

PUBLIC HEALTH APPEAL BOARD

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

**AND IN THE MATTER OF THE APPEAL OF THE ORDERS OF
AN EXECUTIVE OFFICER DATED APRIL 12 AND
APRIL 26, 2021, AND THE FOOD HANDLING PERMIT-NOTICE
OF SUSPENSION DATED APRIL 15, 2021, ISSUED BY
ALBERTA HEALTH SERVICES, ZONE 3**

PANEL: Kevin Kelly, Chair
Miles Weatherall, Member
Vicki Wearmouth, Member

BETWEEN:)
)
)
STACEY PACHOLEK) Lani L. Rouillard,
) Rouillard Law Office,
(Appellant)) for the Appellant
)
- and -)
)
ALBERTA HEALTH SERVICES) Ashley McClelland,
) Alberta Health Services,
(Respondent)) for the Respondent
)
)
)
) Stuart Chambers,
) McLennan Ross LLP,
) Independent Counsel for the Board
)
)
)
)
) Heard: May 18, May 21 and
) June 4, 2021

DECISION AND REASONS FOR DECISION

A notice of appeal was received on April 21, 2021. This matter came before a panel of the Public Health Appeal Board (the “Panel”) on May 18, May 21 and June 4, 2021, via video and telephone conference.

The Appeal

- [1] This is an appeal (the “Appeal”) to reverse:
- (a) an Alberta Health Services (“AHS”) Order of an Executive Officer (“EO”) dated April 12, 2021 (the “April 12 Order”),
 - (b) a Food Handling Permit-Notice of Suspension dated April 15, 2021 (the “Suspension”), and
 - (c) an order of an EO-Notice of Defined Closure dated April 26, 2021 (the “April 26 Order”).

Board Decision

[2] The Panel rendered its decision to confirm the April 12 Order, the Suspension and the April 26 Order on June 18, 2021 following the Panel’s review of written submissions of the Appellant received by the Board June 9, 2021, the written submissions of the Respondent dated June 11, 2021, and the written rebuttal submissions of the Appellant received by the Board June 14, 2021.

Background

[3] The Appellant and her husband, Collin Pacholek own and operate a bookstore that serves coffee and other beverages at the subject property named Stacey’s Happy Place, located in Eckville, Alberta (the business operated by the Appellant and the business’ location are collectively referred to as the “Premises”).

[4] AHS Executive Officer Bulek-Lachman (the “EO”) inspected the Premises and noted the following conditions in and about the Premises in contravention of one or more Chief Medical Officer of Health (“CMOH”) Orders 04-2021, 05-2021, 10-2021, 25-2021 and 26-2021 of the *Public Health Act* (“PHA”) and which are or may become injurious or dangerous to the public health or which might hinder in any manner the prevention or suppression of disease:

- (a) Staff members working at the counter within the Premises and providing service were not wearing a face mask and were within two metres of patrons;
- (b) 16 students were observed in the Premises at one time and were observed seated less than two metres from other seated patrons.

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[5] After inspecting the Premises and noting the above conditions, the EO ordered and directed in paragraph 1 of the April 12 Order that the Appellant immediately:

- (a) ensure staff properly wear face masks, or staff limited physically or mentally from wearing a face mask must maintain two metres distance from staff and patrons;
- (b) ensure patrons are dining in accordance with all active CMOH Orders including maintaining two metres distance, seated on patios with no more than six people per table, require patrons to remain seated while consuming food or beverages and prohibit seated patrons from interacting with persons seated at a different table;
- (c) update and resubmit to an EO the Relaunch Plan (“RP”) Template, which must include details of appropriate COVID-19 risk mitigation measures to be implemented and followed with particular consideration to masking and distancing among staff and patrons, and ensure the details of the completed RP Template are shared with and implemented by all management and staff.

