

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 DAN EDDIE ON BEHALF OF
ENCORE NIGHTCLUB & CONCERT HALL
OF THE EXECUTIVE OFFICER'S ORDER/DECISION
ISSUED BY ALBERTA HEALTH SERVICES
ZONE 4 EDMONTON
DATED MARCH 4, 2015
HEARING HELD APRIL 15, 2015

Appearance:

Ms. Jill Wilkie, Counsel for Alberta Health Services/Respondent

Witness:

Ms. Sharon Regimbald, Executive Officer, Alberta Health Services Zone 4 Edmonton

Board Decision:

Alberta Health Services' decision to restrict Encore Nightclub & Concert Hall's food handling permit to single service disposal cups only and the order to remove the dishwashers from the premises are confirmed.

A. INTRODUCTION

On March 4, 2015 Alberta Health Services sent an email to 1208558 Alberta Ltd. operating as Encore Nightclub & Concert Hall (the "Appellant") care of Dima Perelman of Encore with respect to the premises located at #2687, 8882 – 170 Street, Edmonton, Alberta (the "Premises"). The email advised the Appellant that its permit would be restricted to single service disposal cups only and that the dishwashers on the premises were to be removed by March 23, 2015. The email containing the decision and order was entered as Exhibit "1" at the hearing.

The Appellant, represented by Business Manager, Dan Eddie, appealed Alberta Health Services' decision and order. A Notice of Appeal dated March 11, 2015 was received by the Board on March 16, 2015. It was entered as Exhibit "2" at the hearing.

A stay hearing was held on March 31, 2015 and both Alberta Health Services and the Appellant attended by way of a telephone conference. The Chair of the Public Health Appeal Board granted a partial stay wherein a stay was granted for the order to remove the dishwashers but was not granted for the restriction to use single service glasses only.

This appeal was heard on April 15, 2015 at ATB Place, 10025 Jasper Avenue, Edmonton, Alberta. The Appellant did not attend the hearing. Following a 30 minute delay in commencing the hearing, the Board heard the appeal in the Appellant's absence.

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 Notice of Appeal was served on the Board 12 days after the Appellant received the email advising that its permit would be changed to single serve glasses only and that the removal of the dishwashers was required.

If the Notice of Appeal is not served within the 10 day time frame the Board may extend the time within which an appeal may be taken if it considers it appropriate to do so. There was no objection from Alberta Health Services to extending the time for receiving the Notice of Appeal. The Board finds that it is appropriate to extend this time period.

C. JURISDICTION

Section 5(1) of the *Public Health Act* sets out what decisions can be appealed to the Public Health Appeal Board. It states:

- 5(1) In this section, "decision of a regional health authority" means
- (a) an order issued under section 62, and
 - (b) a decision to issue or to cancel, suspend or refuse to issue a licence, permit or other approval provided for in the regulations, and any other decision in respect of which an appeal to the Board is permitted under the regulations, whether any of those decisions is made by the regional health authority itself or one of its employees or agents.

There are two decisions being appealed by the Appellant. The first was the decision to restrict the Appellant's food handling permit to single service disposal cups only and the second was the order to remove the dishwashers from the premises.

The Notice of Appeal did not clearly state that the Appellant was appealing the order to remove the dishwashers but this point was raised at the stay hearing by Alberta Health Services and the Appellant clarified at that time that this order was also being appealed.

Alberta Health Services did not advance a position on whether s.5(1) of the Act was broad enough to encompass both the decision and order of Alberta Health Services which is required for the Board to have jurisdiction in this matter. Counsel for Alberta Health Services did point out that this could be an issue but she was unable to find any case law addressing the matter. In addition, Alberta Health

Services advised the Board that the “right to appeal” information had been attached to the email wherein the decisions had been communicated to the Appellant.

With respect to the decision to restrict the Appellant’s food handling permit, the Board finds that s.5(1)(b) of the *Public Health Act* may include decisions to vary a permit where the variation of the permit is tantamount to cancelling a permit and issuing a permit with different conditions.

