

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF PUBLIC HEALTH

Statutory Authority: 16 Delaware Code, Section 122(3)u.1 (16 **Del.C.** §122(3)u.1)

FINAL

ORDER

4458 State of Delaware Food Code Regulations (2011)

NATURE OF THE PROCEEDINGS

Delaware Health and Social Services ("DHSS") initiated proceedings to adopt the 2011 State of Delaware Food Code. The DHSS proceedings to adopt regulations were initiated pursuant to 29 **Del.C.** Ch. 101 and authority as prescribed by 16 **Del.C.** §122 (3) u.1. (e).

On December 1, 2010 (Volume 14, Issue 6), DHSS published in the Delaware Register of Regulations its notice of proposed regulations, pursuant to 29 **Del.C.** §10115. It requested that written materials and suggestions from the public concerning the proposed regulations be delivered to DHSS by December 31, 2010, or be presented at a public hearing on December 21, 2010, after which time the DHSS would review information, factual evidence and public comment to the said proposed regulations.

No oral comments were made at the public hearing and no written comments were received during the public comment period. Therefore, no evaluation or summarization of comments is presented in the accompanying "Summary of Evidence." Letters of endorsement were received from the Food and Drug Administration, Center for Food Safety and Applied Nutrition, and from Mr. Ciro C. Poppiti, Esquire, a food and beverage attorney "who represents dozens of restaurants throughout the state".

FINDINGS OF FACT

There were no public comments received. The Department finds that the proposed regulations, as set forth in the attached copy should be adopted in the best interest of the general public of the State of Delaware.

THEREFORE, IT IS ORDERED, that the proposed 2011 State of Delaware Food Code is adopted and shall become effective February 10, 2011, after publication of the final regulation in the Delaware Register of Regulations.

RITA M. LANDGRAF, SECRETARY

SUMMARY OF EVIDENCE

In accordance with Delaware Law, public notices regarding proposed Department of Health and Social Services (DHSS) 2011 State of Delaware Food Code were published in the Delaware State News, the News Journal and the Delaware Register of Regulations.

The public comment period was open from December 1, 2010 through December 31, 2010. No comments were received on the proposed regulations during the public comment period and no changes have been made to the proposed regulations.

Verifying documents are attached to the Hearing Officer's record. The regulation has been approved by the Delaware Attorney General's office and the Cabinet Secretary of DHSS.

4458 State of Delaware Food Code Regulations (2011)

1.0 State of Delaware Food Code

- 1.1 **Name.** These Regulations shall hereby be known as the "State of Delaware Food Code".
- 1.2 **Effective Date.** The State of Delaware Food Code shall be effective (to be determined).
- 1.3 **Prior Regulations Repealed.** All current or previous regulations or parts of regulations in conflict with this State of Delaware Food Code are hereby repealed.
- 1.4 **Location.** A copy of the complete State of Delaware Food Code is available for public view at the following locations:
 - 1.4.1 Jesse S. Cooper Building, 417 Federal St, Dover DE 19901
 - 1.4.2 <http://dhss.delaware.gov/dhss/dph/hsp/files/99fdcodetoc.pdf>

- 1.5 **Severability.** Should any part, sub-part, section, paragraph, sentence or phrase of this State of Delaware Food Code be declared unconstitutional or invalid by any competent authority, the remainder of this Code shall not be affected in anyway.

2.0 Adoption of United States Public Health Service 2009 Food Code

- 2.1 The State of Delaware Food Code adopts, as if fully set forth herein, the “United States Public Health Service 2009 Food Code” excluding Annex 1 through Annex 7, as amended herein:

2.1.1 Amend **Subpart 1-101.10** by inserting the words “State of Delaware” before the words “Food Code” and after the words “as the”.

2.1.2 Amend **Subpart 1-102.10** by deleting the subpart in its entirety and by inserting in lieu thereof the following, “The purpose of this Code is to safeguard public health, reduce the risk of foodborne illness and provide to consumers food that is safe, unadulterated and honestly presented. The purpose is also to regulate, within the State of Delaware, the production, transportation, storage, processing, handling, preparation and consumer service of human food; the inspections of food establishments; the issuing and revocation of permits to food establishments; and the application of compliance and enforcement procedures.

2.1.3 Subpart 1-201.10(B) Terms Defined

2.1.3.1 Amend **Subpart 1-201.10(B)** by adding thereto a new defined term after the defined term “Prior Foundation Item” and before the defined term “Public water system” to read as follows: “**Private**” means a use or function that is intended for a particular individual or group, such as a celebration of a birthday, wedding, anniversary or funeral, and that is not intended for consumers as members of the general public.

2.1.3.2 Amend **Subpart 1-201.10(B)** by deleting the definition for “Regulatory authority” and inserting in lieu thereof the following: “**Regulatory authority**” means the Secretary, Delaware Health and Social Services, or his/her authorized representative.