[6] The April 12 Order further ordered and directed the work referred to in paragraph 1(a) and (b) to be completed immediately, and for the work in paragraph 1(c) to be completed by April 16, 2021. It also advised the Appellant that further work may be required to ensure full compliance with the PHA and Regulations or to prevent a public health nuisance.¹

[7] On April 15, 2021, AHS Director Brown issued the Suspension due to the Appellant’s ongoing non-compliance with the April 12 Order and section 71 of the PHA. The Suspension indicated that the suspension of the Appellant’s food handling permit would not be lifted unless the Appellant:

- (a) complies with the April 12 Order to the satisfaction of an EO;
- (b) complies with all relevant CMOH Orders including CMOH Orders 10-2021, 25-2021 and 26-2021;
- (c) ceases obstructing EOs in carrying out their duties under the PHA, including inspection under section 59.²

[8] An EO issued the April 26 Order after an inspection of the Premises disclosed the following breaches of the PHA and the Food Regulation, Alberta Regulation 31/2006 (the “Food Regulation”):

- (a) operating without a valid and subsisting food handling permit from AHS in contravention of section 3(1) (a) and (b) of the Food Regulation, which state that

3(1) No person shall operate a food establishment unless

(a) the person is an operator who holds a valid and subsisting permit for the operation of the food establishment, and

¹ Order of an Executive Officer dated April 12, 2021 (“April 12 Order”).

² Food Handling Permit Notice of Suspension dated April 15, 2021 (“Suspension”).

(b) *the food establishment is identified on the permit as approved by the regional health authority that issued the permit.*

[9] The April 26 Order further ordered and directed the Appellant to (1) immediately close the Premises to food and beverage service; (2) obtain a valid food handling permit from AHS; and (3) keep the Premises closed to food and beverage service until they obtain a valid food handling permit.³

Timing of Appeal

[10] Section 5(3) of the PHA requires the Appellant to serve the notice of an appeal within 10 days after receiving notice of the decision being appealed.

[11] The Public Health Appeal Board Secretariat received a notice of the appeal dated April 20, 2021 (the “Notice of Appeal”) on April 21, 2021. The Notice of Appeal was therefore filed on time.

[12] No stay of the Orders or Suspension was requested.

Grounds of the Appeal

[13] In response to the Board’s request for clarification of the grounds of appeal in its Notice of Appeal, the Appellant provided a response which the Board reviewed and determined must be further clarified to enable the Board to consider if it has the jurisdiction to hear the appeal. On April 29, 2021 the Board Chair, the Appellant, Appellant’s Counsel, and the Respondent’s Counsel held a procedural preliminary hearing to narrow the Appellant’s grounds of appeal, which the Appellant articulated as followed:

- (a) Items 1(a) and 1(b) of the April 12 Order are vague with no specifics regarding date, time, evidence or particulars of the offence; and
- (b) Item 1(c) of the April 12 Order does not apply because items 1(a) and 1(b) are invalid.

Legal Issues

[14] The legal issues on this Appeal for consideration by the Panel are as follows:

- (a) Are Items 1(a) and 1(b) of the April 12 Order vague with no specifics regarding date, time, evidence or particulars of the offence?
- (b) If Items 1(a) and 1(b) of the April 12 Order are invalid, does Item 1(c) of the April 12 Order apply?

Jurisdiction

[15] There are no objections to the Panel’s jurisdiction to hear the Appeal.

³ Order of an Executive Officer Notice of Defined Closure dated April 26, 2021 (“April 26 Order”).

