

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA DEPARTMENT OF AGRICULTURE)	
AND CONSUMER SERVICES,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 96-1154
)	
JANET M. AND GERALD A. ROBBINS,)	
)	
Respondents.)	
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RECOMMENDED ORDER

Upon due notice, William R. Cave, Hearing Officer, Division of Administrative Hearings (Division), held a formal hearing in this matter on June 4, 1996, in Winter Haven, Florida.

APPEARANCES

For Petitioner: Linton B. Eason, Esquire
Office of the General Counsel
Department of Agriculture
and Consumer Services
Room 515, Mayo Building
Tallahassee, Florida 32399-0800

For Respondents: Gerald A. Robbins
Qualified Representative
1026 Biltmore Drive, Northwest
Winter Haven, Florida 33881

STATEMENT OF THE ISSUES

1. Do the Respondents operate a food establishment as that term is defined in Section 500.03(1)(j), Florida Statutes? If so, are the Respondents, under the circumstances of this cause, required to obtain a food permit from the Department of Agriculture and Consumer Services (Department) in accordance with Section 500.12, Florida Statutes, in order to continue operating their food establishment located within the premises of International Market World, Inc. (Market World) located at 1052 Highway 92 West, Auburndale, Florida?

2. If the Respondents are required to obtain a food permit from the Department, should the Respondents be required to: (a) purchase a permit for each and every year or partial year of operation since being notified by the Department of such requirement; (b) pay a late fee for their failure to renew a permit that was never issued or; (c) pay an administrative fine for failing to obtain a food permit upon being notified of that requirement by the Department?

PRELIMINARY STATEMENT

This matter was initially referred to the Division by the Department on a Notice of Intent to Impose an Administrative Fine and assigned Division Case No. 95-4517. Subsequent to the matter being referred to the Division, Respondents filed a Motion to Dismiss which was unopposed by the Department. A Recommended Order of Dismissal was issued by the Hearing Officer and the matter returned to the Department for final disposition. As it turned out, the Department was, after all, opposed to dismissing the Notice of Intent to Impose an Administrative Fine. However, rather than entering an order remanding the matter to the Hearing Officer, the Department chose to enter an Order advising the Respondents of its intent to issue an immediate cease and desist order requiring Respondents to cease operating their alleged food establishment in violation of Chapter 500, Florida Statutes, and its intent to impose an administrative fine for operating the alleged food establishment in violation of Chapter 500, Florida Statutes. The Order contained a Notice of Rights section which advised the Respondents of their right to request an informal or formal hearing. Subsequently, the Respondents filed a Petition For Formal Administrative Hearing with the Department which, along with the Department's Order, was forwarded to the Division for the assignment of a Hearing Officer and conduct of a hearing.

At the hearing, the Department presented the testimony of Jimmy D. Daugherty and Earnest L. (Buddy) Levins. The Department's exhibits one through five were received as evidence. Janet M. Robbins and Gerald A. Robbins testified on their own behalf but presented no other witness. Respondents' exhibits one through six were received as evidence. Chapter 5K-4, and Rule 12A-1.098, Florida Administrative Code, and Chapter 500, Florida Statutes, were officially recognized.

A transcript of this proceeding was filed with the Division on July 8, 1996. However, upon an unopposed motion filed by Respondents, the parties were granted an extension of time within which to file their respective Proposed Findings of Fact and Conclusions of Law with the understanding that any time constraint imposed under Rule 28-5.402, Florida Administrative Code, was waived in accordance with Rule 60Q-2.031(2), Florida Administrative Code. The parties timely filed their respective Proposed Findings of Fact and Conclusions of Law under the extended time frame. A ruling on each proposed finding of fact submitted by the parties has been made as reflected in an Appendix to the Recommended Order.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings are made:

1. The Department is the agency in the State of Florida responsible for the administration and enforcement of Chapter 500, Florida Statutes, and the rules promulgated thereunder relating to permitting, food safety and the sale of food to the consuming public.

2. Janet M. Robbins and Gerald A. Robbins (Respondents) operate a stall within the confines of a flea market owned and operated by Market World located on Highway 92 West in Auburndale, Polk County, Florida. The Respondents lease the stall from Market World. Respondents receive all proceeds from the sale of

items from their stall in Market World. Respondents' business mailing address is listed as 1026 Biltmore Drive, Northwest, Winter Haven, Polk County, Florida 33881.

3. Respondents did not, at any time pertinent to this proceeding, possess an occupational license issued in their name from Polk County, Florida for operating their stall in Market World. Instead, Respondents operated under a blanket occupational license issued to Market World by the Tax Collector of Polk County, Florida in accordance with Polk County Ordinance No. 95-27 which covered all flea market vendors within the confines of Market World. However, had Market World elected not to purchase this blanket occupational license, Respondents would have been required under this ordinance to obtain a Polk County occupational license from the Tax Collector in order to operate their stall in Market World.