If the Board is wrong in its finding that the decision to vary the food handling permit fits within s.5(1)(b) of the *Public Health Act*, the Board finds that the decision to vary the food handling permit to single serve glasses only, is an order issued under s.62 of the *Act*. The order was issued by an Executive Officer, in writing, after an inspection on March 2, 2015 and served to the Appellant via email. Although the decision was not set out in the typical format of orders issued pursuant to s.62, it did meet the legislative requirements required in that section of the *Act* which states:

62(1) Where, after an inspection under section 59 or 60, the executive officer has reasonable and probable grounds to believe that a nuisance exists in or on the public place or private place that was the subject of the inspection or that the place or the owner of it or any other person is in contravention of this *Act* or the regulations, the executive officer may issue a written order in accordance with this section.

(2) An order shall be served on the person to whom it is directed and shall set out the reasons it was made, what the person is required to do and the time within which it must be done.

(3) Where the order is directed to a person who is not the registered owner, a copy of it shall also be served forthwith on the registered owner.

(4) An order may include, but is not limited to, provisions for the following:

- (a) requiring the vacating of the place or any part of it;
- (b) declaring the place or any part of it to be unfit for human habitation;
- (c) requiring the closure of the place or any part of it;
- (d) requiring the doing of work specified in the order in, on or about the place;
- (e) requiring the removal from the place or the vicinity of the place of anything that the order states causes a nuisance;
- (f) requiring the destruction of anything specified in the order;
- (g) prohibiting or regulating the selling, offering for sale, supplying, distributing, displaying, manufacturing, preparing, preserving, processing, packaging, serving, storing, transporting or handling of any food or thing in, on, to or from the place.

A decision to vary a condition of the food handling permit to restrict the Appellant to serving drinks in single serve glasses only, could also be included in section 62(4)(g): “ An order may include, but is not limited to, provisions for the following: prohibiting or regulating the selling,.....packaging, serving of any food or thing in, on, to or from the place”.

With respect to the second matter that was appealed, the order to remove the dishwashers from the premises by March 23, 2015, the Board finds that it was an order pursuant to s.62 of the *Act* and in particular, sections 62(4)(d) and (e). Requiring the removal of the dishwashers was the requiring of

work on or about the place and the removal from the place of anything that the order states causes a nuisance.

The Board finds it has jurisdiction to hear both matters appealed by the Appellant.

D. NOTICE OF HEARING

As the Appellant did not attend the appeal hearing, the Board reviewed the notice provided to the Appellant with respect to the hearing dates and times to ensure sufficient and proper notice was given and that it was administratively fair to proceed with the hearing in his absence.

The following correspondence was provided to the Appellant relating to the date, time and place of the appeal hearing:

- March 25, 2015 both parties were sent a letter by way of email confirming the date of the hearing noting that the time and location would follow shortly; March 31, 2015 a stay hearing was held via teleconference with both parties attending and the Chair confirmed the date of the hearing with both parties;
- April 9, 2015 a follow-up letter was sent via email to both parties confirming the date, time and location of the hearing;
- April 13, 2015 an email was sent to the Appellant to confirm his attendance at the upcoming hearing;
- April 14, 2015 two emails were sent to the Appellant to confirm his attendance at the upcoming hearing;
- April 13 and 14, 2015 phone calls were made every 2 hours at both phone numbers provided by the Appellant but no messages could be left as the mail box was full.

The Board finds that the Appellant received sufficient and proper notice of the hearing's date, time and location. Therefore, the Board decided to proceed with the hearing in the Appellant's absence. In addition, the Board had received a written submission from the Appellant when the Notice of Appeal was served to the Board.

E. APPELLANT'S SUBMISSIONS

The Appellant provided a written submission dated March 11, 2015 that contained the following documents:

- three page letter outlining the reasons for the appeal, history of contraventions and a request for a stay hearing;
- Executive Officer's Order dated February 27, 2013;
- Executive Officer's Inspection Report dated March 2, 2015;
- emails dated March 3, 4 and 6, 2015;
- letter from Alberta Health Services dated January 30, 2015; and
- Dishwasher Policies & Procedures Checklist.