Documents/Exhibits

[16] Prior to the commencement of the hearing, the following documents were entered as exhibits by agreement of the parties:

- (a) **Exhibit A** – AHS Disclosure (410 page PDF file)
- (b) **Exhibit B** – Food Handling Permit Notice of Suspension dated April 15, 2021
- (c) **Exhibit C** – AHS email thread dated April 16, 2021
- (d) **Exhibit D** – Appellant’s Disclosure (72 page PDF file)
- (e) **Exhibit E** – Complaints received by AHS (10 page PDF file)
- (f) **Exhibit F** – Complaints received by AHS (2 page PDF file)

Submissions of the Appellants

[17] Appellant’s Counsel cited page numbers of Exhibits at the hearing, and she was unsure of the correct page numbers, so any reference to pages Appellant’s Counsel mentioned in the hearing have been changed to reflect their location in the Exhibits provided to the Panel. The Appellant was the only witness called by the Appellant’s Counsel and she provided oral testimony. Evidence adduced by the Appellant, and submissions made by the Appellant’s Counsel, will now be summarized. The Appellant and her husband own Stacey’s Happy Place and, along with their daughter, are mask exempt. Wearing masks would prevent them from operating their business. One of their daughters wears a mask while serving patrons. The Appellant states they have continuously complied with the masking requirements of the CMOH Orders.⁴

[18] The AHS inspector did not gather facts or speak with patrons to determine how the rules applied to each individual, and the inspector did not make any determinations regarding family cohorts or exemptions. No questions were made about the contents in patrons’ cups. The Appellant’s Counsel submits that the inspector’s lack of inquiry and inaccurate assumptions breached the administrative duty of fairness. AHS alleged that 16 students were in the Premises at the same time, while a photograph taken by AHS on April 7, 2021 shows nine students sitting at tables and one child exiting the Premises. They are sitting as they would in a classroom, and all but one of them are not eating, drinking or interacting with each other between tables.⁵

[19] Three inspections were conducted from a vehicle and contained multiple inaccuracies, such as who were members of the Appellant’s family. The April 12 Order is vague due to uncertainty, because the AHS inspector gave no advice or direction why they do not educate patrons directly or how a business owner can compel a patron to follow directives contained in that Order. The photographs do not support the contraventions because of a lack of inquiry by AHS. AHS submitted duplicate copies of conflicting reports to the Public Health Appeal Board, and AHS did not explain the additional violations appearing in copies that the Appellant says she did not receive. A January 8, 2021 Inspection Report contains a critical violation for equipment sanitization that is

⁴ Appellant Submissions at pages 6-7.

⁵ Ibid at page 7.

not noted in the Appellant's copy, which constitutes a breach of the administrative duty of legitimate expectation for regular procedures of investigation and inquiry to be utilized by AHS inspectors.⁶

[20] The RP Template, and the Specific COVID-19 Guidelines for businesses found on the Province of Alberta website, both indicate that the RP is recommended but not mandatory. The Appellant submitted an RP to the AHS inspector on January 12, 2021. The April 7, 2021 Inspection Report and the April 12 Order indicated that the RP needed revisions but neither document gave specifics of the required revisions. As a result, this makes the April 12 Order vague for uncertainty and is an error in law because the Guidelines are only optional.⁷

[21] AHS ordered and directed the Appellant to implement changes that conflicted with the RP in order to have the RP approved, including: a) removing chairs and changing signage; and b) speak to customers entering the Premises about COVID-19 rules and taping lines on the floor. The Appellant's signage was deemed inappropriate due to statements about mask exemptions and self-regulation. The Appellant had to change the RP because the students observed on April 7, 2021 increased her business volume, but AHS never documented or communicated this requirement to the Appellant. AHS has repeatedly enforced the recommended Guidelines as being mandatory even though the CMOH Orders, Guidelines and RP expressly state they are optional. All terms contained in the AHS Orders against the Appellant are not legally enforceable obligations against the Appellant. Further, the April 12 Order and the email serving it on the Appellant did not contain notice of the Appellant's right to appeal the April 12 Order. These constitute errors in law, which is a breach of the duty of administrative fairness and a misuse of discretionary power.⁸

[22] The Suspension and the April 26 Order give the EO even broader discretion because they state that the April 12 Order and the EO's orders and directions must be complied with to the EO's satisfaction. This is a misuse of discretionary power that collapses businesses by imposing compliance requirements that owners can never achieve.⁹

