

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 JOHN SCOTT MANSFIELD
OF THE ORDER OF AN EXECUTIVE OFFICER
NOTICE OF CLOSURE
ISSUED BY ALBERTA HEALTH SERVICES
ZONE 2 CALGARY
DATED MAY 27, 2014
HEARING HELD JULY 24, 2014

Appearances:

Mr. John Scott Mansfield, Appellant
Ms. Jill W. Wilkie, Legal Counsel, Alberta Health Services/Respondent

Witnesses:

Mr. John Scott Mansfield, Appellant
Ms. Jiwan Bhardwaj, Executive Officer, Alberta Health Services Zone 2 Calgary

Board Decision:

The Board's decision is to reverse the Order dated May 27, 2014.

A. INTRODUCTION

The Appellant is in the hotdog business. He has several mobile food units that sell hot dogs at various venues. He has been in the business for more than eight years. On May 25, 2014 the Appellant had two permits to sell hotdogs at the Lilac Festival in Calgary.

He set up one of his locations and then proceeded to set up his second location which was a food truck licensed as CGY-086, the subject of the Order being appealed. The protocol is for mobile food units to be inspected by an Executive Officer from Alberta Health Services prior to selling food to the public at these types of venues. The inspections typically begin prior to the Festival starting which was at 10 a.m.

The Executive Officer, Jiwan Bhardwaj with Alberta Health Services, attended at the food truck on two occasions and was informed by an employee of the Appellant that the food truck was not ready for an inspection. Following the Appellant's arrival at the food truck, the Executive Officer was advised by one of the Appellant's employees that they were ready to proceed with the inspection.

After the inspection the Executive Officer verbally issued the Closure Order and two days later issued the Order of an Executive Officer Notice of Closure dated May 27, 2014 (the "Order"). The Order is attached as Appendix "A".

The Order was issued pursuant to s. 62 of the *Public Health Act* (the "Act"). The Order set out eight infractions of the Act, the *Food Regulation (31/2006)* and the *Food Retail and Foodservices Code*. It also set out a list of work that was to be completed by the Appellant to the satisfaction of an Executive Officer prior to being permitted to serve food to the public.

The Order was sent to the Appellant by email on May 27, 2014 and he received it by registered mail on May 29, 2014. The Notice of Appeal was dated June 8, 2014 and the accompanying letter from the Appellant was dated June 9, 2014. Both documents were received by the Board on June 10, 2014.

The Order was rescinded after an inspection was completed approximately two weeks after the Order was issued.

The hearing of this appeal was heard on July 24, 2014 at Standard Life Tower 639 5 Avenue S.W. Calgary, Alberta.

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 Order. The Appellant served notice 12 days after he received the Order by registered mail and 14 days after the Order was emailed to him.

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

There were no objections to the Board's jurisdiction to hear this appeal.

D. ISSUE

Were the infractions set out in the Order dated May 27, 2014 accurate and if not, should the Board vary or reverse the Order?

E. APPELLANT'S SUBMISSIONS

The Appellant provided the Notice of Appeal with a letter, photographs of the food truck (Exhibits C, D and E) and the hot holding unit.

The Appellant submitted three main grounds for appeal:

1. the Order included inaccurate information that ought to be corrected;
2. the Closure Order was not required; and
3. the Executive Officer was difficult to work with and the inspection process and issuance of the closure order lacked procedural fairness.

