARTMENT HEARING OFFICER**

I. INTRODUCTION

At issue here is whether the Allegheny County Health Department (“ACHD”) was within its rights to impose a civil penalty against a restaurant in Glenshaw for various food safety violations. In December 2017, the ACHD assessed a \$2,600 civil penalty against The Middle Road Inn (“Appellant” or the “Facility”¹), an Italian restaurant in Glenshaw, for numerous violations of the ACHD’s Rules and Regulations, Article III, Food Safety (“Article III”). These violations included: failure to disclose risk for consuming raw or undercooked foods, failure to prevent cross-

¹ Throughout this case, the “Facility” has referred variously to the Middle Road Inn, to Willee’s Tavern II, and to 1822 Middle Road, Inc. For the purposes of this case, “Facility” refers collectively to these three entities.

contamination, lack of convenient hand washing sink, improper sanitation, an inoperable dishwasher, and concealment of consumer alert signs.

Appellant contends that the civil penalty was arbitrary because it was out of line with civil penalties that the ACHD has issued against other food facilities. Additionally, Appellant contends that the ACHD's actions caused Appellant to suffer lost profits of \$150,000.

The ACHD argues that its civil penalty was justified because the above-listed violations were well-documented and that the ACHD acted within its discretion in issuing a \$2,600 penalty based on the number and severity of the violations present.

After considering the factual and legal arguments presented in this case, this tribunal finds that the ACHD has met its burden of proving by a preponderance of the evidence that the civil penalty was properly assessed. Appellant's appeal is therefore dismissed.

II. EVIDENCE

Appellant did not offer any exhibits into evidence.

The following exhibits were offered by the ACHD and admitted into evidence:

- D1: Photograph of Consumer Alert Placard
- D2: Penalty Assessment Calculation Form
- D3: Civil Penalty Notice
- D4: Food Safety Assessment Report
- D5: Food Safety Assessment Report
- D6: Food Safety Assessment Report
- D7: Email from Katherine Costello
- D8: Photographs of Concealed Consumer Alert
- D9: Photograph of Concealed Consumer Alert
- D10: Memorandum to File
- D11: Email Containing Complaint

III. FINDINGS OF FACT

Based on this tribunal's review of the evidence and having resolved all issues of credibility, the following facts are established:

1. Willee's Tavern II, 1822 Middle Road, Inc. (the "Facility" or "Appellant") is an Italian restaurant in Glenshaw, PA.
2. Natalie Fezza is the Facility's owner. (Hearing Transcript ("H.T.") at 47).
3. On August 11, 2017, Allegheny County Health Department ("ACHD") food inspector Dean Crystaloski inspected the Facility, and found the following violations of ACHD Rules and Regulations, Article III, Food Safety ("Article III"): failure to disclose or risk for consuming raw or undercooked foods (Art. III § 304), cross-contamination not prevented (§ 303), lack of convenient hand washing sink (§ 317), dish machine not operating and utensil washing sink unable to hold water (§ 312). There were a total of nine low-risk, six medium-risk, and five high-risk violations. (Ex. D4).
4. The ACHD also put up consumer alert placards on doors of the Facility, due to the number of violations and the violations' risk to the public. (H.T. at 11-12; Ex. D3).
5. Pursuant to Article III, consumer alert placards "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. (Art. III, § 335). Once a consumer alert is posted, the facility has ten days to correct all violations. If the violations are not corrected within this time, the facility's permit is suspended, and the facility is ordered to close. (H.T. at 12, 55).
6. On August 12, 2017, ACHD food safety inspector Katherine Costello visited the Facility to check that the consumer alert placards were still posted. (H.T. at 12, 37, 40). Ms. Costello took photographs of the front and side entrances to the facility, which depicted consumer alert placards being concealed by paper and an umbrella. (Exs. D7-D9). A consumer alert placard on the front door was concealed with a sign stating "plumbing issue 'Basement Water break' Problem Rectified." (Exs. D7-D9).
7. On August 14, 2017, the ACD conducted a follow-up inspection at the Facility, and found that two high-risk, four medium-risk, and three low-risk violations remained at the Facility. (Ex. D5).

8. On August 21, 2017, the ACHD conducted a re-inspection of the Facility. This re-inspection indicated that the violations had been largely corrected, and that a handwashing sink was about to be installed. (Ex. D6).
9. On December 8, 2017, the ACHD assessed a civil penalty of \$2,600 against Appellant for the above-listed Article III violations. (Exs. D2, D3).
10. On January 8, 2018, Appellant timely appealed the ACHD's civil penalty.
11. On November 27, 2018, an administrative hearing was held in this matter.