[23] AHS inspections of the Premises always happened within a day or two of new CMOH Orders. The Appellant provided photographs and articles in Exhibit D to suggest that the CMOH Orders appear to be enforced differently against the Appellant to the prejudice of the Appellant's business as compared to other local businesses, including: a) photographs showing, by the Appellant's estimation, 80 – 100 people outside a Red Deer Costco; b) articles about charitable drive-in movies in High River and the Grey Eagle Casino being closed,¹⁰ while a drive-in movie for AHS nurses in Grande Prairie was approved; and c) a photograph of two unmasked AHS employees in an AHS vehicle. The discretionary power given to AHS results in a breach of the duty of administrative fairness.¹¹

[24] The Suspension states that, in order for the food handling suspension to be lifted, the Appellant must comply with all relevant CMOH Orders, including but not limited to Orders 10-2021, 25-2021 and 26-2021. This term is vague for uncertainty, because it could apply to any

⁶ Ibid at pages 7-8.

⁷ Ibid at page 8.

⁸ Ibid at pages 8-9.

⁹ Ibid at page 9.

¹⁰ Exhibit D at pages 66-72.

¹¹ Appellant Submissions at page 9-10.

provision in any active CMOH Order. The April 12 Order, the Suspension and the April 26 Order all contain vague terms, and the AHS inspector did not specify the Orders or provisions being referred to. This gives the AHS inspector an overarching discretion to maintain the closure of the Premises by shifting issues of non-compliance. This is also an abuse of discretionary power which results in a breach of the duty of administrative fairness.¹²

[25] Businesses have a legitimate expectation that government agents will regulate within the parameters of regular processes, and the Appellant had a legitimate expectation that the AHS inspections of the Premises were in response to verified complaints. The only complainant that spoke with AHS was in January, 2021. Subsequent complaints received in and after March 2021 were not produced or could not be supported or verified. The Premises obtained compliance from the March 19 and 22, 2021 inspections, and the Premises were again inspected on April 7, 2021 even though the complainant left a wrong number and the incident occurred on March 16, 2021. The discretionary power given to AHS obstructed the Appellant's business from operating.¹³

[26] The Appellant requests that the Board should exclude or place a lower probative value on the cash register receipts obtained by AHS from the Premises. The Appellant states that AHS obtained the receipts by threatening the Appellant, her husband and daughter if they did not provide the receipts in their cash register. This is unlawful search and seizure because the PHA does not contemplate seizing a business' confidential and protected financial records within the scope of a health inspection, and a warrant is required. The AHS inspector also interpreted "documents" in section 59 of the PHA to include any type of document requested. This is a dangerous use of discretionary power which would allow law enforcement to seize confidential information or documents from any business or individual in any context without a warrant. RCMP threatened the Appellant owners with unlawful arrest when they initially refused to provide the financial records approximately 30 minutes before the hearing of this appeal was scheduled to start. The Appellant states that the request was not legitimate and was egregious, and the threat of arrest was unlawful because the PHA does not provide for a penalty of imprisonment if confidential documents are not supplied to an AHS inspector. AHS abused its discretionary power.¹⁴

[27] The Appellant submits that a) the Appellant owner asked the AHS inspector what "this term" in the Suspension meant but her question was not answered, and no explanation was provided in testimony; b) this term of the Suspension is vague for uncertainty, an error in law and error of fact; c) including this term in the Suspension gives the AHS inspector a broad discretionary power to deem any difference of opinion with or any request made by AHS an obstruction that AHS can use to justify the continued closure of the Premises, and is an abuse of discretionary power.¹⁵

[28] The Appellant submits that the Suspension required the Appellant to attend an in-person meeting at the Sylvan Lake Community Health Centre. As this is a provincial facility, the Appellant owners, being mask exempt, might not be permitted entrance. Despite being told they could attend a virtual meeting instead of in person, the Appellant owners, because they felt bullied and harassed, refused to attend the meeting. In addition, they submit it was not a requirement to obtain a food permit in accordance with the *Food Regulation*. The meeting represents a breach of the duty of

¹² Ibid at pages 10-11.