The Appellant submitted that the change in the condition of the food handling permit preventing the use of re-usable glasses and permitting the use of single service disposable cups only, would cause financial hardship to the business. The business had invested a substantial amount of money in washable glassware and dishwashers (also referred to as glasswashers) and not using them would be financially detrimental to the business. The cost to use disposable cups was \$1100 a weekend or \$57,200 per year. The business would also incur additional costs to renovate the area where the dishwashers were situated if they were to be removed.

The Appellant also submitted that the use of disposable cups was an environmental concern and that all businesses have a responsibility to reduce their environmental impact and carbon footprint and the use of single serve cups was a step backwards in that regard as the waste was significant.

The Appellant provided submissions regarding its history with Alberta Health Services inspections and its response to those inspections, as follows:

- the Executive Officer's Order dated February 27, 2013 was the first major violation and equipment repairs and personnel changes were effected immediately;
- on December 30, 2014 and January 16, 2015 the dishwashers were found not to be in proper working order at all times: the final rinse concentration was measured at 0 ppm and the chemical agents were hooked up incorrectly. The Appellant arranged for service calls by a dishwasher repair company to ensure the dishwashers were working properly, staff members were re-trained and a new policy was implemented to ensure the chemicals would be properly attached to the dishwashers;
- subsequent to the above noted changes being implemented, the Premises passed a re-inspection on January 30, 2015. However, another inspection on the night of February 28, 2015 found the dishwashers were not operating properly. The Executive Officer restricted its permit to a single service license for the night. Although the log book showed all dishwashers were tested with litmus paper before the Premises opened that evening, following the inspection, they found that the chemicals in two of the dishwashers were attached incorrectly. To ensure this would not happen again two staff members were dismissed, a new department head was appointed and a new policy was implemented March 2, 2015. A checklist that was to be followed regarding the operations of the dishwashers was also provided; and
- on March 3, 2015, the Appellant sent an email to the Executive Officer to inform him that all dishwashers were in working order and new policies and procedures had been implemented.

The Appellant submitted that he was confident that the changes in management and the new policies in place would result in no further contraventions.

F. ALBERTA HEALTH SERVICE'S SUBMISSIONS

Counsel for Alberta Health Services entered in to evidence a binder that included: an overview of relevant events connected to the Premises; a copy of the permit application and ownership records;

February 27, 2013 Order of an Executive Officer; January 30, 2015 letter to the Appellant; and emails dated March 3 and 4, 2015. The binder was accepted by the Board as Exhibit "3".

The witness for Alberta Health Services provided a history of inspections and contraventions involving the Appellant summarized as follows:

- the original application for a food handling permit was received by Alberta Health Services on August 8, 2007. Given the type of permit that was issued for food handling, the Premises were to be inspected yearly. No issues were found during routine inspections by the Executive Officer until 2011;
- December 22, 2011 - three contraventions were noted and a December 28, 2011 phone re-inspection by the Executive Officer accepted the correct changes were completed;
- December 11, 2012 - six contraventions were noted and the Appellant was instructed not to open to the public until a re-inspection confirmed that the hot water had been restored and the glasswashers were sanitizing properly;
- December 14, 2012 - re-inspection found the glasswashers were not in proper working order and no sanitizer was detected. The Executive Officer placed a temporary permit restriction on the Premises and allowed them to re-open using single service disposable cups;
- December 18, 2012 - re-inspection found that two of the glasswashers required repair, replacement or removal and two glasswashers were in working order. The restriction on single service cups was lifted;
- February 22, 2013 - inspection was conducted due to a name change of the Appellant requiring a new permit approval. Three infractions were noted, the permit was denied and the Appellant was instructed not to operate until the new permit was approved;
- February 27, 2013 - Executive Officer was informed the Appellant was in operation contrary to her instructions and issued an Order of an Executive Officer based on the February 22, 2013 inspection;
- March 1, 2013 - re-inspection was conducted that confirmed all infractions noted in the Order had been addressed and an updated permit under the new name was issued. The Appellant was advised to maintain the conditions of the Order;
- December 30, 2014 - routine inspection found no glasswashers were in working order and issued a temporary permit restriction to single service disposable cups;
- January 16, 2015 - at the request of the Appellant a re-inspection was conducted that found all glasswashers were reading 0 ppm sanitizer and incorrect chemicals were attached to the hoses. The temporary permit restriction to single service disposable cups remained;
- January 30, 2015 - re-inspection by the Executive Officer found all three glasswashers in proper working order. A warning letter was issued to the Appellant stating that all glasswashers must remain in good working order and outlining what actions might be taken if the Appellant did not comply; and

