OAH 82-0900-31453

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HEALTH

In the Matter of the Administrative Penalty Order Issued to Fay's Homestyle Catering	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

This matter is pending before Administrative Law Judge Barbara J. Case pursuant to a Notice and Order for Hearing filed on May 2, 2014. A hearing was held on December 1, 2014, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101. At the hearing, the parties were given an opportunity to submit post-hearing closing statements on or before December 11, 2014. The record closed on that date with the submission of closing statements from both parties.

Cody M. Zustiak, Assistant Attorney General, appeared on behalf of the Minnesota Department of Health (Department). Diana Longrie, Attorney at Law, appeared on behalf of Fay's Homestyle Catering (Respondent).

STATEMENT OF ISSUES

1. Did Respondent[1] violate Minn. Stat. § 157.16, subd. 1 (2014), by failing to obtain a license to operate a food and beverage service establishment for her catering operation?

2. If Respondent did violate Minn. Stat. § 157.16, subd. 1, did the Department of Health properly issue an Administrative Penalty Order?

3. Was the $10,000 nonforgivable penalty assessed in the Administrative Penalty Order reasonable under Minn. Stat. §§ 144.99, subd. 4, .991 and 14.045 (2014)?

SUMMARY

The Administrative Law Judge concludes that Respondent violated Minn. Stat. § 157.16 (2014) and that the Department properly issued the Administrative Penalty Order. The Administrative Law Judge further concludes that the administrative penalty assessed was unreasonable under the statutory factors and recommends that the Department reduce the fine to $2,500.

[1] Throughout this decision Faye Scott and Faye's Homestyle Catering are referred to interchangeably, as they were in the parties' documents.

Based on all the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

FINDINGS OF FACT

A. Background

1. On February 25, 2014, the Department issued an Administrative Penalty Order to Respondent, Fay's Homestyle Catering. By letter dated March 24, 2014, Respondent appealed the Administrative Penalty Order and requested a hearing. This contested case proceeding was thereafter initiated by the Department.[2]

2. Respondent worked for State Farm Insurance for 26 years. She lost her job in 2006, and some time thereafter started a catering business. Respondent's husband is retired from his job as a truck driver for the State of Minnesota.[3]

3. Respondent has a "ServSafe Certification" issued on May 7, 2013 and expiring in 2018.[4]

4. Respondent has a Food Manager Certification effective May 29, 2013 and expiring on May 29, 2016.[5]

5. Respondent was operating her catering business out of her Maplewood, Minnesota home in 2009.

B. Respondent's One Prior Violation: May 2009, City of Maplewood

6. On May 5, 2009, the Department's foodborne illness hotline received a complaint of gastrointestinal illness from an individual who had attended the Annual State Usher's Convention on May 2, 2009 at Pilgrim Baptist Church in St. Paul. The complainant provided a list of attendees, and Department staff contacted them to obtain information on food consumption and illness history. Department staff interviewed nine attendees, who reported five cases of illness consisting of diarrhea and cramps and, in two cases, vomiting. No food items were significantly associated with the illness but all cases reported consuming foods provided by the caterer while four reported that they had also consumed breakfast items provided by the original complainant. Respondent had prepared two 15-pound roasts and 60 pieces of chicken for this event.[6]

7. The sanitarian who investigated the complaint identified improper time-temperature practices, cross-contamination issues, improper use of domestic equipment, and lack of a certified food manager. The Department concluded that this was a probable foodborne outbreak of gastroenteritis associated with a church

[2] Exhibits (Ex.) 5, 10; Notice and Order for Hearing.
[3] Testimony (Test.) of Faye Scott; Test. of Willy Scott.
[4] Ex. R-1; Test. of F. Scott.
[5] Test. of F. Scott.
[6] Ex. 6 at 5.

convention. The combination of symptoms, incubation periods, and illness durations were not characteristic of known foodborne pathogens. Since no stool specimens were obtained, the etiology of the outbreak could not be identified. Only a minority of convention attendees could be interviewed, and the vehicle was not identified. Improper cooling procedures and improper hot–holding and cold-holding temperatures were documented, but their role in the outbreak was not confirmed.[7]

8. Related to the above described event, on May 7, 2009 the City of Maplewood's Health Officer sent Respondent a letter informing her, in relevant part, as follows:

> catering operations require a commercially equipped kitchen that meets the requirements of the Minnesota food code. Requirements of the food code can be found in the Minnesota Rules, parts 4626.0450-4626.0505. Included but not limited to, in these requirements are commercial/NSF approved equipment, a designated hand sink, three (3) compartment sink and/or mechanical dishwasher for dishwashing, a state certified food manager, etc. Domestic kitchens and equipment can not [sic] be approved. In addition a catering operation requires a food establishment license that has been issued by the health authority.[8]

The letter also stated that "you have not met the above requirements and therefore you are hereby ordered to immediately discontinue all food service and/or catering activities within your home."[9]

9. Immediately after her receipt of the letter from the City of Maplewood, Respondent discontinued preparing food for her catering business in her home.[10] She began catering fewer than 20 events a year. These events were usually church events such as weddings and funerals.[11]

C. The September 27, 2013 Event and its Investigation

10. On September 27, 2013, Respondent prepared and provided food service to a private homecoming picnic for faculty, staff, and alumni of the College of Education and Human Development at the University of Minnesota (University).[12]

11. For this event, Respondent prepared most of the food in the church kitchen of the Progressive Baptist Church (Church) located at 1505 Burns Avenue, St. Paul, Minnesota 55106.[13] Respondent also occasionally used the church kitchen of Redeemer Lutheran Church (Redeemer Lutheran) located at 285 N. Dale Street in St. Paul.

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[7] Ex. 6, at 6 (report dated May 2009 without identification of a specific day).
[8] Ex. 9 at 6.
[9] *Id.*
[10] Test. of F. Scott.
[11] *Id.*
[12] *Id.*
[13] Ex. 3; Test. of F. Scott.

12. For the September 27, 2013 event, Respondent's husband grilled chicken, brats, hamburgers, and veggie brats in the parking lot of Redeemer Lutheran. As the items finished cooking, he took them off the grill and put them in a pan. He put the pans of cooked meat in a refrigerator in the Redeemer Lutheran kitchen. When he was completely finished grilling, he brought the meat over to the church kitchen and put the meat in the oven.[14]

13. Other menu items were prepared in the church kitchen, including rice and beans, rice and beans with smoked turkey, potato salad, grilled chicken, fried chicken, brats, hamburgers, veggie brats, buns, apple cobbler, cupcakes, assorted cookies, corn muffins, bottled water and canned soda.[15]

14. On October 1, 2013, Dr. Kirk Smith, Epidemiologist Manager with the Department, received an e-mail from the City of Maplewood asking if the Department had received complaints about illnesses occurring as a result of an event that was held at the University.[16] The Department was not aware of any reports. Nicole Koktavy, an Epidemiologist Senior with the Department, called Mark Rossi, a sanitarian at the University, to inquire if he had received complaints of illness after an event at the University.[17] When Mr. Rossi informed Ms. Koktavy that he had heard complaints of illness, Ms. Koktavy requested a list of the people that had reported being sick from the University.[18]

15. On October 3, 2013, Ms. Kotavy went to the Redeemer Lutheran to interview Respondent and her husband. Accompanying Ms. Kotavy was Aaron Gertz, a Department sanitarian and another Department employee.[19]

16. During Ms. Kotavy's interview of her, Respondent's description of the timing of her cooking, "food-flow," and food handling was imprecise and inconsistent.[20]

17. The Department was concerned with, among other things, Respondent's ability to hold, and her process for holding, the food at proper temperatures.[21]

18. The following includes specific Department concerns with Respondent's hot-holding and cold-holding capacity and execution, and the Department's other issues with Respondent's operation:

[14] Ex. 3 at 3.
[15] Ex. 3.
[16] Test. of Nicole Koktavy; Test. of Dr. Kirk Smith.
[17] Test. of N. Koktavy.
[18] *Id.*
[19] *Id.*; Ex. 4.
[20] *Id.*; Ex. 4 at 4.
[21] Test. of Aaron Gertz.

a. Whether the cooked rice was kept cool enough (below 41 degrees) when cooling or hot enough (above 140 degrees) when placed in the oven at a low temperature.[22]

b. Whether the red beans were allowed to cool to a safe cool temperature or were packed for the event after they had cooled and then reheated on chafing dishes at the event.[23]

c. Whether the food was put into aluminum pans and then into black insulated bags and held at an undetermined temperature for transfer at approximately 1:45 p.m. for service at 4:30. Insulated bags are not considered sufficient for transporting hot food; an electrical unit is required.[24]

d. There were no records of the temperature of the food being taken by Respondent at the church.[25]

e. The food was warmed in chafing dishes at the event and no temperatures were taken at the event. Chafing dishes are not properly used for reheating food because they cannot bring food up to a proper temperature and they heat unevenly.[26]

f. The church kitchen did not have the capacity for the preparation of food for hundreds of people. The cold-holding area was one residential size refrigerator and the oven was the only equipment available for hot-holding food and so the choice had to be made whether to use the oven to cook or to hold food safely hot.[27]

g. The sanitizer was not working.[28]

h. The period of time between the beginning of the food preparation and the food service time.[29]

i. The cooking of food on a grill in a church parking lot was a concern because even if Respondent had been licensed, cooking in that manner would not have been permitted.[30]