¹³ Ibid at page 11.

¹⁴ Ibid at pages 11-12.

¹⁵ Ibid.

administrative reasonableness and an abuse of discretionary power. Other government departments, including The Town of Eckville, Occupational Health and Safety (“OHS”), the RCMP and Bylaw did not abuse the discretionary power the Appellant alleges AHS committed.¹⁶

[29] The AHS inspector could not provide evidence of a nuisance at the Premises. No active cases or COVID-19 outbreaks have occurred at the Premises, and Occupational Health and Safety found the Premises to be safe. AHS found reasonable and probable grounds of injurious or dangerous conditions to justify closing the Premises. If the April 12 Order and the Suspension are dismissed or declared invalid, the April 26 Order would also be invalid. Alternatively, the April 26 Order is a breach of the administrative duty of reasonableness and is vague for uncertainty due to the overarching power it gives AHS. The AHS inspector stated that any additional requirements for obtaining a food permit were within her discretion, and therefore at page 15 the Appellant submits that the wording of “this provision” is an error in law.¹⁷

[30] At page 15 Appellant’s Counsel submits that the CMOH Orders apply to everyone in Alberta but only AHS has the legislative authority to enforce them, yet AHS inappropriately delegates this authority to small business owners.¹⁸

Submissions of the Respondent

[31] AHS called two witnesses (Catherine Bulek-Lachman, Executive Officer, Environmental Public Health, AHS and Garth Gosselin, Manager, Central Zone, Environmental Public Health, AHS). Evidence adduced by the Respondent, and submissions made by the Respondent’s Counsel, will now be summarized. On January 8, 2021 AHS received a public complaint that the owners and staff were not masking and they were allowing unmasked patrons to sit down and have coffee in the Premises.¹⁹ EO Bulek-Lachman inspected the Premises the same day and noted several indications of non-compliance, including a) that none of the five staff members present during the inspection were wearing a mask; and b) “the owner stated they are choosing not to wear masks, taking a stand against government interventions, and don’t believe they are effective.”²⁰ CMOH Order 42-2020 was in effect at that time and required masking unless an exemption applied.²¹ EO Bulek-Lachman emailed the Inspection Report to the Appellant on January 11, 2021²² and provided web links to all current CMOH Orders, relevant signage, AHS website and other resources. The Appellant testified that EO Bulek-Lachman sent her several resources.

[32] After two more inspections on January 14 and 18, 2021 AHS concerns were mitigated, partly due to the Appellant submitting a Relaunch Plan.²³ AHS received a public complaint that the staff were not wearing masks or following public health measures.²⁴ On March 19, 2021 EO Bulek-Lachman observed a) unmasked patrons, two unmasked staff, no barriers at the counter, and staff serving unmasked patrons within two metres of each other; b) the Appellant indicated she is

¹⁶ Ibid at pages 13-14.

¹⁷ Ibid at page 14.

¹⁸ Ibid at page 15.

¹⁹ Exhibit E at page 1.

²⁰ Exhibit A at page 323.

²¹ CMOH Order 42-2020 at sections 23-24.

²² Exhibit A at page 3.

²³ Ibid at page 408.

²⁴ Exhibit E at page 4.

not willing to follow the relaunch plan she submitted in January, and her husband stated they do not have to follow CMOH Orders; and c) EO Bulek-Lachman informed the owners of next steps in the event of non-compliance with CMOH Orders. Two photos taken by EO Bulek-Lachman show the Appellant's two daughters unmasked and serving patrons within close proximity to each other.²⁵ The Appellant testified that one of her daughters is mask exempt and does not directly serve patrons. EO Bulek-Lachman sent the Appellant the March 19, 2021 Inspection Report and CMOH Order 04-2020 regarding masking requirements on the same date.²⁶

[33] EO Bulek-Lachman and Manager Gosselin inspected the Premises on March 22, 2021 and discussed strategies with the owners for maintaining two metre distancing and other strategies such as signage to encourage patrons to follow public health restrictions.²⁷ EO Bulek-Lachman emailed the Inspection Report to the Appellant and provided information about floor markers, barriers and a mask poster to reduce the chance of confrontations with patrons.²⁸ The owners indicated they would try to make sure their non mask wearing staff maintain two metres distance from patrons.