4. In accordance with Department of Revenue Rule 12A-1.098, Florida Administrative Code, flea market vendors are required to collect sales tax on their sales but are not required to register with the Department of Revenue in order to remit those taxes. Instead, the rule allows the flea market vendor to remit the taxes collected under the registration of the flea market operator, manager, lessor or owner. Respondents have in the past used this method of remitting the sales tax collected by them to the Department of Revenue. However, the Respondents are presently remitting sales tax directly to the Department of Revenue.

5. On May 6, 1994, Jimmy D. Daugherty, a Department Sanitation and Safety Specialist, visited the Respondents' stall at Market World and observed that Respondents were offering food for sale. Daugherty advised Janet Robbins that a food permit was required to sell food from Respondents' flea market stall. On this same date, Daugherty inspected Respondents' facility and issued a Food Safety Inspection Report and gave the facility an overall rating of good. Also, the report indicated that this was a new firm and that a food permit application was attached. The food permit application had been filled out by Janet Robbins with Daugherty's assistance. Subsequent to filling out the Food Permit Application, Janet Robbins discussed the matter with her husband, Gerald Robbins, who advised the Department that he disputed the requirement that Respondents' establishment must obtain a food permit. While it appears from the record that Respondents' application was submitted to the Department along with Daugherty's Food Safety Inspection Report, there was no evidence that Respondents tendered the proper fee for a permit or that a permit was ever issued to Respondents.

6. On January 17, 1995, the Department issued Notice Number 95R-69185 concerning Respondents' 1995 Food Permit Renewal Notice. The Notice advised Respondents that they had failed to remit their 1995 Food Permit Renewal Fee, the reminder for which had been mailed to them on November 15, 1994. The November 15, 1994, notice was not introduced as evidence. The January 17, 1995, notice also advised Respondents that a late fee of \$37.50 would be added if the food permit renewal fee was not paid by January 31, 1995, and that the late fee would be increased to \$100.00 if the food permit renewal fee was not paid by February 28, 1995.

7. On February 15, 1995, and again on April 26, 1995, the Department advised Respondents that the 1995 Food Permit Renewal Fee was past due and that an appropriate late fee had been added.

8. In pertinent part, each of the Notices provided:

If you dispute your firm type, the State Agency regulating your business, or if you are no longer in business, please indicate on the application (reverse side), sign and return.. . . .

9. Respondents did not respond in writing to the Department disputing any of the matters set forth in the Notices received by them. Instead, Gerald Robbins made telephone calls to Dr. Martha Rose Roberts, Deputy Commissioner, and to Linton Eason in the legal department. These calls were not returned by the Department.

10. On July 26, 1995, the Department issued a Notice of Intent To Impose Administrative Fine against Janet Robbins for operating a Food Establishment without a Food Permit in violation of Section 500.12, Florida Statutes.

11. Respondents requested a formal hearing, and this matter was referred to the Division for the assignment of a Hearing Officer and the conduct of a hearing. Respondents moved to dismiss the matter which was unopposed by the Department. A Recommended Order of Dismissal was entered by the Hearing Officer and jurisdiction relinquished to the Department for final agency action. The Department entered an "Order" overruling the Recommended Order of Dismissal and further ordered that the Department intended to issue an immediate cease and desist order and to impose an administrative fine. The matter was again referred to the Division and this hearing ensued.

12. On May 6, 1994, the Respondents were selling food, as defined in Section 500.03(1)(h), Florida Statutes, from their stall in the flea market known as Market World and have continued to sell food from their stall in the flea market since that date.

13. Respondents' establishment within Market World is of a semi-permanent nature. This finding is based on the photographs entered into evidence as Respondents' Exhibits 5 and 6 and the unrebutted testimony of Gerald Robbins that certain pieces of Respondents' equipment located within the Respondents' stall at Market World were bolted to the floor.

14. Several other flea market vendors within Market World have applied for and were issued food permits by the Department after paying the necessary fee.

15. Because flea market vendors can move from one flea market to another, any flea market vendor who is issued a food permit for one location may operate under that same food permit at another flea market location provided the vendor does not operate at two or more flea market operations simultaneously.

16. There was no evidence as to the annual gross food sales generated by Respondents' stall located within Market World.

17. On May 5, 1995, Daugherty visited and inspected Respondents' stall at Market World. The Food Safety Inspection Report submitted by Daugherty for this inspection indicated an overall rating of good as did the report of May 6, 1994. Respondents have not interfered with, or attempted to interfere with, the Department's inspection of their food establishment even though they disagree with the requirement of having to obtain a food permit from the Department.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, this proceeding pursuant to Section 120.57(1), Florida Statutes.

19. Sections 500.12(1)(a) and (b), Florida Statutes, in pertinent part provide:

(1)(a) A food permit from the department [is required] of [any person] who [operates a food establishment] or retail food store, [except]:

1. Persons operating minor food outlets, including, but not limited to, video stores, that sell commercially prepackaged, nonpotentially hazardous candy, chewing gum, soda, or popcorn, provided the shelf space for those items does not exceed 12 linear feet and no other food is sold by the minor food outlet.