IV. DISCUSSION

Pursuant to ACHD Rules and Regulations Article XI—Hearings and Appeals (“Article XI”), § 1105.C.7, the ACHD bears the burden of proof in an administrative appeal when it assesses a penalty or issues an order. To prevail in its appeal, the ACHD must prove by a preponderance of the evidence that the penalty was properly assessed in view of any violations present at the Facility.

A. The ACHD's Arguments

The ACHD makes two core arguments justifying its enforcement action against Appellant. First, that there is copious evidence and testimony to support findings of Article III violations at the Facility. Second, that in light of these violations, \$2,600 was a reasonable civil penalty to assess.

1. Presence of Violations

The ACHD contends that it assessed the civil penalty because of the presence and recurrence of high- and medium-risk Article III violations. These violations were: failure to disclose or risk for consuming raw or undercooked foods (Art. III § 304), cross-contamination not prevented (§ 303), lack of convenient hand washing sink (§ 317), dish machine not operating and utensil washing sink unable to hold

water (§ 312). A penalty was also assessed for concealment of consumer alert signs. (Exs. D3, D4; *ACHD Brief* at 3).

At the hearing, ACHD food inspector Dean Crystaloski testified that he inspected the facility on August 11, 14, and 21, 2017. (H.T. at 30-31; Exs. D4-D6). In his inspections, Mr. Crystaloski observed that the Facility's menu did not inform consumers of the health risks of eating raw or undercooked animal-derived products. (H.T. at 33). Mr. Crystaloski also observed cross-contamination of food, including raw meat products stored above ready-to-eat products rather than below, an inoperable dishwasher, and the lack of a convenient handwashing sink in the food preparation area. (H.T. at 32-35); Exs. D4-D6). This testimony was largely uncontradicted.

The ACHD also presented the testimony of Donna Scharding, its Food Safety Program Manager to explain the rationale behind the ACHD's posting of consumer alert placards at the facility, as well as justification for the civil penalty. Ms. Scharding explained the criteria that the ACHD used to determine whether to post a consumer alert placard at a facility include the risk the violations pose to the public, the risk level of the violations, and the history of violations at the facility. (H.T. at 11). The greater the number of high-and medium-risk violations, the likelier it would be that the ACHD would post a consumer alert. Consumer alert placards are typically placed when other methods, such as a conference or additional time to correct violations, have been unsuccessful. (H.T. at 54).

Under Article III, “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.” (Art. 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. (*Id.*). Once a consumer alert is posted, the facility has ten days to correct all violations. If the violations are not corrected, the facility’s permit is suspended, and the facility is ordered to close. (*Id.*; H.T. at 12, 55).

On August 11, 2017, the ACHD observed nine low-risk, six medium-risk, and five high-risk violations at the Facility. (Ex. D4). On that date, the ACHD placed consumer alert placards at the Facility due to the risk to the public posed by these violations, as well as a history of repeated violations. (H.T. at 44-45). During this August 11, 2017 inspection, Natalie Fezza, the Facility’s owner, and Joe Fezza, the Facility’s manager, informed the ACHD that the Facility was holding a funeral luncheon the next day, and that the consumer alerts could not be made visible.

On August 12, 2017, ACHD food safety inspector Katherine Costello stopped by the Facility to check that the consumer alert placards were still posted. (H.T. at 12, 37, 40). Ms. Costello took photographs of the front and side entrances to the facility, which depicted consumer alert placards being concealed by paper and an umbrella. (H.T. at 38-39, 41, 43; Exs. D7-D9). A consumer alert placard on the front

door was concealed with a sign stating, “plumbing issue ‘Basement Water break’ Problem Rectified.” (Exs. D7-D9). The inspection reports from August 11 and 14, 2017 and corresponding letters sent to Appellant warn that the consumer alert placards cannot be removed or concealed. (H.T. at 32; Exs. D4-D5). Ms. Costello’s testimony and related evidence indicate that Appellant concealed the consumer alert placards, in violation of ACHD regulations.

Appellant did not provide anything of note to contradict the ACHD’s testimony regarding the presence of the above-listed food safety violations at the facility. And this tribunal finds the evidence and testimony of the ACHD’s witnesses here to be credible. Therefore, the ACHD has demonstrated that there were numerous violations at the Facility that justified the enforcement action.