[34] AHS received another public complaint on March 24, 2021 regarding a) the staff refusing to wear masks; b) holding evening meetings and not requiring attendees to wear masks; and c) sometimes as many as 20 unmasked students being in the Premises at lunch time.²⁹ EO Sonam Khaira inspected the Premises on March 30, 2021³⁰ and noted a) three unmasked staff members behind the food service area; b) less than two metres between staff and patrons; and c) no physical barriers.³¹

[35] On April 7, 2021 EO Bulek-Lachman, Manager Gosselin and an OHS officer inspected the Premises and a) observed owners and staff unmasked and not maintaining two metres distancing; b) discussed the complaint and the concerns about large numbers of students; c) the Appellant's husband became aggressive, started swearing and approached AHS staff within two metres and insisted they leave; and d) observed 16 students in the Premises at the same time, seated at tables within two metres of each other. EO Bulek-Lachman testified that she told the Appellant that enforcement, such as Orders and possible food permit suspension, could follow if they did not comply with COVID-19 restrictions. EO Bulek-Lachman emailed the owners on April 9, 2021 and provided several relevant PHA sections and a copy of the PHA.³² Following the April 7, 2021 inspection and the continued non-compliance, EO Bulek-Lachman issued the April 12 Order and emailed it to the Appellant, who replied the same date that she will not comply with or enforce the Orders.³³

[36] On April 16, 2021 EO Bulek-Lachman issued the Suspension due to the Appellant's refusal to comply with the April 12 Order and the obstruction she experienced at the previous inspection. The Appellant replied three days later with questions about legislative authority and that she cannot wear a mask, therefore attending the meeting could be a problem. On April 20, 2021 EO Bulek-

²⁵ Exhibit A at pages 383-384.

²⁶ Ibid at page 253.

²⁷ Ibid at page 340.

²⁸ Ibid at page 275.

²⁹ Exhibit E at page 6.

³⁰ Exhibit A at page 342.

³¹ Ibid at page 344.

³² Ibid at page 279.

³³ Ibid at page 321.

Lachman emailed the Appellant copies of all CMOH Orders and again sent her a copy of the PHA, and gave her the option of having a virtual or outdoor meeting.³⁴ The Appellant confirmed in her testimony that EO Bulek-Lachman gave her the option of having a virtual meeting. On April 20, 2021 EO Bulek-Lachman observed, during a follow-up inspection to the Suspension, several people entering the Premises empty handed and leaving with beverages.³⁵

[37] EO Bulek-Lachman provided clarification of PHA sections 59 and 71 to the Appellant in an email dated April 22, 2021. The Appellant replied the following day and indicated she reviewed the information and she has what she needs.³⁶ She also stated she has filed an appeal to the Board and she has decided to wait for its decision rather than attend a meeting. On April 26, 2021 EO Bulek-Lachman issued the April 26 Order and emailed it with the supporting Inspection Report to the Appellant, and stated that the Appellant must follow the permit suspension and cannot operate as a food premises.³⁷

[38] EO Bulek-Lachman inspected the Premises on April 29, 2021 with an RCMP officer and observed patrons with coffees. A part of the inspection, cash register receipts for the period April 20, 2021 forward were demanded and received. The receipts showed sales of coffee and other beverages since April 20, 2021.³⁸

[39] AHS received another public complaint on May 5, 2021 raising concerns that the Premises were continuing to provide coffee to the public, patrons were encouraged to not wear masks, and insufficient distancing between tables which are not properly sanitized.³⁹ Manager Gosselin conducted a follow-up inspection on May 14, 2021 and observed eight people enter the Premises without drinks and exit with drinks.⁴⁰

Analysis and Reasons

Are Items 1(a) and 1(b) of the April 12 Order vague with no specifics regarding date, time, evidence or particulars of the offence?