- March 2, 2015 - an after-hours inspection found none of the glasswashers in working order. A restriction to allow for single service disposable cups only was made to the permit.

Following a review of the Appellant's file, the Executive Officer decided that the Appellant's food handling permit ought to be permanently restricted to single service disposable cups only. The decision was based on the lengthy and serious history of contraventions of the *Food Regulation (31/2000)*. The Appellant was also ordered to remove the dishwashers from the Premises by March 23, 2015 due to concerns that the Appellant would use the dishwasher to wash disposal cups or use washable cups.

When the Executive Officer was asked about the checklist submitted by the Appellant that was intended to eliminate further issues with the dishwashers she pointed out two omissions: a litmus test is the incorrect test for the dishwashers and the checklist did not include the strengths required for the cleaning fluids or the required test results.

The Executive Officer stated that to remove the permanent restriction the staff would have to demonstrate knowledge about the proper chemicals, the strengths required and the operation of the dishwashers.

Alberta Health Services submitted that the Appellant had been given many opportunities to address the issues with the dishwashers and that Alberta Health Services could have suspended the Appellant's permit or prosecuted them instead of giving them opportunities to address the contraventions of the *Food Regulation*.

G. ISSUES

1. Whether Alberta Health Services' decision to change the Appellant's food handling permit from re-usable glassware to single-service disposable cups only, ought to be reversed, varied or confirmed?
2. Whether Alberta Health Services' order to remove the dishwashers from the Premises, ought to be reversed, varied or confirmed?

H. REASONS

Alberta Health Services' legislative authority to make decisions regarding a permit is found in Section 9 of the *Food Regulation (31/2006)*. It states:

- (1) A regional health authority may make the issue or renewal of a permit subject to
 - (a) restrictions on the type of food that, or the manner in which any type of food, may be served, manufactured, processed or stored, and
 - (b) any other terms and conditions the regional health authority considers to be appropriate.
- (2) The terms and conditions must be stated on the permit.
- (3) The regional health authority may recall a permit and add to, delete or vary the terms and conditions to which a permit is subject.
- (4) An operator must ensure that the terms and conditions of the permit are not contravened.

- (5) A person who carries on any activity under the purported authority of a permit must comply with the terms and conditions of the permit.

Section 1(1) of the *Food Regulation* provides the following definitions:

- (dd) “operator” means the person who manages or directs the handling of food in a food establishment, and includes an Operator as defined in the Act; and
- (ee) “permit” means a food handling permit or a farmers’ market permit issued or renewed under Part 1.

And, Section 28 of the *Food Regulation* states:

- (1) A commercial food establishment must have all the facilities, equipment and utensils that are necessary to ensure its safe operation and maintenance.
- (2) A commercial food establishment, all equipment and utensils in it and all surfaces in it with which food comes into contact must be maintained in a sanitary condition and, without limiting the foregoing, must be washed and sanitized in a manner that removes contamination.
- (3) All equipment and utensils in a commercial food establishment must be
- (a) kept in good working order and condition, and
- (b) maintained in a manner that ensures the safe and sanitary handling of food.

The Board finds that Alberta Health Services acted within its legislative authority when it changed the permit to single service glasses only and when it ordered the dishwashers removed as they were not in good working order or maintained in a manner that ensures the safe and sanitary handling of food as required by the *Food Regulation*.

Both the decision and the order were reasonable given the number of contraventions of the *Food Regulation* found during inspections of the Premises from December 22, 2011 to March 2, 2015.

