

PUBLIC HEALTH APPEAL BOARD

IN THE MATTER OF THE *PUBLIC HEALTH ACT*,
CHAPTER P-37, R.S.A. 2000 AND ITS REGULATIONS

IN THE MATTER OF AN APPEAL
TO THE PUBLIC HEALTH APPEAL BOARD
BY PERSONNEL & GENERAL SERVICES INC.
AND ROBERTO MAGLALANG
OF THE ORDER OF AN EXECUTIVE OFFICER
NOTICE OF CLOSURE
ISSUED BY ALBERTA HEALTH SERVICES
ZONE 4 EDMONTON
DATED JULY 13, 2016
HEARING HELD SEPTEMBER 15, 2016

Appearances:

Roberto Maglalang, Appellant

Mark Raven-Jackson, Legal Counsel, Alberta Health Services, Respondent

Nicole Obert, Executive Officer, Alberta Health Services/Respondent

Board Decision

The Order of an Executive Officer Notice of Closure dated July 13, 2016 is confirmed.

A. Introduction

An Order of an Executive Officer - Notice of Closure dated July 13, 2016 (the "Order") was issued pursuant to the *Public Health Act* and the *Food Regulation*, Alberta Regulation 31/2006 and the *Food Retail and Foodservices Code* relating to Little Asia Noodle House and Dylan's House of Minis, a food establishment located in Millbourne Market Mall, Edmonton, Alberta (the "Premises").

The Order directed the owner to immediately close the Premises and to immediately undertake and diligently address several contraventions found on the Premises. The Order was entered as Exhibit 1 at the appeal hearing and is attached to this decision as Appendix 1.

On July 19, 2016, the Board received the Notice of Appeal. An appeal hearing date was set for August 18, 2016. The Notice of Appeal was entered as Exhibit 2 at the appeal hearing and is attached to this decision as Appendix 2.

The Order was rescinded by Alberta Health Services on August 4, 2016. Alberta Health Services took the position that the appeal was moot because the Order being appealed had been rescinded. The Appellant advised the Board that he did not intend to withdraw his appeal.

The Board informed the parties that it would hear the preliminary application of Alberta Health Services as to whether the appeal was moot on August 18, 2016 by way of telephone conference. Further, the appeal hearing would not proceed until the Board heard this application on the issue of mootness. A different hearing date would be scheduled for the appeal if the Board decided that the appeal should proceed.

The Board provided a written decision regarding the preliminary application on September 13, 2016 whereby the Board decided to hear the appeal of the Order notwithstanding that the Order was rescinded by Alberta Health Services.

B. Timing of the Appeal

Section 5(3) of the *Public Health Act* requires the Appellant to serve notice of the appeal within 10 days after receiving notice of the decision being appealed. The Appellant received the Order on July 13, 2016 and served the Notice of Appeal on July 19, 2016, which was within the 10-day period.

C. Jurisdiction

There was no objection raised by either party to the Board's jurisdiction to hear this appeal.

D. Issue

Whether the Order dated July 13, 2016 ought to be varied, reversed or confirmed due to inaccuracies, the closure being disproportionate, or a lack of procedural fairness.

E. Appellant's Submissions

The Appellant provided written submissions that included background information, grounds for the appeal, the Order, Rescind Notice, 2013 Court of Queen's Bench Application by Alberta Health Services, Alberta Health Services Inspection and Re-Inspection Reports, Orkin Follow Up Reports, Position Description for Food Safety Management Consultant and Memo from Operations Manager, Millbourne Market Mall. These submissions were entered as Exhibit 3.

The Appellant raised the following four grounds of appeal:

1. The Closure Order included inaccurate information.
2. There was no need for the Closure Order.
3. The Closure Order was disproportionate to the charges.
4. The Executive Officer was difficult to work with and her issuance of the Closure Order lacked procedural fairness amounting to grave abuse of discretion.

1. Inaccuracy of the Closure Order

The Appellant submitted that the Closure Order contained incorrect information:

- Alberta Health Services alleged there were contraventions of the 2013 Alberta Court of Queen's Bench Order. The Appellant listed inaccuracy of the contraventions that resulted in the Court of Queen's Bench Order as follows:

- i) On October 29, 2013, high risk food was stored at room temperature for more than 30 minutes on a flat grill and measured 44/45 degrees at 2 to 3 pm.