[40] Item 1 of the April 12 Order orders and directs:

1. *That the Owner immediately undertake and diligently pursue the completion of the following work in and about the above noted premises, namely:*
 - a. *Ensure that staff are properly wearing cloth or medical face masks. Staff who have a physical or mental limitation that prevents them from wearing a face mask must maintain 2 metres of distance from staff and patrons.*
 - b. *Ensure patrons are dining in accordance with all active CMOH Orders including but not limited to being distanced by 2 metres, seated on patios only with no more than 6 people per table, requiring diners to remain seated while consuming food or*

³⁴ Exhibit A at pages 288-289.

³⁵ Exhibit A at page 346.

³⁶ Ibid at pages 318-319.

³⁷ Exhibit C.

³⁸ Exhibit A at page 397.

³⁹ Exhibit F.

⁴⁰ Appellant Disclosure at page 56.

beverages and prohibiting seated patrons from interacting with persons seated at a different table.

- c. *Update and re-submit the Relaunch Plan Template. The plan must include details of appropriate COVID-19 risk mitigation measures to be implemented and followed with particular consideration to masking and distancing procedures among staff and patrons. Submit the Relaunch Plan Template to an Alberta Health Services Executive Officer for review. Ensure the details of the completed Relaunch Plan Template are shared with and implemented by all management and staff of the food establishment.*

[41] Section 59(1) of the PHA gives Executive Officers the authority to “inspect any public place for the purpose of determining the presence of a nuisance or determining whether this Act and the regulations are being complied with.” Section 1(1)(ee) of the PHA defines a nuisance as “a condition that is or that might become injurious or dangerous to the public health, or that might hinder in any manner the prevention or suppression of disease.”

[42] The CMOH issues her orders under section 29(2.1) of the PHA. The Executive Officers, who act to enforce the orders of the CMOH, issue orders under section 62(1) of the PHA. Section 62(1) 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.

[43] EO Bulek-Lachman inspected the Premises several times in response to public complaints. During her inspections she observed several instances of non-compliance with COVID-19 public health restrictions, including: a) tables not being spaced apart less than two metres; b) staff, including one daughter the Appellant identified as not being mask-exempt, and patrons not wearing masks within the Premises and not maintaining a distance of two metres; c) unmasked staff serving patrons; d) no protective screens or barriers at the serving counter. After seven inspections she issued the April 12 Order due to the Appellant’s non-compliance with COVID-19 public health restrictions. The Panel found EO Bulek-Lachman to be a credible and truthful witness and finds that she had reasonable and probable grounds to believe that a nuisance existed in or on the Premises, and that she carried out the inspections pursuant to the legislative authority given to Executive Officers under the PHA.

[44] Section 62(2) of the PHA states:

(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.

[45] EO Bulek-Lachman sent the April 12 Order, the Suspension and the April 26 Order to the Appellant, and the Appellant confirmed receipt of those Orders and the Suspension. The Panel finds that the April 12 Order, the Suspension and the April 26 Order were served on the Appellant. The Panel has considered the April 12 Order, the Suspension and the April 26 Order and finds that

they set out the reasons they were made, what the Appellant is required to do and the time within which it must be done, pursuant to section 62(2) of the PHA. For example,

