

POLICY AND PROCEDURE

SUBJECT/TITLE:	Food Safety Enforcement
SCOPE:	Food Safety Program, Environmental Health
CONTACT PERSON & DIVISION:	Stephanie Zmuda, RS, Environmental Health Director
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PURPOSE

The intent of this document is to set forth a policy and procedures for enforcement in the food safety program.

POLICY

The department will implement and maintain a progressive enforcement model that ultimately ensures each facility is in compliance with the Ohio Uniform Food Safety Code. This approach begins with providing education and if non-compliance persists, enforcement will escalate through a series of actions that may include license revocation. This approach must be equally applied to all facilities. When applied properly, it will provide opportunities for compliance and promote fair and objective treatment.

DEFINITIONS

Administrative Hearing: An informal hearing that includes the Health Commissioner and Environmental Health Director. The hearing may result in writing a corrective action plan for violations or in setting a Board of Health hearing.

Board of Health Hearing: A formal hearing with the Board of Health that may result in license suspension or revocation.

Clear and Present Danger or Immediate Danger to the Public Health (ORC 3717.29(D)(1), ORC 3717.49(C)(1)): This may include, but is not limited to, loss of power, sewage backup, loss of hot water, contaminated water supply, unapproved public water system, severe vermin infestation, boil advisory, damage from fire or other disaster, an ongoing foodborne outbreak caused by the facility, or any situation that the Health Commissioner or designee deems a clear and present or immediate danger to public health.

Critical Violation: A violation that, if left uncorrected, is more likely to contribute to foodborne illness. Examples of violations include poor employee hygiene, food from unsafe sources, improper cooking temperatures, and contaminated equipment.

Follow-Up Inspection: An inspection that focuses on the violations that resulted in the follow-up inspection. A follow-up inspection may be conducted due to the presence of uncorrected critical or non-critical violations, as a result of an enforcement action, if deemed necessary by the sanitarian, or as requested by the operator.

Food Code: Ohio Uniform Food Safety Code, Ohio Administrative Code Chapter 3717-1.

Non-Critical Violation: A violation that does not pose an immediate public health threat. These violations can easily be corrected during the inspection, or a timeline can be instituted to ensure that compliance is obtained. Examples of non-critical violations include dirty walls and floors, and maintenance issues.

Repeat Violation: A specific violation that was cited at the previous inspection. This includes corrected and uncorrected violations.

Routine Inspection: This is an unannounced inspection. All areas of the facility will be inspected to ensure compliance with regulations.

PROCEDURES & STANDARD OPERATING GUIDELINES

DOCUMENTING VIOLATIONS

At a minimum, each facility is evaluated for compliance with the Food Code at routine inspection intervals. Assessment is based on presence of violations at the time of inspection, as well as history of violations and/or enforcement.

Violations must be accurately and properly documented, including (a) a description of the violation observed; (b) acceptable corrective measures, and (c) any actions taken at the time of inspection. Critical violations shall be corrected at the time of inspection, when possible, or within such time as the sanitarian deems necessary to protect public health. A time frame should be established so that uncorrected violations can be corrected in a timely manner. The date of follow-up inspection, if required, shall be specified. The sanitarian will discuss the report with the person in charge, ask him/her to sign the inspection report, and provide a copy of the report for the facility's records.

FOLLOW-UP INSPECTIONS

A sanitarian may determine that any violation requires a follow-up inspection. Facilities found to have one or more uncorrected critical violations during an inspection will be scheduled for a follow-up inspection within 10 business days. The time frame for follow-up inspection will be dependent upon the nature of the violation. A follow-up inspection shall be conducted on the date specified in the initial inspection report. During a follow-up inspection, the focus will be on the items previously violated. However, no obvious deficiencies should go unnoticed or undocumented. If the condition of the operation warrants a full inspection, the inspection shall be made. The inspecting sanitarian shall prepare a written inspection report that documents corrections of items previously cited, remaining violations that have not been corrected, and any additional violations noted. An extension of time to achieve compliance may be granted at the discretion of the sanitarian if the operator is working in good faith to comply with the previous orders or if extenuating circumstances have rendered compliance difficult.

ENHANCED ENFORCEMENT PROGRAM

The goal of the Enhanced Enforcement Program (EEP) is to bring facilities with critical, ongoing, and recurrent violations into compliance with the Food Code. Although situations necessitating enforcement actions make up a small percentage of those encountered, enforcement tools must be used where compliance is not obtained voluntarily. The uniform application of these guidelines can assist the sanitarian in facilitating compliance and reducing the risk of foodborne illness at the facilities inspected.

Criteria for Inclusion for Critical Violations

There are 2 reasons facilities with critical violations may be entered into the EEP:

Recurrent critical violations – Facilities found to have the same critical violation documented and corrected at 3 standard inspections within a 3 year period.

Uncorrected critical violations – Facilities found to have one or more uncorrected critical violations during an inspection will be scheduled for a follow-up inspection within 10 business days. If the same critical violation is observed during the follow-up inspection, the facility will be entered into the EEP. However, the sanitarian will be afforded the use of professional judgment regarding these circumstances to determine if enough progress has been made to avoid the facility being entered into the EEP.

Criteria for Inclusion for Standard (Non-Critical) Violations

Facilities found with the same standard (non-critical) violation(s) during 3 consecutive inspections will be entered into the EEP. In most facilities 3 inspections will constitute a period of 18 months to correct the violation(s). The time period will be shorter for seasonal operations, however after 3 inspections they will have completed a minimum of 1 full licensing period.

Enhanced Enforcement Program Process

Upon being entered into the EEP, the Environmental Health (EH) Director will conduct a Facility Review. Following the facility review the EH Director will issue a Notice of Noncompliance to the facility that explains the violations and their critical, continuous, and/or recurrent nature. The letter will outline any future enforcement actions and establish compliance dates for correction. A follow-up inspection is required to verify correction of the violations. If the violations are not corrected or if substantial progress has not been made to correct the violations at the time of the Notice of Noncompliance follow-up, the EH Director will inform the person in charge he/she will be required to appear at an administrative hearing with the Health Commissioner. The administrative hearing will provide the operator with an opportunity to inform the Health Commissioner why the facility has not achieved compliance. The operator will be asked to provide a reasonable time frame for when the facility will be brought into compliance, and to sign a document agreeing to the corrective action plan. The sanitarian will conduct a follow-up inspection in accordance with the agreed-upon time frame to determine if the facility has been brought into compliance. If violations have been corrected the sanitarian will document the inspection and inform the Health Commissioner of the inspection results. If violations have not been corrected, the sanitarian will inform the Health Commissioner who will take the necessary steps to hold a hearing before the Board of Health during the next regularly scheduled meeting. The Board will have the option of providing the operator with an opportunity to correct the violations within a specified time frame, or suspend or revoke the facility's license based on their authority contained in Ohio Revised Code Sections 3717.29 and 3717.49.

TOOLS FOR ACHIEVING COMPLIANCE

The following tools may be used alone or in combination to facilitate compliance with the Food Code.

- *Articles-Requirement to Cease Use* – An order may be made to remove a utensil, material, or piece of equipment from use in a retail food establishment because it presents a public health hazard. (OAC 901:3-4-12)
- *Embargo* – An order may be made to hold food that is in violation of OAC 901:3-4-15. A follow-up inspection is required to ensure that food is removed from sale and that records have been obtained to document the disposition of the product. (Resolution 2015-137)
- *Food Safety Certification* – Food safety certification may be recommended, or made mandatory for certain individuals during or after an administrative hearing. (OAC 3701-21-25 (I)(3))
- *License Limitation* – The Board may limit or place restrictions on the license, such as limiting the menu or limiting the types of items that can be prepared at the facility, during or after an administrative hearing.

ADMINISTRATIVE HEARING

If the sanitarian finds that the operator has failed to adequately address the violations the sanitarian shall notify the Health Commissioner and request an administrative hearing. The hearing shall be scheduled at such time as the Environmental Health Director considers prudent to protect the public health and ensure the respect for and integrity of the regulatory process.

A Notice of Administrative Hearing should include:

- Reason(s) for hearing
- List of violations
- Time, date, and location for the hearing

Hand deliver or send the notice by certified mail with return receipt requested.

At the hearing the operator's inspection history will be discussed and he/she will be asked to show cause for noncompliance. A compliance agreement will be completed, in which the operator, Environmental Health Director and Health Commissioner designate mutually agreed-upon methods and schedule for required corrections. At the conclusion

of the hearing additional time to achieve compliance may be provided, or the case may be referred to the Board of Health and/or City Law Director for enforcement action, up to and including license suspension or revocation.

A post-hearing letter should include:

- Individuals present for the hearing
- Violations discussed
- Corrective action plan with a time frame for compliance
- Resolution of the hearing, e.g. extended time frame for compliance, referral to Board for license action, etc.

If a facility achieves compliance following an administrative hearing, a 3 month follow-up inspection will be conducted. This is to ensure that the facility has maintained compliance.

If the operator fails to adhere to the corrective action plan and a subsequent inspection indicates that the facility has not achieved compliance, a Board of Health hearing shall be scheduled and a recommendation for the suspension or revocation of the license shall be made.

BOARD OF HEALTH HEARING & LICENSE SUSPENSION/REVOCATION PROCEEDINGS

(ORC 3717.29, ORC 3717.49)

The Board of Health may suspend or revoke an FSO or RFE license for violations of applicable law or rule, including a violation evidenced by documented failure to maintain sanitary conditions within the facility.

Before initiating action to suspend or revoke the license, the Board shall give the license holder written notice specifying each violation and a reasonable time within which the license holder must correct each violation to avoid suspension or revocation of the license. The Board may extend the time specified in the notice for correcting a violation if the license holder is making a good faith effort to correct it.

If the license holder fails to correct the violation in the time granted by the Board, the Board may initiate action to suspend or revoke the license by giving the license holder written notice of the proposed suspension or revocation. The board shall include in the notice a description of the procedure for appealing the proposed suspension or revocation. The license holder may appeal the proposed suspension or revocation by giving written notice to the board. The license holder shall specify in the notice whether a hearing is requested.

If the Board initiates actions to suspend or revoke a food service operation or retail food establishment license, the board shall determine whether to revoke or suspend the license by a majority vote of the Board members who are present at a meeting at which there is a quorum. If the board decides to revoke or suspend the license, the board shall issue a formal written order revoking or suspending the license.

EMERGENCY LICENSE SUSPENSION

(ORC 3717.29, ORC 3717.49)

If a critical violation is found that presents a clear and present (RFE – ORC 3717.29 (D)(1)) or an immediate (FSO – ORC 3717.49 (C)(1)) danger to public health, emergency closure proceedings shall be initiated. The Board may suspend a license without serving written notice or affording the license holder the opportunity to correct the violation. If the license holder is operating a mobile or catering RFE or FSO, either the licenser that issued the license or the licenser for the health district in which the establishment is being operated may suspend the license.

An emergency license suspension takes effect immediately and remains in effect until the Board rescinds the suspension. When a mobile RFE or FSO license is suspended, the licenser that suspended the license shall hold the license until the suspension is lifted and the licenser receives from the license holder written notice of the next location at which the license holder proposes to operate the RFE or FSO.

The Health Commissioner has been authorized by the Board to take any action that may be taken by the Board under Ohio Revised Code Sections 3717.29 (D)(1) and 3717.49 (C)(1), per Resolution 2015-135. If the Health Commissioner suspends a license under this authority, on determining that there is no longer a clear and present danger to the public health, he/she may rescind the suspension without consulting the Board.

APPEAL PROCEDURES

(ORC 3717.29, ORC 3717.49, OAC 901:3-4-08, OAC 3701-21-26)

Procedures follow for appealing the proposed denial, suspension or revocation of an RFE or FSO license, and appealing the suspension of a license for a violation presenting a clear and present or immediate danger to public health.

Emergency License Suspension

In the case of a suspension issued for a violation presenting clear and present danger to public health, the Board shall give the license holder written notice of the action, the cause for the action, and the effective date of the action. The written notice shall specify the procedure for appealing the suspension and shall list the address to which a hearing request shall be sent or delivered. The license holder may appeal the suspension by mailing or hand-delivering a written request for a hearing to the address specified in the notice, and stating whether a hearing is requested. If a hearing is requested, it shall be heard not later than two (2) business days after the request is received by the Board. The hearing shall be held before the Board issues any order regarding the continuation of a clear and present danger to public health. However, the Board may conduct the hearing at the same meeting at which issuance of the order is considered.

At the hearing, the license holder shall have the opportunity to present its case orally or in writing and to confront and cross-examine witnesses. The license holder may be represented by counsel and may review the case record before the hearing.

If the license holder appeals a suspension for presenting a clear and present danger to public health, whether or not a hearing is requested, the Board shall determine whether the clear and present danger to the public health continues to exist by majority vote of the Board members who are present at a meeting at which there is a quorum. If the Board determines that there is no longer a clear and present danger to the public health, the Board shall rescind the suspension. If the Board determines that the clear and present danger continues to exist, the Board shall issue an order continuing the suspension.

Non-Emergency License Denial, Suspension, or Revocation

In the case of a proposal to deny, suspend, or revoke an RFE or FSO license, the licensor shall provide the license holder with written notice of the proposed action and the cause for the action. The notice shall describe the procedure for appealing the proposed denial, suspension, or revocation.

1. The licensor shall provide written notice by certified mail, return receipt requested, or by hand delivery. If the notice is returned because of failure of delivery, the licensor shall send the notice by regular mail to the retail food establishment location listed on the license or conspicuously post the notice at an entrance of the operation, and posting or mailing constitutes notice.
2. After receiving the notice, to obtain a hearing, the license holder must submit a written request that the licensor receives within fifteen (15) days.
3. The Board shall schedule a hearing before its members or a hearing officer designated by the Board. If the Board provides a hearing officer, he/she shall be licensed to practice law in Ohio and shall not have participated in any manner in the decision to take the action against the license holder, per OAC 3701-21-26(B)(3). The hearing shall be held before issuing an order to suspend or revoke a license, but may be held at the same meeting at which issuance of the order is considered.

4. The Board shall mail or hand-deliver notice of the date, time, and place of the hearing to the license holder no less than ten (10) days before the scheduled date.
5. At the hearing, the license holder shall have the opportunity to present his/her case orally or in writing and to confront and cross-examine witnesses. The license holder may be represented by counsel and may review the case record before the hearing. If a hearing officer has been designated, a member of that board does not have to be present at the hearing.
6. If the hearing is before a hearing officer, he/she shall prepare a written recommendation as to the validity of the Board's action, which shall rest solely on the evidence presented at the hearing and the statutory and regulatory provisions governing the Board's action. The hearing officer shall describe the basis for his or her recommendation, but need not prepare a full opinion or formal findings of fact and conclusions of law. The hearing officer shall mail by certified mail, return receipt requested, or hand-deliver the recommendation to the Board and the license holder. Either party may file objections to the recommendation provided that the objections are received by the Board within five (5) days of receiving a copy of the recommendation from the hearing officer.
7. After reviewing any timely objections, the Board may, by motion, take additional evidence or approve, modify, or disapprove the hearing officer's recommendation and shall enter an order in the record of its proceedings.
8. If the licensor does not receive a timely request for a hearing, the licensor may immediately enter an order as proposed in the notice.

Emergency and Non-Emergency License Denial, Suspension or Revocation

Any determination made or order entered by the Board shall be made by majority vote of the members of the Board at a meeting at which there is a quorum.

If the Board conducts the hearing, the Board may immediately render a decision denying, suspending, or revoking a license, or render a decision removing or continuing a license suspension. The determination or order may be considered and made at a meeting without publication or advertisement, and may become effective without such publication or advertisement, recording or certifying. An order is not effective until it is recorded in the Board minutes.

PROSECUTION & OTHER REMEDIES

(ORC 3717.31, ORC 3717.50)

At the request of the Board, when a person has allegedly operated an RFE or FSO without a license, the City Law Director shall initiate a criminal prosecution against the person.

At the request of the Board, when a person or government entity allegedly has failed to comply with a requirement of Chapter 3717 of the Revised Code and the rules adopted under it applicable to RFEs and FSOs, the City Law Director shall initiate an action requesting the issuance of a temporary restraining order, a preliminary or permanent injunction, or a mandamus action regarding the act of noncompliance. The court may grant the appropriate relief if it is shown that the respondent failed to comply with the requirement.

A person or government entity found to be in contempt of court for failing to comply with a restraining order, injunction, or writ of mandamus shall be fined not more than one thousand dollars (\$1,000) for each offense. Each day the noncompliance continues is a separate offense. Fifty percent (50%) of fines collected shall be deposited in the Board's RFE or FSO fund, and the remaining fifty percent (50%) shall be credited to the City's general fund.

At the request of the Board of Health, Ohio Department of Agriculture or Ohio Department of Health shall provide enforcement support to assist in the prosecution of a person or government entity who is not in compliance with the provisions of Chapter 3717 of the Revised Code and the rules adopted under it applicable to RFEs and FSOs.

CONTRIBUTORS

The following staff contributed to the authorship of this document:

1. Stephanie Zmuda, primary author

APPLICABLE CODES

ORC 3717.21 – License required for retail food establishments
ORC 3717.29 – Board of health may suspend or revoke retail food establishment license
ORC 3717.31 – Prosecution and other remedies when board of health is licenser (RFE)
ORC 3717.41 – License required for food service operation
ORC 3717.49 – Licenser may suspend or revoke food service operation license
ORC 3717.50 – Prosecution and other remedies for violations (FSO)
OAC 901:3-4-08 – Appeal procedures
OAC 3701-21-25 – Certification in food protection
OAC 3701-21-26 – Appeal procedures

SIGNATURES

Trish Factor, MPH, MCHES, CHEP
Health Commissioner

_____/_____/_____
Date