1. Inaccuracy of the Order

The Appellant submitted that the following details of the Order were incorrect:

- the coolers had ice in them and were sufficiently cool to store the hotdogs;
- the hot holding unit did work but the Executive Officer measured the temperature of the water in the unit before it had sufficient time to boil however it did boil after the Executive Officer measured the temperature;
- the hot water tank was working but there had not been sufficient time to heat the water to the required temperature and he had asked the Executive Officer to come back as he was just setting up the food truck;
- there was water leaking from the tap in the hand washing sink but it could be shut off as there were two other sinks with taps in the food truck that could have been used for hand washing;
- only one sink was required when selling hotdogs and not three as submitted by the Executive Officer;
- the water bottles were not on the ground as he saw them placed on the table;
- the pop cans arrived at the food truck directly from the Appellant's vehicle and were not on the food truck floor;
- the ketchup cans were stored as stated in the Order but they were sealed and unopened and the water dripping on them was clean water not waste water; and
- the dirty floor was the result of the leak from the tap which he could shut off and there was a mat sitting outside of the trailer that could have been taken inside.

The Appellant submitted that the employees who were working at the food truck that day were new and did not know how to turn on the generator. He submitted that the fridge was powered by the generator and it should have been turned on earlier. He placed the hot dogs in the fridge when he arrived at the food truck which was about 20 minutes before the inspection.

In addition, because the employees were new he showed them how to cook the hotdogs and those were the ones that were on top of the deep fryer. This had been a teaching exercise and he did not intend to sell those hotdogs to the public. Those cooked hotdogs and the ones that were in the fridge (referred to as the cooler in the Order) that were not the correct temperature were disposed of during the inspection and he was in total agreement with this solution.

The food truck was modern and had been renovated six month previous to the Order being issued. It had been in operation two days before the inspection at a three day event and it was fully operational at that time. A week before the Order was issued the plumbing and electrical systems had been inspected and were in working order. In addition, two to three days after the Order was issued, the Appellant booked an inspection of the food truck with Alberta Health Services and two weeks later it was inspected at which time there were no problems identified with these systems. The only repair that was required and completed prior to the re-inspection was the leaking tap on the third sink.

2. Requirement of a Closure Order

The Appellant submitted that there was no need for a Closure Order because all of the issues raised by the Executive Officer could have been addressed at the time of the inspection or shortly thereafter. He submitted there were solutions to the problems that were pointed out during the inspection but the Executive Officer was not open to those solutions.

During the inspection he had agreed to the disposal of the hotdogs that were the incorrect temperature to address the problem of the fridge (referred to as the cooler in the Order) not yet being at the correct temperature.

During the inspection he suggested turning the water supply off for the leaking tap. There were two additional sinks that could have been used. Turning the water off at the leaking tap would have also stopped the water from leaking onto the floor of the food truck, making it dirty, and onto the ground outside of the food truck.

He submitted that this solution was unacceptable to the Executive Officer and knowing that he would be unable to immediately fix the leaking tap, he took the initiative and decided not to open the food truck that day. Given the Executive Officer's response to his solutions, he felt there was no option but to stay closed.

The Appellant submitted that the Executive Officer did not need to issue a Closure Order because he had voluntarily agreed not to open his food truck to the public

3. Lack of procedural fairness

The Appellant denied that he advised the Executive Officer he was ready for inspection and that if one of his employees told her they were ready, it was improper for her not to ask him, the owner. It was the Appellant's position that the Executive Officer could see that he and his employees were setting up the food truck for service to the public and not ready for inspection: there were no condiments on the table and they were unloading items when she arrived. The

Appellant submitted that the Executive Officer ought to have given him a chance to finish setting up the food truck and had she returned a half hour later, the power systems would have had sufficient time to arrive at the required temperatures for storing food.

He submitted that he was treated unfairly in comparison to other food vendors who were given an opportunity to correct a lack of hot water problem and he should have been afforded this opportunity as well.

The Appellant denied that he was verbally advised of the Closure Order but that the Executive Officer had discussed with him some of the issues that were set out in the Order, but not all of them. In addition, he was not provided with any written documentation immediately after the inspection was completed.

F. ALBERTA HEALTH SERVICES SUBMISSIONS

Alberta Health Services provided Excerpts of Key Evidence and Arguments (Exhibit F) and a binder with a Summary of Events prepared by the Executive Officer, Notice of Appeal, Food Permit, Corporate Search, Inspection Report, photographs, copy of email to the Owner, Letter of Transmittal, Closure Order, Formal Hearing Meeting Letter and Prior Closure Orders from 2008 to 2012 (Exhibit G).

Alberta Health Services submitted the conditions that existed at the time of the inspection could have resulted in risks to the public's health and therefore a Closure Order was the proper Order to issue at the time. There were five main infractions.

1. The temperature of the cooler (not the ice coolers but the fridge) was 18 degrees Celsius and the hot dogs stored in the cooler measured between 9 and 16 degrees Celsius. Pictures of the thermometer and hot dogs were provided to support this finding. The temperature of the cooked hot dogs stored on top of the deep fryer measured between 34 and 45 degrees Celsius.

The measured temperatures were in violation of section 25(1) (a) and (b) of the *Food Regulation* that states all high-risk food must be stored, displayed and transported at a temperature of not more than 4 degrees Celsius or such higher temperature, or not less than 60 degrees Celsius or such lower temperature as an executive officer stipulates under subsection (4)...

The Executive Officer gave verbal testimony stating that the Appellant told her the holding unit was broken and he would hold the hotdogs at the back of the grill. During the inspection the hotdogs stored in the cooler that were too warm were disposed of and the ones that measured the correct temperature were placed in the ice cooler.

2. There was no hot water available. This was in violation of s. 17(1)(f)(ii) of the *Food Regulation* which states an operator must ensure that, before operation of the commercial food establishment commences, the commercial food establishment is supplied with hot

and cold running water that is safe for human consumption and available in quantities sufficient to meet the needs of the commercial food establishment. To support this finding the Executive Officer gave evidence that she washed her hands in the hand washing sink and there was no hot water available.

3. The water bottles, pop cans and tomato ketchup cans were not stored properly and the ketchup cans, which were not open, were stored where they were getting wet from the leaking tap in the hand washing sink. This was in violation of s. 23(1)(a) and (b) of the *Food Regulation* which states all food used or to be used in a commercial food establishment must be protected from contamination, and handled in a sanitary manner. To support this finding the Executive Officer gave verbal evidence that there was no mat under the ketchup tins and when she advised the employees the pop cans were dirty from being on the floor instead of rinsing them as she requested, the Appellant's employees wiped them with a cloth. A photograph of the ketchup tins was also provided
4. The hand washing sink tap was leaking and water was accumulating on the ground. This was in violation of s.17(1)(a) of the *Food Regulation* which states an operator must ensure that, before operation of the commercial food establishment commences, the commercial food establishment is of sound construction and in a good state of repair.

In support of this finding the Executive Officer gave adamant verbal evidence that the leaking tap could not be resolved by turning off the tap to that sink and using the other two sinks in the food truck. She gave evidence that three sinks were required: one for hand washing, one for washing utensils and another for sanitizing the utensils.

However, Alberta Health Services conceded near the close of the hearing that the application of the requirement for the separate hand washing sink was not correct and only one sink was required in these circumstances.

In addition, the Executive Officer gave verbal evidence that the water leaking on the ground was waste water and not clean water as she observed that when she washed her hands the water went onto the ground outside of the food truck. It was her position that the leak would have resulted in the fresh water being depleted prior to the end of the day.

5. There was dirt on the floor of the truck. This was a violation of section 28(2) of the *Food Regulation* which states 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.

Alberta Health Services also submitted that there was no proper cleaning solution at the start of the inspection and the staff had to prepare it during the inspection. This was not included in the Order.

With respect to the matter of the Executive Officer asking the employees rather than the Appellant if he was ready for the inspection to begin, Alberta Health Services submitted that

there was no obligation for the Executive Officer to deal with the Appellant only as the definition of Owner in the Act is broad and encompasses the employees who had care and control of the food truck. Alberta Health Services also submitted that at no time did the Appellant state that he was not ready for the inspection and that he could have asked for a re-inspection after failing the initial inspection and being issued the verbal closure order.

G. DECISION

Having considered all of the evidence and submissions of the parties, the Board has decided to reverse the Order of an Executive Officer dated May 27, 2014.

H. REASONS

The Appellant was late arriving at the second location where he was planning to sell hotdogs at the Lilac Festival. He had two new employees who were not experienced in setting up the food truck or starting the systems. After the Appellant arrived at the food truck he started the generator which provided power to the fridge, hot holding unit where the cooked hotdogs were held and hot water tank. These were three important systems that did not have sufficient time to attain the proper temperatures for food safety prior to the inspection by the Executive Officer. The inspection began before the food truck was set up and organized for selling hotdogs to the public but it was well after the Festival had started.

The Board finds that there were infractions of the Act and the *Food Regulation* and those infractions were critical to public safety. However, the improper temperature of the hotdogs was remedied during the inspection by discarding them and the improper temperature of the fridge, hot holding unit and hand washing water could have been remedied with sufficient time for those systems to attain proper operating temperatures. The opportunity to have these systems brought to the correct temperatures was not provided by the Executive Officer and not actively pursued by the Appellant because the Executive Officer made a fundamental error in applying the incorrect requirement for three operational sinks in the food truck.

The food truck only required one sink in this particular circumstance. The Executive Officer did not accept the solution proposed by the Appellant to address the leaking tap issue which was to turn off the water source to that tap and sink in the third sink. It was the inability to have the leaking tap immediately repaired that resulted in the Appellant volunteering not to open the food truck and serve hotdogs to the public that day.

Alberta Health Services' counsel submitted that if the systems in the Appellant's food truck only required more time to be functioning at the proper temperatures, he could have asked the Executive Officer to re-test the systems later but this was not a logical solution given that he was clearly advised by the Executive Officer that the leaking tap in the third sink was fatal to opening for service to the public that day. The Appellant stated he had previous experience dealing with leaking taps and knew it could not be immediately repaired.

The Board finds that the water leaking onto the ground and the ketchup tins was clean water from the leaking tap and not waste water. The food truck's plumbing functioned properly prior to the inspection and after the inspection with the exception of the leaking tap.

The Board finds that the other matters: the storage of the water, pop cans, ketchup, dirty floor and water on the ground outside of the food truck were minor matters that could have been easily resolved and would not have resulted in a Closure Order being issued.

The Board finds in setting aside the requirement for three sinks in the food truck, a requirement that Alberta Health Services admitted was an error at the time of the inspection, the remaining regulatory infractions could have been resolved by granting more time to the Appellant to have the operating systems attain the required temperatures. The Appellant gave evidence that other food vendors had been allowed more time when found to be lacking hot water which was not disputed by the Executive Officer.

The incorrect application of the three sink requirement by the Executive Officer, which both parties agreed could not be immediately remedied, had the effect of denying the Appellant the reasonable opportunity to satisfy the remaining regulatory infractions and conduct his business on that day.

The Board finds that in these rather unique circumstances the Closure Order ought to be reversed.

The Board finds that if the Appellant volunteered not to open the food truck to the public after the inspection was completed, that would not be sufficient grounds for the Executive Officer to refrain from issuing a Closure Order. If an inspection determines that important food safety systems do not meet regulatory requirements a Closure Order ought to be issued notwithstanding that the owner has volunteered not to open to the public. In most situations issuing a Closure Order is required to ensure that any non-functioning systems would be repaired prior to re-opening. In this situation more time was required to meet the required regulatory temperatures rather than repairs.

With respect to whether the inspection began without the consent of the Appellant, the food truck was a public place as defined by the Act and section 59 permits the inspection of a public place by an Executive Officer in these circumstances without the consent of the owner. While there is no regulatory requirement for the Executive Officer to obtain the consent of the owner to commence an inspection or to deal with the owner rather than the employees, doing so may have enhanced the Appellant's perception of fairness during the inspection process and improved the communication between the parties.