2. Reasonableness of Penalty Assessment

The ACHD asserts that the \$2,600 civil penalty was in line with ACHD Regulations and policies. (*ACHD Brief* at 6-9). The ACHD’s authority to issue civil penalties for food safety violations derives from its Rules and Regulations, Article XVI, Environmental Health Civil Penalties, §§ 1604-05. When determining the penalty amount, the ACHD may consider economic benefit gained by failing to comply with regulations, the willfulness of the violation, the actual and potential public harm, frequency and magnitude of the violation, and any other relevant factors. (*Id.*).

At the hearing, Ms. Scharding discussed the process by which the ACHD issued a civil penalty against the Facility. First, she elaborated on some additional

factors that the ACHD considers when assessing a penalty against a food facility, including the type of food facility and the type of food served. (H.T. at 14-15; Ex. D2). The ACHD categorizes food facilities into four groups. A Group 1 facility serves only packaged food. A Group 2 facility has minimal food handling, such as a convenience store. A Group 3 facility is a food service restaurant that primarily uses multiple ingredients and prepares food in advance. And a Group 4 facility is a major food processor that has wider distribution than a restaurant. (H.T. at 14-15). Here, the Facility was classified as Group 3.

Ms. Scharding explained that after the group is identified, the ACHD reviews the violations to classify them into the following risk levels: imminent danger, high risk, moderate risk, administrative, and low risk. (Ex. D2). Each risk level has a corresponding penalty according to group. (H.T. at 15-16). For a Group 3 facility such as Appellant's, high-risk violations are \$600 each, medium risk violations are \$400 each, and administrative violations are up to \$800 each. (*Id.*). A penalty is also assessed if a consumer alert placard is concealed or removed. (H.T. at 22, 26). Next, the ACHD considers whether violations were repeated, and whether they were accidental, negligent, reckless, or deliberate. (Ex. D2). Finally, the ACHD considers the projected cost savings for the facility for not complying with Article III. (*Id.*).

Here, after categorizing the Facility as Group 3, the ACHD considered the violations. On August 14, 2017, Ms. Fezza requested a same-day inspection, three days after the consumer alert placards were posted. (H.T. at 47-48). She requested the inspection because she claimed the high- and medium-risk violations had been

corrected. (*Id.*). However, many of these violations remained during the August 14, 2017 inspection, as demonstrated during Mr. Crystaloski's testimony. (H.T. at 13-14, 29; Exs. D2-D6). The ACHD chose to penalize the Facility for only four of these repeated violations, as well as for concealing the consumer alert placards. (*Id.*). Two of these five violations were categorized as high-risk, two as medium-risk, and one as administrative, for a total of \$2,400. (Ex. D2). The ACHD did not increase the penalty despite four of these violations being observed multiple times.

The ACHD then added a \$200 penalty for willfulness, but did not increase the penalty for economic benefit for non-compliance. (Ex. D11). The total penalty assessed was thus \$2,600.

This tribunal finds that the ACHD's rationale for assessing the \$2,600 penalty was reasonable. The penalties assessed were in line with ACHD policies and regulations. And the \$200 willfulness penalty was justified in light of evidence that Appellant concealed consumer alert placards. Furthermore, Appellant did not present any credible evidence to contradict the ACHD's evidence and testimony.

B. Appellant's Arguments

Appellant presents two arguments of its own. First, that the ACHD's enforcement action was arbitrary. Second, that the enforcement action caused Appellant to suffer a loss of profits, as well as costs needed to bring the Facility into compliance. Neither of these arguments is persuasive.

In support of its arbitrariness argument, Appellant compares this enforcement action to those of other food facilities in Allegheny County, attempting

to show that the ACHD has been inconsistent with its enforcement. (See H.T. at 26-27). But Appellant did not present any evidence that the other food facilities it mentioned were similarly situated to the Facility in terms of violations observed and risks posed. This superficial analysis does not pass muster.

Appellant's loss of profits argument is even less convincing. Appellant's counsel announced in her opening statement that the violations that the ACHD assessed against the facility caused "loss of profits totaling about \$150,000, as well as some losses—some monies total that were expended to bring the restaurant into compliance." (H.T. at 6).

However, Appellant did not present anything indicating that loss of profits is a recognized cause of action here. Nor did Appellant present anything showing where this \$150,000 figure and compliance costs came from. Appellant has failed to provide anything substantive to buttress its claims.

V. CONCLUSION

This tribunal finds that the ACHD has met its burden of proving by a preponderance of the evidence that the penalty was properly assessed in view of the violations present at the Facility. Appellant's appeal is therefore dismissed. This administrative decision may be appealed to the Court of Common Pleas of Allegheny County, Pennsylvania.



Max Slater
Administrative Hearing Officer
Allegheny County Health Department



Dated: