#16

1-6010-14421-3

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNEAPOLIS CITY COUNCIL

In the Matter of Las Americas, Inc.

RECOMMENDATION ON MOTION FOR REHEARING

On October 2, 2002, the Licensee brought a motion before the City's Public Safety and Regulatory Services Committee seeking reconsideration or rehearing of the Administrative Law Judge's recommended disciplinary action that was adopted by the City Council on July 26, 2002. On January 14, 2003, the City sent the Licensee's motion to the Office of Administrative Hearings for a ruling on whether a rehearing is warranted based on the Licensee's claim of newly discovered evidence. On January 16, 2003, the City faxed to the ALJ an October 4, 2002 letter from the Licensee's counsel regarding the motion. The OAH motion record closed on January 16, 2003.

Scott Reeves, Assistant City Attorney, 333 South 7th Street, Suite 300, Minneapolis, MN 55402-2453, represents the City of Minneapolis. Jordan S. Kushner, Esq. Sexton Building, Suite 636, 529 South 7th Street, Minneapolis MN 55415, represents Las Americas, Inc., the Licensee.

Based upon all of the filings by the parties and for the reasons set out in the attached Memorandum:

IT IS HEREBY RECOMMENDED that:

The Licensee's motion for rehearing be DENIED.

Dated this 24th day of January, 2003.

GEORGE A. BECK
Administrative Law Judge

MEMORANDUM

Procedural History

In 2001, the City initiated this license disciplinary proceeding against Las Americas, Inc. (Licensee) for violations of the Minneapolis Food Code Ordinance and the Minnesota Food Code relating to its operation of grocery stores and restaurants in the City of Minneapolis. The matter was heard in March 2002 and the OAH record closed on May 30, 2002. The Administrative Law Judge issued findings of fact, conclusions of law and a recommended decision on June 12, 2002. In his decision, the ALJ recommended that the City Council take disciplinary action against Las Americas' licenses. On July 17, 2002, the City's Public Safety and Regulatory Services Committee recommended adopting the ALJ's findings and implementing his recommendations with slight modifications. The City Council approved the Committee's recommendation on July 26, 2002, and the matter became final upon publication on August 3, 2002.

On October 2, 2002, the Licensee brought a motion to the City's Public Safety and Regulatory Services Committee meeting, seeking reconsideration of the adverse action or rehearing based on newly discovered evidence. The Committee recommended referring the motion to the Office of Administrative Hearings and this recommendation was approved by the City Council on November 22, 2002. On January 14, 2003, the City Council sent the motion to the Office of Administrative Hearings along with the City's response dated October 2, 2002.

Motion for Rehearing

The Licensee has brought a motion for rehearing based on what it claims is newly obtained evidence that substantially affects the basis for the recommended disciplinary action approved by the City Council. Specifically, the Licensee has submitted numerous photographs of other grocery stores and food establishments throughout the city that the Licensee contends document food code violations similar to or more serious than those found at Las Americas' stores over the years. The Licensee argues that this evidence demonstrates that the conditions at Las Americas' stores were not unique, but typical of other similar businesses. Consequently, the Licensee argues that this evidence refutes what it calls the ALJ's "central conclusion" that Las Americas stood apart from other stores in its number of violations requiring reinspection and its failure to correct violations despite repeated reinspections.[1] According to the Licensee, the conclusion that Las Americas had more repeated violations than other stores was essential for establishing good cause for taking adverse action against its licenses. The Licensee asserts that the newly obtained photographs disprove this conclusion and that a rehearing should be held to consider whether the disciplinary action was appropriate.

Selwin Ortega, an owner of Las Americas, Inc., personally took all of the photographs at issue on July 6 and July 7, 2002.[2] The violations depicted in the photographs include food stored in boxes on floors, inoperable light bulbs and missing thermometers inside coolers and deli cases, cross contamination inside meat deli

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[1] ALJ's Recommended Decision at 16 (memorandum).
[2] Affidavit of Ortega at ¶2.

cases, and other unsanitary conditions at various grocery stores. The Licensee contends that this photographic evidence of blatant food code violations at other stores establishes that adverse action against its licenses was inappropriate as the Licensee was guilty of nothing more than other establishments. The Licensee maintains that it did not present such evidence at the hearing because the burden was on the City to establish good cause. In addition, the Licensee asserts that it did not realize until the ALJ issued his recommended decision that evidence comparing its history of violations to other stores would be significant. The Licensee argues that the City Council should either rescind its prior disciplinary action or permit the Administrative Law Judge to conduct a further hearing on the matter based on the newly obtained photographs.