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[22] Test. of A. Gertz and N. Koktavy.
[23] *Id.*
[24] Test. of N. Koktavy
[25] *Id.*
[26] Test. of N. Koktavy
[27] Test. of A. Gertz; Ex. 4.
[28] Test. of A. Gertz; Ex. 4.
[29] Test. of A. Gertz; Ex. 4.
[30] Test. of A. Gertz; Ex. 4.

j. Respondent's food operation was not licensed to operate in either church kitchen.[31]

19. The Department wrote an inspection report, Report 8008131131, which cited Respondent for violating Department rules regarding knowledge of "foodborne disease prevention, time and temperature control for potentially hazardous foods, safe handling procedures."[32] Specifically, improper food safety practices were noted including reheating food items in chafing dishes, cooling foods on the counter at room temperature, and improper hot-holding by storing foods in insulated bags.[33]

20. The report also cited Respondent for failing to notify the Department as soon as she knew that there had been complaints of illness from a customer.[34]

21. Because part of the University is located in Hennepin County, on October 1, 2013, the Department notified the Hennepin County Human Services and Public Health Department (HSPHD) Epidemiology Unit of the reports.[35]

22. HSPHD conducted an investigation of the outbreak, which was subsequently reviewed by Dr. Smith and Ms. Kotavy.[36] A list of picnic attendee e-mail addresses was provided to HSPHD by a representative of the College of Education and Human Development. HSPHD gathered information from picnic attendees about food consumption and illness history via an e-mailed interview form.[37] E-mail messages were sent to 273 picnic attendees. 53 responses were received.[38]

23. For this event, the Department defined a case as "anyone who has vomiting, three or more loose stools in a 24 hour period and also has consumed the food from that event."[39]

24. Of the 53 picnic attendees who responded to the e-mail interview form, 22 met the definition of what the Department considers a "case." All cases reported diarrhea, 18 reported cramps, 5 reported fever, 1 reported vomiting, and none reported bloody stools. The median incubation was 9.5 hours; the range was 4 to 15 hours. The median duration of illness was 16 hours; the range was 4 to 65 hours. No cases reported visiting a healthcare provider.[40]

25. Both those reporting illness (cases) and those who did not (controls) consumed a wide variety of food at the picnic.[41] A univariate analysis indicated that

[31] Ex. 3 at 2.
[32] *Id.* at 3; Test. of N. Koktavy; *see also* Minn. R. 4626.0030 2-102.11 (2013).
[33] Ex. 3, at 3.
[34] Ex. 3, at 4.
[35] Ex. 6 at 1; Test. of N. Koktavy.
[36] Ex. 6.
[37] *Id.* at 1-2.
[38] *Id.* at 2; Test. of N. Koktavy.
[39] Test. of N. Koktavy.
[40] Ex. 6 at 2; Test. of N. Koktavy.
[41] Ex. 6 at 3.

illness was significantly associated with eating any red beans and rice (vegetarian or containing turkey). Through multivariate analysis, only red beans and rice was independently associated with illness.[42]

26. Because of the length of time between the event and the investigation, stool samples were not taken to confirm the etiology of the illness outbreak. However, the distribution of incubation periods and symptoms are characteristic of illness caused by Clostridium Perfringens or the diarrheal form of Bacillus Cereus.[43]

27. The Department concluded that "a foodborne outbreak associated with consumption of red beans and rice" occurred as a result of the homecoming event catered by Respondent on September 27, 2013.[44]

28. The Department's investigation surmised that the outbreak likely resulted from improper cooling procedures and improper hot-and-cold holding temperatures, which created an environment in which Clostridium Perfringens or Bacillus Cereus proliferated and survived in food.[45]

29. The *Control of Communicable Diseases Manual*, an authoritative source in the field, indicates the intestinal illness caused by Clostridium Perfringens food intoxication is characterized by the sudden onset of colic (abdominal pain) followed by diarrhea.[46] The Manual states that it is "[g]enerally a mild disease of short duration, 1 day or less," and is "rarely fatal in previously healthy people."[47] The germ is typically transmitted by ingesting food "that was contaminated by soil or feces and then held under conditions that permit multiplication of the organism.[48]" The manual further notes:

> a. Almost all outbreaks are associated with inadequately heated or reheated meats, usually stews, meat pies, and gravies made of beef, turkey or chicken. Spores survive normal cooking temperatures, germinate and multiply during slow cooling, storage at ambient temperature, and/or inadequate rewarming. Outbreaks are usually traced to food catering firms, restaurants, cafeterias and schools that have inadequate cooling and refrigeration facilities for large-scale service.[49]

The manual goes on to identify the following preventive measures:

> a. Educate food handlers about the risks inherent in large scale cooking, especially of meat dishes. Where possible, encourage serving hot dishes while still hot from initial cooking.

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[42] *Id.*
[43] *Id.* at 4.
[44] *Id.*; Test. of N. Koktavy.
[45] Ex. 6 at 4.
[46] Ex. 7.
[47] *Id.*
[48] *Id.*
[49] *Id.*

b. Serve meat dishes hot, as soon as they are cooked, or cool them rapidly in a properly designed chiller and refrigerate until serving time; reheating, if necessary, should be … rapid. Do not partially cook meat and poultry one day and reheat the next, unless it can be stored at a safe temperature. Large cuts of meat should be thoroughly cooked; for more rapid cooling of cooked foods, divide stews and similar dishes prepared in bulk into many shallow containers and place in a rapid chiller.[50]

30. The Department's testimony regarding whether it would license a food establishment to operate from a church kitchen was contradictory and confusing.[51]

31. Respondent applied for a license on October 1, 2013.[52] She received a "receipt/temporary license" for her remittance of $541. The receipt states that it is for a "Catering food establishment for 1505 Burns Ave. Progressive Baptist Church … for 2013-14." As of December 1, 2014, Respondent had not received any communication from the Department regarding this temporary license and her check had not been returned.[53]

D. The Penalty Determination

32. The "Health Enforcement Consolidation Act"[54] required the Department to prepare a plan for using the administrative penalty and cease-and-desist authority of the Act.[55]

33. The Commissioner of Health has developed a Plan for the Use of Administrative Penalty and Cease and Desist Authority and Other Division-wide Enforcement Tools (Plan) to serve as guidance in using the Administrative Penalty Order authority. The Plan describes the process the Department follows when using its administrative penalty authority.[56] The Plan includes a penalty calculation worksheet and instructions, including a penalty calculation matrix, to guide Department staff in calculating administrative penalties.[57] Under Part II, item C of the Plan, the performance of work without a required license is included in a list of "serious" violations.[58]

34. On November 19, 2013, the Department held an "enforcement forum" to decide on an appropriate enforcement action for Respondent's violations of the Food

[50] *Id.*
[51] Mr. Gertz first testified that he would not license a church kitchen as a food establishment because they are exempt from licensing. He later described a scenario in which an applicant could apply to use a church kitchen as part of its application plan.
[52] Ex. R2.
[53] Test. of F. Scott.
[54] Minn. Stat. § 144.989 (2014).
[55] Minn. Stat. § 144.99, subd. 7 (2014).
[56] Test. of Mark Peloquin.
[57] Ex. 8.
[58] *Id.* at 4 (Operating or performing work for which a license is required without the required license is generally noted as likely to be considered serious.)

Code.[59] The "enforcement forum" is not part of the Plan. The forum occurs when the Department "pulls together persons who are involved in any particular potential enforcement case to discuss the specifics of the case, make a determination if enforcement action is appropriate and, if so, the type of action to be taken that is authorized by the statute. If a penalty is involved it also includes the calculation of the penalty."[60] The forums consist of many Department employees in order to ensure that all the factors are considered in a particular case and for "insuring consistency across the program."[61]

35. Participants in the forum included: Dan Disrud, a sanitarian supervior; Colleen Paulus, a section manager; Blake Nordin, an environmental health supervisor; Mark Peloquin, the Enforcement Coordinator; Mathew Thies, a supervisor and sanitarian; Wendy Spanier, an environmental health supervisor, and April Bogard, an environmental health supervisor .[62]

36. The forum participants documented their decisions on a summary worksheet.[63]

37. For their first step, the forum participants determined whether the "penalty is forgivable or non-forgivable."[64] According to the Plan, "for a serious or repeated violation(s), the commissioner may issue a non-forgivable administrative penalty order."[65] The Department often makes a portion of a fine forgivable for a licensed establishment in order to provide an incentive for the operator to comply. The repeat nature of the violations is not a factor in whether a fine is made forgivable, rather it is whether there is a need for corrective actions.[66]

38. The decision of whether a penalty is forgivable or non-forgivable, in whole or in part, is within the Department's discretion.[67] Throughout the Plan it is emphasized that non-forgivable penalties *may* be assessed only if a violation is serious, repeated, or both.[68] Nowhere does the plan state that if a violation is serious or repeated, or both, that the sanction *must* be non-forgivable.

39. Under the Plan, a "serious violation" includes "conduct showing disregard for requirements or standards, or violations that present an actual or potential danger to public health or natural resources."[69] The forum participants determined that Respondent's violation of the licensure requirement fell under the violations defined as

[59] Ex. 9; Test. of M. Peloquin.
[60] Test. of M. Peloquin.
[61] *Id.*
[62] Ex. 9; Test. of M. Peloquin.
[63] Ex. 9.
[64] *Id.* at 2.
[65] Ex. 8 at 12.
[66] Test. of M. Peloquin.
[67] Ex. 8; Test. of M. Peloquin.
[68] Ex. 8 at 8.
[69] *Id.* at 7.

serious under the Plan[70] because Respondent "failed to obtain a license to operate the food and beverage establishment as required by statute."[71]

40. The forum participants determined that the violation was not a repeat violation because the Department "had not had any contact with the Respondent prior to this time so we had no indication if this was a repeat or not."[72]

41. The forum participants determined that the penalty should be non-forgivable because "the forum determined a non-forgivable penalty was deemed necessary to deter future violations."[73]

42. According to the Plan, "[b]ecause of the seriousness and finality of a non-forgivable administrative penalty order, the department will provide written notice of the alleged violation(s) and an opportunity for response before issuing the non-forgivable order. The department will provide a letter, called a 'ten-day letter,' to the regulated party which clearly identifies the violation(s) and explains the underlying findings. The letter contains a request that the regulated party provide, within ten calendar days, any information that might impact the commissioner's determination of alleged violation(s). In addition, department staff may contact the regulated party by telephone to explain the violation(s)."[74]

43. The Department did not send Respondent a "ten-day letter."[75]

44. In determining the base penalty, the forum participants consider "the deviation from compliance and the potential for harm regarding the particular violation and then use a matrix that is Appendix B of the Plan to locate the appropriate penalty range according to the matrix."[76]

45. The matrix has a vertical axis titled "Potential for Harm" and a horizontal axis titled "Deviation from Compliance." Each axis has a range of minor, moderate, or severe.[77] The forum participants determined that the potential for harm in this case was severe because actual harm resulted when "at least 22 persons fell ill."[78] The forum participants determined that the deviation from compliance was severe because "the operator of the business failed to obtain a license to operate the food and beverage establishment as required by statute."[79]

46. The forum participant's determination that Respondent's violation had been severe on both axes put the penalty into the highest possible range: a fine of

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[70] *Id.*
[71] Ex. 9 at 2.
[72] *Id.*; Test. of M. Peloquin.
[73] Ex. 9, at 2.
[74] *Id.*
[75] *See* record generally; Test. of M. Peloquin.
[76] Ex. 8 at 49; Test. of M. Peloquin.
[77] Ex. 8 at 49.
[78] Ex. 9 at 2; Test. of M. Peloquin.
[79] Ex. 9 at 2; Test. of M. Peloquin.

$5,000 to $10,000.[80] The forum participants, and subsequently the Department, levied the highest penalty possible because "actual harm did occur when persons were made ill."[81]

47. The forum participants next applied a series of factors to determine if an adjustment to the base penalty was warranted.[82] Adjustments can only be used to increase a penalty, not to reduce it.[83]

48. The Department's penalty procedures take mitigating factors into account at the time the base penalty is calculated.[84]

49. The forum participants made a 100% adjustment to the base penalty amount of $10,000. Under a "willfulness of the violation" factor, the forum participants reasoned that Respondent's previous order from the City of Maplewood to not provide catering out of her home and without a license meant that she had a "history of past violations."[85]

50. The forum participants finally reduced the penalty back to $10,000, the maximum penalty the law allows.[86]

51. The Department issued an Administrative Penalty Order to Respondent on February 25, 2014, citing Minn. Stat. § 157.16 (2014) which requires an individual to obtain a license to operate a food and beverage service establishment prior to operation.[87]

52. Respondent attempted to obtain a license on October 1, 2013.[88] The application and fees were accepted in error because at the time of the application there was a transition of authority from the City of St. Paul to the Department.[89]

53. Respondent appealed the Administrative Penalty Order on March 24, 2014.[90]

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Department have jurisdiction in this matter.[91]

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[80] Ex. 8, at 49.
[81] Test. of M. Peloquin.
[82] Ex. 9, at 3, 4.
[83] Test. of M. Peloquin.
[84] *Id.*
[85] Ex. 9 at 4; Test. of M. Peloquin.
[86] Ex. 9 at 5; *see also* Minn. Stat. § 144.99, subd. 4.
[87] Ex. 5 at 2.
[88] Test. of M. Peloquin; Ex. R-2.
[89] Test. of M. Peloquin.
[90] Ex. 10.
[91] Minn. Stat. §§ 14.50, 144.991, subd. 5 (2014).

2. The Notice and Order for Hearing are proper in all respects and the Department has complied with all relevant procedural requirements set forth by statute and rule.[92]

3. The Department is responsible for adopting and enforcing rules establishing standards for food and beverage service establishments, hotels, motels, lodging establishments, and resorts.[93]

4. The Commissioner of Health (Commissioner) has adopted the Food Code, which outlines various requirements and standards for food and beverage establishments.[94] The Department is responsible for enforcing the Food Code.[95]

5. Minnesota Statutes, section 157.16, subdivision 1 (2014), states, in relevant part, that:

> a license is required annually for every person, firm, or corporation engaged in the business of conducting a food and beverage service establishment. … Any person wishing to operate a place of business licensed in this section shall first make application, pay the required fee specified in this section, and receive approval for operation, including plan review approval. Application shall be made on forms provided by the commissioner and shall require the applicant to state the full name and address of the owner of the building, structure, or enclosure, the lessee and manager of the food and beverage service establishment, …; the name under which the business is to be conducted; and any other information as may be required by the commissioner to complete the application for license.[96]

6. A "food and beverage service establishment" is a "building, structure, enclosure, or any part of a building, structure, or enclosure used as, maintained as, advertised as, or held out to be an operation that prepares, serves, or otherwise provides food or beverages, or both, for human consumption."[97]

7. The Food Code includes catering in its definition of a food establishment.[98]

8. A person shall not operate a food establishment without a valid license to operate issued by the regulatory authority.[99]

9. The requirements for obtaining a license are governed by the Food Code.

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[92] Minn. Stat. § 14.58 (2014).
[93] Minn. Stat. § 157.011 (2014).
[94] Minn. R. 4626.0010-.1870 (2013).
[95] Minn. Stat. § 157.19 (2014).
[96] Minn. Stat. § 157.16, subd. 1.
[97] Minn. Stat. § 157.15, subd. 5 (2014).
[98] Minn. R. 4626.0020, subp. 35(a)(1).
[99] Minn. R. 4626.1755.

10. Respondent operated a catering service without a food and beverage service establishment license in violation of Minn. Stat. § 157.16, subd. 1.

11. The Health Enforcement Consolidation Act of 1993 authorizes the Commissioner to issue administrative penalty orders for violations of the Food Code.[100] An administrative penalty order can have two components: a correction order and assessment of a monetary penalty.[101] The Department has adopted the "Plan for Use of Administrative Penalty Order, Cease and Desist Authority, and other Enforcement Tools" (Penalty Plan) to utilize when enforcing the Food Code via administrative penalty orders.[102]

12. The Department has the burden of proving by a preponderance of the evidence that its enforcement action against Respondent is warranted.[103]

13. Minn. Stat. § 144.991, subd. 4 (2014), requires that the procedures set forth in that section must be followed when issuing administrative penalty orders. Section 144.991, subd. 1(a) (2014), states that, in determining the amount of a penalty, the Commissioner may consider:

> (1) the willfulness of the violation;
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> (2) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;
>
> (3) the history of past violations;
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> (4) the number of violations;
>
> (5) the economic benefit gained by the person by allowing or committing the violation; and
>
> (6) other factors as justice may require, if the commissioner specifically identifies the additional factors in the commissioner's order.

Section 144.991 goes on to state that, if the violation is not "serious" or "repeated," the penalty "must be forgiven" if the violation is corrected within 30 days or the person to whom the order was issued has developed a corrective plan acceptable to the Commissioner. For serious or repeat violations, the Commissioner may assess a penalty which will not be forgiven.

14. In Minn. Stat. § 144.99, subd. 7, the Legislature directed the Commissioner to finalize a plan for the Department when using its administrative penalty authority.

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[100] Minn. Stat. § 144.99, subd. 4.
[101] *Id.*
[102] Minn. Stat. § 144.99, subd. 7.
[103] Minn. R. 1400.7300, subp. 5 (2013).

15. Under Minn. Stat. § 144.991, subd. 5(c), the Administrative Law Judge may not recommend a change in the proposed penalty amount unless the Judge determines that, based on the factors set forth in Minn. Stat. § 144.991, subd. 1, the amount of the penalty is unreasonable.

16. For reasons set forth in the Memorandum below, the Administrative Law Judge finds that based on the factors set forth in Minn. Stat. § 144.991, subd. 1, the amount of the penalty is unreasonable and, therefore, recommends that the penalty be reduced to $2,500.

17. If the Administrative Law Judge finds that the hearing was requested solely for the purposes of delay or that the hearing request was frivolous, the Commissioner may add the costs that the Office of Administrative Hearings charged to the agency for the hearing to the amount of the penalty.[104]

18. The Administrative Law Judge finds that request for hearing in this case was not frivolous and there were reasonable bases for the request.[105]

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Health affirm the Administrative Penalty Order issued against Respondent, Fay's Homestyle Catering, but reduce the monetary penalty to $2500.

Dated: January 15, 2015

s/Barbara J. Case
BARBARA J. CASE
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Health will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions of Law, and Recommendations. Under Minn. Stat. § 14.61 (2014), the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Edward Ehlinger, Commissioner, Minnesota Department of Health, 85 East Seventh Place, P.O. Box 64975, St. Paul, MN 55164, to learn the procedure for filing exceptions or presenting argument.

[104] Ex. 8 at 17.
[105] Ex. 10.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2014). The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1 (2014), the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

A. Background

The Department of Health is charged by the legislature to protect the health and safety of the people of Minnesota.[106] The inspection of food service establishments is an integral part of its fulfillment of that critical responsibility. The epidemiologists and sanitarian who testified regarding this case appeared to take a factual and neutral approach to their inspection and investigation duties. The Administrative Law Judge also found the Respondent to be credible and forthright. Although the Department viewed many of her actions as willfully violative of the law, the Administrative Law Judge viewed her actions as generally attempting to comply with rules she found confusing.

In this case, the Department seeks to impose the maximum possible penalty on Respondent for operating a food and beverage service establishment without a license. The Department argues that it followed its "Plan for the Use of Administrative Penalty and Cease and Desist Authority" and that its penalty determination is entitled to deference.[107] Respondent argues that the Department failed to follow its own rules for due process in this case. She also contends that the monetary penalty assessed in the Administrative Penalty Order is unreasonable and should be reduced.

B. The Violation and Foodborne Illnesses

It is undisputed that Respondent acted as the caterer for an event at the University and was not licensed to provide that service. The facts also show it was reasonable for the Department to conclude that Respondent's food was the cause of illness in 22 people. In the majority of those sickened, the illness caused loose stools and was resolved in about a day. While this result is unacceptable, it is not comparable to other reported cases in which the Department has levied its maximum fine of $10,000 on an individual.[108] Based upon review of the entire record in this case, the

[106] Minn. Stat. § 144.05, subd. 1 (2014).
[107] Ex. 8; Department's Closing Argument at 20.
[108] *See In re the Administrative Penalty Order Issued to Anna Brown*, OAH No. 15-0900-21862-2, 2011 WL 3348141, at *1-*3 (June 29, 2011) (the unlicensed respondent prepared food for 2 events and, as a result, twelve people became ill with Salmonella Enteridid SE1B1, one person was hospitalized for four days, and one illness lasted fourteen days). *But see In re the Administrative Penalty Order Issued to Susan Delaittre*, OAH No. 11-0900-20081-2, 2009 WL 1648857, at *13 (March 16, 2009).

Administrative Law Judge concludes that Respondent violated the law regarding food establishments and, while illness resulted from those violations, the penalty imposed by the Department's committee was unreasonable considering the factors in Minn. Stat. § 144.991, subd. 1.

C. Failure To Provide the Ten-Day Letter

The Administrative Law Judge finds that the Department's failure to provide the ten-day letter was a violation of the process that the Department relies upon to ensure that its determinations are consistent and not arbitrary. When balanced against the Department's responsibility for assuring food safety, the denial of due process is not sufficient to support dismissing the case in its entirety. Regardless, the Department contradicts itself when it represents that it is applying a consistent process in the form of a penalty grid to reach the penalty and yet is inconsistent in its application of the ten-day letter right. If the Department depends on the Plan to demonstrate that it is not making arbitrary penalty determinations then the Department must apply the Plan in its entirety. The Department insists that nothing Respondent could have said would have altered its penalty in this case.[109] But that statement leaves the impression that the penalty was not considered at the forum but rather was a foregone conclusion. The essence of due process is the opportunity to be heard at a meaningful time in a meaningful manner.[110] Respondent was denied that right when the unforgiveable penalty was determined without her being given the process that the Department itself has determined is due. If the Department's policy is that an unlicensed entity that causes illness is always subject to the highest penalty, then that unwritten rule makes the consideration of the factors and the opportunity to respond a pointless exercise and not actual due process. The Administrative Law Judge believes that had the Department opened the channels of communication that the ten-day letter affords, it would have better appreciated the Respondent's understanding of its rules and so not viewed her actions as negatively. At the same time the process would have opened channels of communication so that the Respondent might better understand compliance requirements.

D. The Penalty Determination

The sole issue is whether the amount of the penalty is reasonable, especially when considering the fact that the Department did not follow its own method for providing due process when it failed to provide Respondent with a "ten-day letter" and the required opportunity for input prior to the determination of the penalty. The Department determined that the potential for harm was severe because at least 22 people became ill after eating the food at the event and the deviation from compliance was severe because Respondent failed to obtain a license before catering the banquet. The Department chose the top of the range set forth on the penalty matrix because actual harm (illness) resulted from Respondent's improper food handling. The

[109] In another similar case, the Department acknowledged that facts submitted by a Respondent might lead to a consideration of the lowering of the penalty. *In re the Administrative Penalty Order Issued to Anna Brown*, OAH No. 15-0900-21862-2, 2011 WL 3348148, at *7 (June 29, 2011).

[110] *See, e.g., Eisen v. State,* 352 N.W.2d 731, 736 (Minn.1984); *In re Henry Youth Hockey Ass'n, License No. 02795*, 511 N.W.2d 452, 457 (Minn. Ct. App. 1994).