The Appellant stated the food was sweet and sour sauce (vinegar and sugar), which was being steamed before being stored in the chiller.

- ii) On June 15, 2015, high risk food was stored at room temperature.

The Appellant stated the food was sliced onion on a rack, which was about to be used.

- iii) Other violations were either corrected on the spot, for example food items stored in a cooler or with lids, lack of hand towel, sanitizer and soap, or they were rectified before the next inspection which included cleaning walls and ceiling, repainting parts of a wall, repairing a hand sink, faucets, broken soap dispenser and lighting fixture.

- iv) Monitoring hot and cold temperature in a Serving Safer Food Alberta Diary.

The Appellant stated this had been undertaken since 2012.

- A large pan of cooked meatballs was stored at room temperature, in racks near the stove.

The Appellant stated the meatballs were not being stored but were in the middle of being cooked further as the pan was just taken from the oven and the meatballs were about to be mixed with sauce at the time of the inspection. They do not serve meatballs without sauce.

- Dirty scoops were stored in direct contact with the bulk food ingredients.

An Executive Officer said that scoops can be used, provided the scoops had handles.

- Open bags of food ingredients were not stored in pest proof containers with tight fitting lids.

Pest proof containers with tight fitting lids were purchased before the spraying for pests on July 7, 2016.

- Cockroach infestation was present and active.

The pest control treatment on July 7, 2016 was meant to address the issue. The Orkin Pest Control report of July 26, 2016 also indicated cockroaches were found in nearby restaurants. McDonald's was treated for six hours by ECOLAB on the same day while Orkin spent only 45 minutes for the three restaurants.

- The facility and equipment were not kept in a clean and sanitary manner.

The re-inspection dated July 4, 2016 stated the cleaning was completed.

- Cracks, holes and other areas of cockroach harborage were observed.

These were being attended to since April, 2016 when all baseboards were changed and walls were repainted.

- Grey water under the compartment sink.

This was fixed on July 12, 2016.

The Appellant provided a Food Establishment Inspection History showing Critical violations for the Premises from June 16, 2014 to July 13, 2016. There were 16 inspections and 8 found critical violations. On June 21, 2016, there were 6 critical violations in the one inspection.

2. No Need for the Closure Order

The Appellant submitted there was no need for the Closure Order. He submitted that all issues raised by the Executive Officer were addressed immediately and any new findings could have been addressed shortly thereafter. The Appellant submitted the following in support of his position:

- The June 21, 2016 inspection report triggered massive daily cleaning that lasted up to the evening.
- The June 23, 2016 inspection report stated improvement was noted.
- The June 29, 2016 inspection report again noted improvements and advised them to co-ordinate with their pest control company for fishing holes.
- The July 4, 2016 inspection report stated the facility was ready for cockroach treatment and pest control was considered a low hazard.
- The July 12, 2016 inspection report stated no cockroaches were found in Dylan's House of Minis.

3. Closure Order was disproportionate

The Appellant submitted the Executive Officer came back for a re-inspection only after the Premises had been closed for 15 days. Her subsequent inspection on July 27, 2016 reported 75 to 100 live and dead cockroaches observed while the Orkin Report of July 26, 2016 only stated 20 to 30 live cockroaches were caught. Further, the Executive Officer's inspections on August 2 and 3, 2016 were meant to prolong the closure as she was looking for more areas, which could be considered to harbour pests.

4. Lack of procedural fairness

The Appellant submitted that the Executive Officer was difficult to work with and her issuance of the Order lacked procedural fairness amounting to a grave abuse of discretion. The Appellant stated he has a history of cooperation with Alberta Health Services and enlarged his kitchen and bought new equipment to avoid cross contamination. He also volunteered to participate in the "Serving Safer Food Program" and enrolled two staff in Alberta Health Services Training program.