- (a) the April 12 Order states that the inspection disclosed that unmasked staff members working at the counter provided service and were within two metres of patrons; and 16 students were observed in the Premises at one time and were seated less than two metres from other seated patrons. That Order also states the work that must be done and that the work referred to 1(a) and 1(b) “shall be completed immediately.”⁴¹
- (b) the Suspension states that the food handling permit was suspended under section 11(b) of the *Food Regulation* for ongoing non-compliance with the April 12 Order and section 71 of the PHA for obstruction. The Suspension states that the food handling permit suspension will be reviewed on April 26, 2021.⁴²
- (c) the April 26 Order disclosed that the Appellant breached the PHA and the *Food Regulation* by operating without a valid and subsisting food handling permit. That Order orders and directs the Appellant to immediately close the Premises to food and beverage services and obtain a valid food handling permit from AHS.⁴³

[46] After considering the evidence and the parties’ submissions, the Panel finds that the April 12 Order, the Suspension and the April 26 Order and supporting Inspection Reports were all issued to the Appellant and the Appellant received them. Further, the Appellant’s claim that parts 1(a) and 1(b) of the April 12 Order are vague must fail, as the supporting Inspection Reports clearly state the observations made by the EO during their inspections, and, collectively, the April 12 Order, the Suspension and the April 26 Order and supporting Inspection Reports clearly provide specifics regarding date, time, evidence or particulars of the offences. They also state what work must be done to become compliant and when the work must be done. Accordingly, the Panel finds that items 1(a) and 1(b) are valid.

If Items 1(a) and 1(b) of the April 12 Order are invalid, does Item 1(c) of the April 12 Order apply?

[46] As stated above, the Panel finds that items 1(a) and 1(b) of the April 12 Order are valid.

[47] EO Bulek-Lachman testified that the April 12 Order included requirement 1(c) to submit an updated RP because the RP submitted by the Appellant in January 2021 was not being followed. She observed during her inspections that information stated by the Appellant in the original RP might be incorrect. For example, AHS observations had confirmed that the Premises had more customers than were first indicated, including large groups of students entering the Premises. Also, the RP submitted in January 2021 indicated that the Appellant’s family members that cannot wear masks do not serve customers. The Appellant confirmed during her evidence that one of her daughters shown serving patrons in a photograph was not mask-exempt.

[48] The Appellant submits that an EO could not order the Appellant to complete the RP because the Government of Alberta website says that the RP is optional. The Respondent submits that

⁴¹ Exhibit A at page 378.

⁴² Exhibit B.

⁴³ Exhibit A at page 380.

section 62 of the PHA allows the EO to make an order to mitigate a nuisance, including ordering the owner to do work, and that section 62 gives the EO the authority to require the owner to do work. The panel prefers the Respondent's submissions on this point. Section 62(2) clearly authorizes the EO to issue an Order if the EO "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".

[49] The Panel accepts that EO Bulek-Lachman acted within the authority given to her in the PHA to issue the Orders and the Suspension and to require that the owner must do work to bring the Premises into compliance. Section 62(2) provides that the Order must set out what a person must do to become compliant with the PHA and regulations. In this case, EO Bulek-Lachman directed that the Appellant must submit the RP, along with the directions given in items 1(a) and 1(b). The Panel finds that EO Bulek-Lachman acted within her legislated authority to require the Appellants to submit an RP.

Findings and Conclusion

[50] After considering the evidence and submissions made by the Appellant and the Respondent, the Panel makes the following findings:

- (a) With respect to legal issue 1, the Board finds that items 1(a) and 1(b) are valid.
- (b) With respect to legal issue 2, the Board finds that item 1(c) of the April 12 Order applies.

[51] Based on the aforementioned findings, the Board:

- (a) confirms the Order of an Executive Officer dated April 12, 2021;
- (b) confirms the Food Handling Permit-Notice of Suspension dated April 15, 2021; and
- (c) confirms the Order of an Executive Officer Notice of Defined Closure dated April 26, 2021.

[52] The Orders and Suspension shall remain in force until such time as AHS rescinds the Orders and Suspension in accordance with the PHA.

--Original Signed--
Kevin Kelly, Chair
On behalf of the Hearing Panel of the
Public Health Appeal Board

Date: July 6, 2021

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