2.1.4 Amend **Subpart 8-405.11(B)** by deleting the number “10” as it appears therein and inserting in lieu thereof the following number: “7”.

2.1.5 Amend **Chapter 8** by adding thereto a new part “8-6” to read as follows:

“8-6 Enforcement Procedures

8-601 Re-inspection Fee

8-601.10 Fee Assessment and Failure to Pay

- (A) A re-inspection fee shall be assessed under one or more of the following circumstances:
- (1) Priority (P) or Priority Foundation (Pf) violations are shown to exist during a follow-up inspection.
 - (2) Core (c) violations are shown to exist on successive routine inspections.
 - (3) A complaint inspection requires a follow-up inspection to confirm compliance.
 - (4) An inspection is required to determine compliance with the terms of a corrective action plan or an administrative hearing.
 - (5) An inspection to determine the proper posting of a valid permit.
 - (6) Any other follow-up inspection deemed necessary by the Regulatory Authority to determine compliance with this Code.
- (B) The fee shall be that required by Chapter 1, Section 134 of Title 16 of the Delaware Code.
- (C) Failure to pay the re-inspection fee, as specified, shall result in the automatic suspension of the permit to operate a food establishment. The permit shall remain suspended until the Regulatory Authority receives full payment of all fees.

8-602 Administrative Action

8-602.10 General

If the Regulatory Authority determines that a food establishment is operating without a valid permit; that one or more conditions exist which represent an Imminent Health Hazard; or that serious violations, repeat violations, or general unsanitary conditions are found to exist, administrative action may occur. Administrative action will be conducted in accordance with the law.

- (A) Operation without a Permit

- (1) Immediate Closure Order. If a food establishment is found operating without a valid permit as required by subpart 8-301.11 of this Code, the Regulatory Authority shall order the facility immediately closed.
 - (2) Notice of Closure. The closure shall be effective upon receipt of a written notice by the person in charge of the food establishment or an employee of the food establishment. A closure notice statement recorded on the inspection report by the representative of the Regulatory Authority constitutes a written notice.
 - (3) Duration of Closure. The food establishment shall remain closed until a permit application, applicable fees and any required plans have been received and approved by the Regulatory Authority.
- (B) Imminent Health Hazard(s)
- (1) Permit Suspension without Hearing. If some condition is determined to exist in a food establishment which presents an imminent health hazard to the public, the Regulatory Authority may suspend the operating permit of the food establishment without a prior hearing. The suspension shall be effective upon receipt of written notice by the person in charge of the food establishment or an employee of the food establishment. A suspension statement recorded on the inspection report by the Regulatory Authority constitutes a written notice.
 - (2) A permit issued pursuant to subpart (1) shall not be suspended for a period longer than ten (10) government business days without a hearing. Failure to hold a hearing within the ten (10) government business day period shall automatically terminate the suspension.
 - (3) Hearing Request. The permit holder of the food establishment may request, in writing, a hearing before the Regulatory Authority at any time during the period of suspension, for the purpose of demonstrating that the imminent health hazard(s) no longer exist. The request for hearing shall not stay the suspension.
- (C) Serious Violations, Repeat Violations and General Unsanitary Conditions. When conditions exist in a food establishment that represent serious violations, repeat violations or general unsanitary conditions, the Regulatory Authority may initiate a corrective action plan or schedule a hearing.

8-603 Agency Emergency Actions

8-603.10 Examination of Food.

Food may be examined or sampled by the Regulatory Authority as often as necessary for enforcement of this Code.

8-603.20 Wholesome and Free from Spoilage.

All food shall be wholesome and free from spoilage. Food that is spoiled or unfit for human consumption shall not be kept on the premises. The established administrative procedures for the implementation and enforcement of the provisions of Chapter 33 of Title 16 of the Delaware Code, relating to the embargo of misbranded or adulterated food, and penalties shall be applicable to this subpart.

8-604 Penalties

8-604.10 Operation in Violation of Code.

Any person (or responsible officer of that person) who violates a provision of this Code, and any person (or responsible officer of that person) who is the holder of a permit or who otherwise operates a food establishment that does not comply with the requirements of this Code shall be subject to the provisions of Section 107 of Title 16 of the Delaware Code.

8-604.20 Refusal, Failure or Neglect to Comply with Order of the Regulatory Authority.

Any person (or responsible officer of that person) who violates a provision of this Code, and any person (or responsible officer of that person) who is the holder of a permit or who otherwise operates a food establishment that refuses, fails or neglects to comply with an order of the Regulatory Authority shall be subject to an administrative penalty of not less than \$100 and not more than \$1,000, together with costs.

8-604.30 Injunction.

The Regulatory Authority may seek to enjoin violations of this Code.

8-604.40 Public Notification.

A placard, as provided by the Division, shall be prominently displayed at all entrances of food establishments that have failed to obtain a valid permit or have a permit that is suspended, revoked, or expired.

14 DE Reg. 822 (02/01/11) (Final)