For the above reasons, the Board has reversed the Order.

Per: _____



Julia Jones, Chair

Also Sitting:

Linda Cloutier, Member

David Thomas, Member

Date: August 26, 2014

Appendix "A"

Order of an Executive Officer dated May 27, 2014

**ORDER OF AN EXECUTIVE OFFICER
NOTICE OF CLOSURE**

To: **John Scott Mansfield**
"the owner"

Jean Louise Mansfield...
"the owner"

RE: The food establishment located in Calgary, Alberta and municipally described as:
Dog Father's -CGY-086,22 Avenue and 4 Street ,SW , Calgary.

WHEREAS I, an Executive Officer of Alberta Health Services, have inspected the above noted premises pursuant to the provisions of the Public Health Act, RSA 2000, c. P-37, as amended;

AND WHEREAS such inspection disclosed that the following conditions exist in and about the above noted premises 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, namely:

1. Temperature of cooler is 18 C and internal temperature of hot dogs stored in this cooler measured between 9C-16 C
2. Hot holding unit is not functional. Temperature of cooked hot dogs stored on top of deep fryer measured between 34 C-45 C
3. No hot water is available
4. Water bottles are stored directly on floor on the walk way outside food truck.
5. Some pop cans are rolling on the dirty floor of the truck
6. Tomato ketchup cans are stored under hand washing sink and water is dripping from leaking hand washing faucet.
7. Faucet at hand washing sink is leaking and water is accumulating on the ground.
8. Accumulation of dirt on the truck floor.

AND WHEREAS such inspection disclosed that the following breaches of the Public Health Act and the Food Regulation, Alberta Regulation 31/2006 and the Food Retail and Foodservices Code exist in and about the above noted food establishment, namely:

- a. Temperature of cooler is 18 C and internal temperature of hot dogs stored in this cooler measured between 9C-16 C. Temperature of cooked hot dogs stored on top of deep fryer measured between 34 C-45 C. This is in violation of section 25(1)(a, b) of the Food Regulation, AR 31/2006 which states that. All high-risk food must be stored, displayed and transported at a temperature of not more than 4C or such higher temperature, or not less than 60C or such lower temperature as an executive officer stipulates under subsection (4).
- b. No hot water is available. This is in violation of section 17(1) of the Food Regulation, AR 31/2006 which states that. An operator must ensure that, before operation of the

commercial food establishment commences, the commercial food establishment, supplied with hot and cold running water that is safe for human consumption and available in quantities sufficient to meet the needs of the commercial food establishment

- c. Water bottles are stored directly on floor on the walk way outside food truck, some pop cans are rolling on the dirty floor of the truck, tomato ketchup cans are stored under hand washing sink and water is dripping on them from leaking hand washing faucet. This is in violation of section 23(1)(a, b) of the Food Regulation, AR 31/2006 which states that: All food used or to be used in a commercial food establishment must be protected from contamination, and handled in a sanitary manner.
- d. Faucet at hand washing sink is leaking and water is accumulating on the ground This is in violation of section 17(1)(a)(ii) of the Food Regulation, AR 31/2006 which states that. An operator must ensure that, before operation of the commercial food establishment commences, the commercial food establishment is of sound construction and in a good state of repair.
- e. Accumulation of dirt on the truck floor. This is in violation of section 28(2) of the Food Regulation, AR 31/2006 which states that: 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

AND WHEREAS, by virtue of the foregoing, the above noted premises are hereby declared to be Closed.