He stated despite this, the Executive Officer treated him and the staff in a draconian manner. The Appellant listed a long history of dealings with the Executive Officer commencing in 2012 and ending in June 2016 when he believed the Executive Officer started a series of inspections geared toward finally closing the restaurant. He accused her of submitting blown up pictures to exaggerate the problems with the pests.

Alberta Health Services Submissions

Alberta Health Services provided an indexed binder of materials, including a summary of events from 2009 through 2016, previous Executive Officer Orders, Inspection and Re-Inspection Reports, Orkin Reports and photographs. The binder was entered as Exhibit 4. A Table of Violations was also submitted which was entered as Exhibit 5.

The Board was advised that the Appellant had been fined in the past for non-compliance with the Act and had paid a fine. The Court of Queen's Bench had issued an order August 14, 2013 that required the Appellant to correct and maintain specific conditions relating to food handling. An application for a Declaration of Civil Contempt relating to that order was commenced and on August 25, 2016 the application was adjourned to a Special Chambers date. The Court granted an interim injunction prohibiting the Appellant from engaging in the business of operating a food establishment until the application has been adjudicated.

The Court of Queen's Bench Order of August 14, 2013 required the Appellant to monitor hot and cold temperatures in a Serving Safer Food Alberta Diary but the diary was not present at the time of inspection. It was later produced for a three-year period and each entry was in the same hand writing but the date of the inspection was omitted. The Appellant, on cross examination, admitted that it was the same hand writing for every day and that no one employee would have worked at all those times the temperatures were recorded.

The Executive Officer inspected the Premises because a customer complained after finding a half-eaten cockroach in her food. A photo of the half-eaten cockroach was included in Exhibit 4. An inspection found an infestation of cockroaches and the pictures provided by Alberta Health Services confirmed a serious cockroach infestation.

The business was provided with a full year of tutoring and education.

Counsel for Alberta Health Services thoroughly cross examined the Appellant and provided photographs to support the violations contested by the Appellant.

The Board caucused, after the Appellant was cross examined and prior to Alberta Health Services providing verbal evidence from the Executive Officer, and decided it did not need to hear any further evidence from Alberta Health Services.

Reasons

The Appellant maintained the position that each time Alberta Health Services ordered him to rectify a problem, the problem was rectified and therefore there was no need to issue an order. The Appellant failed to understand that he was responsible, not Alberta Health Services, to ensure compliance with the *Act* and its Regulations and compliance was required to protect the public. Over the years Alberta Health Services provided support and education to the Appellant regarding food safety. However, the critical food safety issues continued. Both the evidence of the Alberta Health Services and the Appellant showed the long history of critical violations found on the Premises.

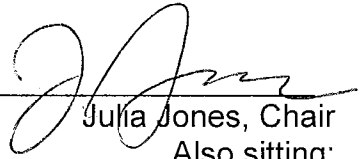
The Board finds that the contraventions as set out in the Order were in existence at the time the Order was issued. There were photographs and reports from the pest control company to support the contraventions. The photographs showed dirty Premises and cockroach traps with a significant number of cockroaches.

The Court of Queen's Bench Order of August 14, 2013 required the Appellant to monitor hot and cold temperatures in a diary. The diary produced after the inspection showed each entry was in the same hand writing and the Appellant confirmed that the same employee could not have been working at all these times to record temperatures. The Board found this to be evidence that the Appellant lacked credibility and that he failed to understand he was responsible to ensure compliance with the *Act* and *Regulations* at all times.

The contraventions were of a serious nature and had occurred consistently over years, notwithstanding the teaching and support provided by Alberta Health Services. The closure Order was required not only because the contraventions were serious but also to address the cockroach infestation. It would have been unsafe to carry on serving food to the public when such a significant number of cockroaches were in the Premises. The closure Order was not disproportionate in the circumstances as the contraventions were serious and the public's health was at risk.

The Board finds the Executive Officer exercised her professional discretion properly and fairly in the circumstances.

For the foregoing reasons, the Board has decided to confirm the Order of an Executive Officer Notice of Closure dated July 13, 2016.

Per: 
Julia Jones, Chair
Also sitting:
Sandra Sheppard, Vice Chair
Ike Zacharopoulos, Member

Date: November 10, 2016