The evidentiary record in this matter closed on May 30, 2002. In order for the Licensee to obtain a new hearing based on newly discovered evidence, the Licensee must show that the evidence is material and could not have been discovered earlier through the exercise of due diligence.[3] The Minnesota Supreme Court has held that:

> granting a new trial based on newly discovered evidence requires a showing that the evidence could not have been discovered through the exercise of due diligence before the trial; that at the time of the trial the evidence was not within the petitioner's or his counsel's knowledge; that the evidence is not impeaching, cumulative, or doubtful, and that it is likely to produce a different result.[4]

Due diligence requires the use of available discovery tools as well as reasonable investigative efforts.[5] The party requesting a new hearing must also state with particularity what was done before the hearing to discover the evidence so the judge can determine whether due diligence was exercised.[6] A new hearing should not be granted if, based on the case as a whole, it is apparent the result would not be changed.[7]

The photographs that the Licensee seeks to present are not newly discovered evidence as they are largely immaterial and could have easily been obtained prior to the close of the record. If the Licensee wanted to introduce evidence of other stores' violations to argue that its violations were not unique or that the City conducted inspections in a selective or discriminatory way, the Licensee could have done so at the hearing. It was the Licensee's burden to establish that it was being unfairly singled out for Food Code violations.[8] The City's inspections reports on other establishments were available to the Licensee prior to the hearing, and with reasonable diligence the Licensee could have obtained photographs documenting similar violations at other

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[3] Minn.R.Civ.P. 59.01, 60.02 and Minn. Rule 1400.8300. *See*, Haaland v. Haaland, 392 N.W.2d 268, 273 (Minn. App. 1986) (no new trial based on evidence appellant discovered in her garage following hearing).
[4] Vikse v. Flaby, 316 N.W.2d 276, 284 (Minn. 1982) (citations omitted).
[5] Regents of the Univ. of Minn. v. Medical, Inc., 405 N.W.2d 474, 479 (Minn. App. 1987), *review denied* (Minn. July 15, 1987).
[6] LeNeau v. Nessett, 194 N.W.2d 580, 583 (Minn. 1972); Vasatka v. Matsch, 216 Minn. 530, 535, 13 N.W.2d 483, 486 (1944).
[7] Gopher State Business Opportunities, Inc. v. Stockman, 265 Minn. 185, 189, 121 N.W.2d 613, 615 (Minn. 1963), *overruled on other grounds* by MacDonald v. Stonebraker, 255 N.W.2d 827 (Minn. 1977).
[8] Draganosky v. Minnesota Bd. of Psychology, 367 N.W.2d 521, 526 (Minn. 1985);State v. Hyland, 431 N.W.2d 868, 872-73 (Minn. App. 1988), *citing*, State v. Russel, 343 N.W.2d 36, 37 (Minn. 1979).

stores prior to the hearing or close of the record. Moreover, the photographs are unlikely to produce a different result as they show only that other stores had possible food code violations on July 6 or July 7, 2002. The record in this matter established that the Licensee had a pattern of excessive, serious and recurrent violations that were verified by qualified food inspectors. Photographs of conditions in other stores on any particular day are immaterial to whether disciplinary action should be taken against Las Americas' licenses for its repeated violations of the Minnesota Food Code.

In addition, contrary to the Licensee's claim, Las Americas' record of violations *as compared to other food establishments* was not decisive in establishing good cause in this case. In fact, the ALJ's recommended decision contains no finding or conclusion comparing Las Americas' violations to other stores. Instead, the ALJ addressed each Food Code violation alleged against the Licensee and made a conclusion as to whether the Licensee complied with the requirements governing the cited provision. Based on the record, the ALJ concluded that the City had established that the Licensee failed to comply with numerous Food Code requirements. And as a result of this conclusion, the ALJ determined that the City had established good cause existed for taking adverse action against Las Americas' licenses. Only in the accompanying memorandum did the ALJ note that Las Americas' high number of violations requiring reinspection set it apart from other food establishments. The ALJ viewed the License's continued violations as evidence of its inadequate concern regarding food code compliance.

The Licensee has failed to show that the photographic evidence it seeks to introduce is material and that it could not have been obtained through the exercise of due diligence prior to the hearing or close of the record. The Administrative Law Judge recommends that the Licensee's motion for a new hearing based on newly discovered evidence or "any other reason justifying relief from the operation of the judgment"[9] be denied.

G.A.B.

[9] Minn.R.Civ.P. 60.02(f).

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
ADMINISTRATIVE LAW SECTION
100 WASHINGTON SQUARE, SUITE 1700
MINNEAPOLIS, MINNESOTA 55401

CERTIFICATE OF SERVICE

Case Title:	OAH Docket No.:
In the Matter of Las Americas, Inc.	1-6010-14421-3

Cindy Ringdahl, certifies that on the 24th day of January, 2003, she served a true and correct copy of the attached RECOMMENDATION ON MOTION FOR REHEARING; by placing it in the United States mail with postage prepaid, addressed to the following individuals:

Minneapolis City Clerk 304 City Hall 350 South 5th Street Minneapolis MN 55415	Scott Reeves Assistant City Attorney 333 S. 7th Street, Suite 300 Minneapolis, MN 55402-2453
Jordan S. Kushner 529 S. 7th Street, Suite 636 Minneapolis, MN 55415	Dana Banwer Assistant City Attorney 333 S. 7th St., Suite 300 Minneapolis, MN 55402-2453