Department argues that the calculations were consistent with the Plan and resulted in a reasonable penalty amount.

The Department adjusted the base penalty of $10,000 because, in 2009, Respondent "pled guilty to failing to obtain a food and beverage license" and "as part of her probationary conditions, she was required to obtain a license before offering catering services."[111] The Department's brief references this citation but it was not entered into evidence. The only evidence offered by the Department in this regard is a May 7, 2009, letter to Respondent from the City of Maplewood Health Officer which directed Respondent to "immediately discontinue all food service and/ or catering activities within your home. ...."[112] The letter also informed Respondent that "catering operations require a commercially equipped kitchen that meets the requirements of the Minnesota food code."[113]

After she received the letter from the City of Maplewood, Respondent ceased operating her catering business out of her home and moved her operation into two church kitchens which she understood to be licensed by the City of St. Paul.[114] The majority of her roughly 20 catering engagements per year were for church functions such as weddings and funerals.[115] Providing food for weddings, fellowship meals, or funerals conducted by a faith-based organization using any building constructed and primarily used for religious worship or education is specifically exempt under the Food Code.[116] Approximately once a year Respondent catered an event in the City of St. Paul. For these few events she obtained a temporary license from the City of St. Paul.[117] During the time that Respondent was engaged to cater the University event, the City of St. Paul's food licensing division ceased operation and stopped answering its phones.[118] This period was confusing to the Department employees as well as to licensees, as Mr. Peloquin referenced when he explained why the Department had issued Respondent a "receipt/temporary license" on October 1, 2013.[119]

The penalty forum participants viewed Respondent as willfully violating the law.[120] The facts illustrate the contrary. When Respondent was told to stop operating from her home, she stopped. When she understood she needed a licensed location to cater, she found church kitchens that were, or she believed were, licensed. She obtained a "ServSafe Certification" and a Food Manager Certification from the State. The Department rested its willfulness finding on the letter Respondent received in 2009 from the City of Maplewood, and stated that the letter ordered her to be licensed.[121] The letter does not state that Respondent must be licensed: it states that she must not

[111] Department's Closing Argument at 9.
[112] Ex. 9.
[113] *Id.*
[114] Test. of F. Scott.
[115] *Id.*
[116] Minn. Stat. § 157.22 (2014).
[117] Test. of F. Scott.
[118] Test. of A. Gertz.
[119] Test. of M. Peloquin.
[120] Ex. 8 at 4.
[121] Test. of M. Peloquin.

operate out of her home, that catering operations require a commercial kitchen and that the City of Maplewood requires a license to run a home-based business.[122] Respondent's actions subsequent to receiving this letter evidence a desire to comply with the requirements set forth. Though the Department argues that Respondent testified that she knew she needed a license before and after the enforcement action, the evidence does not make it clear that she knew she was not complying with licensure requirements.

In levying the highest possible penalty, the Department emphasized the fact that Respondent was unlicensed and that the forum participants believed her behavior was willful.[123] It did so without affording Respondent an opportunity to fully respond outside of the actual inspection or the contested case hearing. Though the Department viewed Respondent as a repeat violator, the Administrative Law Judge perceived her as attempting to comply with complex rules when she was offered clear direction. Further, as the Department admitted, this event occurred during a confusing time of transition from the City of St. Paul to the Department. Finally, the Department did not follow its own procedures for the issuance of an unforgiveable fine. There cannot be compliance without comprehension and there cannot be comprehension without communication: the Department bears some responsibility for the lack of comprehension and communication here. Levying the maximum penalty compounds the lack of communication. As the Department acknowledged, forgivable fines engage licensees with the Department and facilitate compliance.[124] The Administrative Law Judge respectfully recommends that, based on Respondent's demonstrated attempts to meet requirements, a lower penalty or a forgivable penalty, or both, is likely to have that desirable effect here.

B. J. C.

[122] Ex. 9.

[123] The Department also determined that the gravity was of the greatest magnitude as "actual harm occurred" but did not consider that even within actual harm there are degrees of harm. The Department claimed to not have considered past violations, but that is not accurate as the Department issued a 100% increase of the penalty due to a violation, Respondent's first, that occurred in 2009. Similarly, the Department stated it did not consider the number of violations but it is hard to separate that consideration from the Department's 100% increase based upon the previous penalty. As noted above under the Penalty Determination section, if being unlicensed coupled with actual harm always results in the highest penalty, as the Department's testimony seemed to indicate, then there is no consideration of the factors and no room for a consideration of the spectrum of possible or actual harms. If the Department's policy is that an unlicensed entity who causes illness is always subject to the highest penalty then that unwritten rule makes the consideration of the factors or the opportunity a pointless exercise and not actual due process.

[124] Test. of M. Peloquin.