



OATH Health Tribunal

A Division of the Office of Administrative Trials and Hearings

66 John Street, 11th Floor
New York, NY 10038

DEPARTMENT OF HEALTH & MENTAL HYGIENE, -against- TWENTY ONES INC. (Respondent)	Docket No.: <u>05711-11F1</u>	<input checked="" type="checkbox"/> In Person
	Decision Date: <u>2/3/2012</u>	<input type="checkbox"/> By Mail
	Hearing Examiner: <u>Barbour, Susan - G36</u>	<input type="checkbox"/> DFLT
	Resp. Rep.: <u>Jordan Siev, Esq.; Juan Reyes, Esq.; Desiree Perez, Director of Operations/Owner</u>	<input type="checkbox"/> RSUC
Petitioner Rep.: <u>Leslie Ann Maloney, Esq.</u>	<input type="checkbox"/> Attorney Waived	<input checked="" type="checkbox"/> Inspector Waived
		<input type="checkbox"/> Inspector Present
		<input type="checkbox"/> Advocate Present

Summary Disposition: **SUSO - Sustained**

LINE ITEM	VIOL. CODE	CONDITION (SEVERITY)	FINDINGS	DECISION CODE	PENALTY
1a	02B	none	Ms. Perez (Respondent) does not deny that the food was out of temperature. Respondent testified that shortly before the inspector arrived, respondent learned that the downstairs walk-in refrigerator was inoperable. The cited refrigerator contained food and workers were in the process of removing all of the food from the refrigerator, intending to discard the food as respondent was unsure when the refrigerator became inoperable. Respondent testified that when it was discovered that the unit was inoperable, she immediately called a service company requesting an emergency service call to repair the refrigerator. She testified that she was talking with the service representative on the telephone when the inspector arrived and thereafter was obtaining updated phone calls from the service representative as to his location and distance from the establishment in an effort to have the person arrive before the inspector ended the inspection. Respondent testified that although they intended to discard all of the food in the inoperable refrigerator, she did not have the workers throw the food in the garbage because she did not want the inspector to misinterpret the workers behavior. She testified that for approximately 45 minutes, the inspector was with the	Dismissed on the Merits	\$0.00

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floor manager walking through the bar and the other areas of the establishment, which is why the food was on the prep table and food rack for approximately 1 hour. The inspector entered the kitchen as she and the workers were removing food from the refrigerator and placing the food on any flat surface available. She was also on the telephone with the repair person. She testified that she told the inspector the cited unit was inoperable, they were going to discard the food, but had several other refrigerators available to house the food if necessary. For example, respondent had another walk-in refrigerator that contained alcohol, which could be removed to stack food items. In support of her testimony, Respondent submitted a list of all of the refrigeration units at the establishment on the day of the inspection. The document was admitted into evidence. Respondent submitted numerous photographs depicting the additional seven refrigeration units available to house the food from the inoperable unit. The photographs were admitted into evidence. Respondent also submitted a copy of a letter from Anthony Fiorentino, of Americold Inc., dated January 20, 2012 indicating, in substance, that the company responded to an emergency call arriving at the cited establishment on January 20, 2012 at 12:30 a.m. (less than 30 minutes after the inspection concluded) to fix the walk-in refrigerator; the refrigerator had a burned out condenser fan motor that was replaced; upon departure, the unit was operable, with a temperature range between 35 and 40 degrees. Respondent also submitted an invoice dated January 20, 2012, from Americold in the amount of \$1,143.19 for repair to a walk in cooler. The documents were admitted into evidence. Counsel for respondent also argued that the food was not potentially hazardous as the food was being discarded and would not be served to customers. Petitioner argued that food must be maintained at 140 degrees and the defense that they were discarding the food is not an affirmative defense.

I credit respondent's testimony and evidence. Initially, I find that the cited food was potentially hazardous cold food that was to be held in refrigeration units after being cooked and not potentially hazardous hot food as alleged by the inspector in the notice of violation. I find that the cited walk-in refrigerator became inoperable some time prior to the inspection, respondent became aware of its inoperability shortly before the inspection and was making every reasonable effort to correct the condition by initiating an emergency service call to repair the inoperable unit. I also find that respondent was removing the food to discard it. I further find that it wasn't immediately discarded because respondent wanted to



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			<p>speak with the inspector to determine how to proceed. I find that the condition was unforeseen and an emergency in nature but was reasonably and promptly correctly by respondent. Accordingly, I find that dismissal is warranted.</p>		
1b	02B	none	Please see findings in item 1a.	Dismissed on the Merits	\$0.00
2a	02G	none	<p>(Please see item 1a for a detailed recitation regarding inoperability of downstairs walk-in refrigerator) respondent does not deny that the food was out of temperature. Respondent testified that due to inoperable walk-in refrigerator, food was removed from unit and placed on any available surface until it could be discarded. Respondent testified that the food was not just cooked, but was precooked earlier that evening and placed in the walk-in refrigerator for later service, until it was removed to be discarded. Petitioner argued that the food should have been immediately discarded. I credit respondent's testimony and find that downstairs walk in refrigerator became inoperable and respondent was attempting to removal the food items in the unit so the food could be discarded. I also find that it was reasonable for the respondent not to discard the food until the inspector was in the kitchen so as to prevent any misunderstanding about the throwing away of the food. I find that the condition was unforeseen and an emergency in nature, and was reasonably and promptly correctly by respondent. Accordingly, I find that dismissal is warranted.</p>	Dismissed on the Merits	\$0.00
2b	02G	none	Please see item 1a and 2a.	Dismissed on the Merits	\$0.00
3	04C	2	<p>Respondent did not dispute the violation and testified that the worker did not have on gloves, but gloves were available and are always available. Respondent testified that the worker was nervous because of the inspection and immediately corrected the condition by putting on gloves. Respondent requested mitigation and in support of request submitted copies of food protection certificates (FPCs) for employees (including a certificate for the employee not wearing gloves) and FPC course registrations for all kitchen employees. The referenced documents were admitted into evidence. Petitioner argued that the violation should be sustained without mitigation as the only defense to the violation is that the cited food would have been heated prior to serving. I credit the testimony and find that respondent's evidence does not establish a defense to the violation. The penalty imposed reflects reflects the severity of the violation. I note that respondent testified that gloves were available and the cited worker had a FPC and</p>	Sustained	\$440.00



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			presumably should have known proper food handling methods.		
4	04J	4	Respondent testified that she had plenty of thermometers at the time of the inspection. Respondent testified that on the reopening inspection report dated January 20, 2012, the inspector noted that "Appropriately scaled metal stem thermometer was provided." The inspection report was admitted into evidence. She testified that no thermometers were purchased between the time of the inspection on January 19, 2012 and the January 20, 2012 inspection. Petitioner argued that the statute requires that the thermometers be provided and used and it's reasonable to presume that the thermometers were not used given the amount of food out of temperature. SSC 14-1.85 indicates that thermometers "are to be provided and used to determine" proper refrigeration temperatures of potentially hazardous food. I credit respondent's testimony but find that although respondent testified that the establishment had thermometers, there was no evidence that the thermometers were used. Accordingly, the violation is sustained.	Sustained	\$440.00
5	05F	none	Respondent testified that she told the inspector the cited unit was inoperable, they were going to discard the food, but had several other refrigerators available to house the food if necessary. For example, respondent had another walk-in refrigerator that only contained alcohol, which could be removed from the unit, making the unit available to stack food items. Respondent also testified that 1 two-door lowboy only contained plates, was not being used to hold food, and could have held food if necessary. A photograph of this unit was admitted into evidence. Additional support of her testimony included a list of 7 additional refrigeration units at the establishment on the day of the inspection. The document was admitted into evidence. Respondent submitted numerous photographs depicting the additional 7 refrigeration units available to house the food from the inoperable unit. The photographs were admitted into evidence. Petitioner argued that per the inspection report, there were only 3 refrigerators available, the additional walk-in contained food and could not be used and thus the violation should be sustained. I credit respondent's testimony and evidence and find that respondent had additional operable refrigeration units capable of holding the food from the inoperable refrigerator. I also find that respondent's intention was to discard the food and not house the food in other refrigeration units. Accordingly, dismissal is warranted.	Dismissed on the Merits	\$0.00
6	06A	2	Respondent did not dispute the violation and testified that the condition was temporary and corrected. The workers	Sustained	\$275.00



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			<p>were told before and after issuance of the violation that hair restraints must be worn when working in areas where food is prepared. I credit the testimony but find that as the respondent does not dispute that there was some food preparation in the kitchen, the testimony does not state a defense to the violation. Accordingly the violation is sustained.</p>		
				TOTAL:	\$1,155.00



Hearing Examiner