NOW THEREFORE, I hereby ORDER and DIRECT:

1. That the Owner immediately Close the above noted food establishment
2. That the owner immediately undertake and diligently pursue the completion of the following work in and about the above noted premises, namely:
 - a. Ensure Temperature of the cooler is fixed at or below 4 C
 - b. Ensure Hot holding unit is made functional to maintain temperature of perishable food at or above 60 c.
 - c. Ensure hot water is made available at hand washing sink and at two compartment sink.
 - d. Ensure food is stored off the floor in a sanitary manner
 - e. Ensure leaking faucet at hand washing sink is fixed and waste water must be collected in waste water tank.
 - f. Ensure floor of the truck is thoroughly cleaned to remove dirt.
3. That until such time as the work referred to above is completed to the satisfaction of an Executive Officer of Alberta Health Services; the above noted food establishment shall remain closed

The above conditions were noted at the time of inspection and may not necessarily reflect all deficiencies. You are advised that further work may be required to ensure full compliance with the Public Health Act and regulations, or to prevent a public health nuisance.

DATED at Calgary, Alberta, May 27, 2014.

Confirmation of a verbal order issued to John Scott Mansfield, on May 25, 2014.

Jiwan Bhardwaj M.Sc, B.Ed, B.A.Sc, CPHI(C)
Executive Officer
Alberta Health Services

You have the right to appeal

A person who

- a) is directly affected by a decision of a Regional Health Authority, and
- b) feels himself aggrieved by the decision may appeal the decision by submitting a Notice of Appeal form within ten (10) days after receiving the order to:
Public Health Appeal Board
c/o Central Reception
Main Floor, Telus Plaza North Tower
10025 Jasper Avenue NW
Edmonton, Alberta, T5J 1S6
Phone: 780-427-2813
Fax: 780-422-0914
Email: health.appealboard@gov.ab.ca

A Notice of Appeal form may be obtained by contacting Alberta Health Services at 780-342-0122 or by contacting the Public Health Appeal Board.

Health Legislation, Regulations and Standards

Electronic versions of the Public Health Act and Regulations are available at the Alberta Queen's Printer Bookstore 10611 - 98 Avenue, Main Floor, Park Plaza, Edmonton, Alberta, T5K 2P7 or www.qp.gov.ab.ca.

Health Legislation and regulations are available for purchase. Please contact Alberta Queen's Printer Bookstore 10611 - 98 Avenue, Main Floor, Park Plaza, Edmonton, Alberta, T5K 2P7 or www.qp.gov.ab.ca.

Copies of standards are available by contacting the Health Protection Branch of Alberta Health at 780-427-4518, or by visiting: www.health.alberta.ca/about/health-legislation.html

Order of an Executive Officer – Notice of Closure

RE: The Food establishment located in Calgary, Alberta and municipally described as: 229 Mount Douglas Close SE

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AIRDRIE Regional Health Centre
804 Main Street South
Airdrie, AB T4B 3K7
Phone: 403-912-8400
Fax: 403-912-8410

BANFF Health Unit
303 Lynx Street
PO Box 1266
Banff, AB T1L 1B3
Phone: 403-762-2990
Fax: 403-762-5570

CALGARY - Southport Atrium
10101 Southport Road SW
Calgary, AB T2W 3N2
Phone: 403-943-2288
Fax: 403-943-8056

CANMORE Public Health
#104, 800 Railway Avenue
Canmore, AB T1W 1P1
Phone: 403-678-5656
Fax: 403-678-5088

CLARESHOLM Health Unit
5221 2nd Street W
PO Box 1391
Clareholm, AB T0L 0T0
Phone: 403-625-4061
Fax: 403-625-4062

COCHRANE Community Health Centre
60 Grande Boulevard
Cochrane, AB T4C 0S4
Phone: 403-851-6030
Fax: 403-851-6009

OKOTOKS Health and Wellness Centre
11 Cimarron Common
Okotoks, AB T1S 2E9
Phone: 403-995-2600
Fax: 403-995-2639

STRATHMORE Public Health Office
650 Westchester Road
Strathmore, AB T1P 1H6
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Fax: 403-361-7244

www.albertahealthservices.ca/eph.asp