The number of contraventions of the *Food Regulation* was significant and was outlined by Alberta Health Services as follows:

December 22, 2011:

- Glasswashers were using a quaternary ammonium compound for sanitizing but no corresponding test strips were available to test the sanitizing strength nor was the staff aware of the correct concentration to be used; and
- chlorine test strips were available but no chlorine was being used.

December 11, 2012:

- no glasswashers were working;

- carpet cleaner chemical was attached to one glasswasher;
- staff could not demonstrate knowledge of proper glass washing procedures;
- glasswashers were found without detergent and/or sanitizer; and
- no test strips were found onsite to check the sanitizer strength.

December 14, 2012:

- glasswashers were not in proper working order and no sanitizer was detected.

February, 22, 2013:

- glasswashers were not in working order; and
- all glasswashers were reading 0 ppm for chlorine.

December 30, 2014:

- no glasswashers were working; and
- glasswashers were reading 0 ppm for sanitizer.

January 16, 2015:

- all glasswashers were reading 0 ppm for sanitizer;
- incorrect chemicals attached to hoses (rinse agent attached to detergent hose, sanitizer attached to detergent hose); and
- one glasswasher was found attached to two bottles of rinse agent, one bottle of detergent and zero bottles of sanitizer.

February 28, 2015:

- glasswashers were not in working order;
- glasswashers were reading 0 ppm for sanitizer; and
- staff attempted to attach a bottle of iodine to the chlorine glasswashers as no chlorine could be found on site.

Despite the Appellant retraining staff and implementing new policies between December 2014 and January 2015, the glasswashers were not working properly during the inspection of February 28, 2015. The Appellant confirmed he found the chemicals in two of the glasswashers hooked up improperly. Of significance is the January 16, 2015 re-inspection completed at the request of the Appellant wherein it was found that all glasswashers read 0 ppm for sanitizer and incorrect chemicals were attached to the hoses.

Also of significance was that on two separate occasions, chemicals (carpet cleaner and iodine) not intended to be used for glass washing were either attached to a glasswasher or attempts were made to

attach them. The Board finds these to be serious contraventions and to pose a potential serious risk to the health and safety of the public.

The above noted contraventions demonstrate a pervasive and systemic lack of knowledge on the Appellant's part with respect to glass washing and the requirements of the *Food Regulation*. The Appellant has been unable to set up proper procedures that include the operation of the glasswashers, the use of correct chemicals, testing and required test results for the glasswashers. The newly developed checklist provided by the Appellant was deficient as well.

While the Board acknowledges the measures the Appellant had taken to ensure compliance, the inspection history indicates the measures taken to date have not been sufficient and subsequently, the public's health would be at risk.

The Board finds the order to require the Appellant to remove the dishwashers from the Premises is reasonable due to the history of contraventions in using the dishwashers as set out above and the history of noncompliance with previous orders issued by Alberta Health Services.

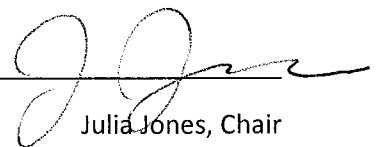
Of particular concern with respect to the noncompliance with previous orders issued by Alberta Health Services, was when the Appellant opened for business after being ordered to close until compliance with the *Food Regulation* was confirmed in February 2013. When the Appellant was questioned about this incident by the Executive Officer a staff member gave false information with respect to why the Premises were opened without approval.

While the Board accepts the submission of the Appellant that its operating costs will increase substantially as a result of the decision and order of Alberta Health Services, the Board finds the many attempts to provide the Appellant with opportunities to eliminate the need for this added expense has not been successful. The Board also accepts that the use of single service glasses will have a negative impact on the environment by increasing waste but the improper use of washable glasses and glasswashers puts the public's health at risk which is paramount.

J. SUMMARY

Having considered all of the evidence and submissions of the parties, the Board has decided to confirm both Alberta Health Services' decision to restrict Encore Nightclub & Concert Hall's food handling permit to single service disposal cups only and the order to remove the dishwashers from the premises.

Per: _____



Julia Jones, Chair

Also Sitting:

Linda Klein, Member

Linda Cloutier, Member

Date: May 15, 2015