2. Persons subject to continuous, onsite federal or state inspection.

3. Persons selling only legumes in the shell, either parched, roasted, or boiled.

(b) An application for a food permit from the department must be accompanied by a fee in an amount determined by department rule, which may not exceed \$350. [Food permits must be renewed annually on or before January 1]. If an application for renewal of a food permit is not received by the department within 30 days after its due date, a late fee, in an amount not exceeding \$100, must be paid in addition to the food permit fee before the department may issue the food permit. . . . [Emphasis Supplied]

20. Sections 500.03(1)(j) and (s), Florida Statutes, in pertinent part provide:

(1) For purpose of this chapter, the term:

* * *

(j) "[Food establishment]" means any factory, food outlet, or [any other facility] manufacturing, processing, packing, holding, or preparing food, or [selling food at] wholesale or [retail].. . .

* * *

(s) "Retail food store" means any establishment [or section of an establishment] where food and food products are offered to the consumer and intended for off premises consumption. The term includes delicatessens that offer prepared food in bulk quantities only. The term does not include establishments which handle only prepackaged, non-potentially hazardous foods; roadside markets that offer only fresh fruits

and vegetables for sale; food service establishments; or food and beverage vending machines.
[Emphasis Supplied]

21. Section 500.121(1), Florida Statutes, provides:

(1) In addition to the suspension procedures provided in s. 500.12, the department may impose a fine not exceeding \$5,000 against any retail food store or food establishment that has violated this chapter,

22. Rules 5K-4.020(1)(j),(o),(5)(a) and (b) and (6)(b), Florida Administrative Code, in pertinent part provide:

(1) As used in this rule, the following definitions shall apply:

* * *

(j) [Limited Sales. Any business fitting any of the above definitions with gross food sales less than \$10,000 annually].

* * *

(o) [Mobile vendor]. [Persons selling foods] other than fresh fruits or vegetables from trucks, trailers or similar conveyance, or [at flea markets], roadside stands [or other semi-permanent, transient, or temporary location].

* * *

(5) Food Permit Fees.

(a) One permit shall be issued to and one fee shall be charged to all food operations at a single location, regardless of whether the location may qualify for two or more permits. If a location qualifies for two of more permits, only the largest applicable fee shall be charged to that location, except that any location qualifying for a Limited Sales permit shall only be charged the fee applicable to a Limited Sales permit. . . . Fees charged new food permit applicants shall be pro-rated with the applicant paying 1/12th of the applicable fee for each month remaining in the calendar year, including the month of application.

(b) The following schedule of charges is established for each food Permit.

* * *

Mobile Vendor	75
Limited Sales	50

(6) Late Fees.

(b) No establishment shall be issued a food permit until all applicable fees, including late fees, are received by the department.
[Emphasis Supplied]

23. The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue. Florida Department of Transportation v. J.W.C. Company, 396 So.2d 778 (Fla. 1st DCA 1981). Therefore,

the Department has the burden of presenting evidence that Respondents must possess a food permit and that their failure to possess such a food permit is a violation of Chapter 500, Florida Statutes. Furthermore, the Department has the burden of presenting its proof by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So.2d 932 (Fla. 1996). The Department has met its burden in this regard.

24. Clearly, the evidence establishes that Respondents operate a food establishment as defined in Section 500.03(1)(j), Florida Statutes, and are required to have a food permit since they do not come within any of the exceptions set out in Section 500.12 (1)(a)1., 2., and 3., Florida Statutes. Furthermore, the evidence establishes that Respondents operate their food establishment within the confines of World Market, a flea market, which places them in the category of a mobile vendor as defined in Rule 5K-4.020(1)(o), Florida Administrative Code, notwithstanding that Respondents' establishment is semi-permanent in nature. Since Respondents fall within the definition of a mobile vendor, Rule 5K-4.020(5)(b), Florida Administrative Code, requires a fee of \$75 for a food permit. Additionally, the evidence establishes that Respondents have not obtained a food permit as required by Section 500.12(1)(a), Florida Statutes. Having failed to obtain a food permit, Respondents have violated Section 500.12(1)(a), Florida Statutes, and are subject to an administrative fine under Section 500.121(1), Florida Statutes, which is the appropriate penalty for such violation. However, there does not appear to be any authority for the late fees assessed by the Department in its Notice since late fees apply to the failure to timely renew the food permit. In the instant case, Respondents are contesting the requirement of having to obtain the permit in the first place. Therefore, any penalty imposed should be for the violation of not having a permit as required by Section 500.12(1)(a), Florida Statutes, and not for failure to renew a permit that was never issued. However, this does not relieve the Respondents from having to pay the required fee for purchasing a food permit for the partial year 1994, and for a full year for 1995 and 1996.

25. Respondents contend that World Market should be required to obtain a blanket food permit which would cover all flea market vendors operating a food establishment within World Market, including Respondents, as World Market does with the Polk County occupational license. Respondents argue that since they are not required to obtain an occupational license in Polk County to operate their food establishment in World Market, they are not recognized as a business by Polk County and therefore, are somehow exempted from the provisions of Section 500.12(1)(a), Florida Statutes, requiring a food permit of any person operating a food establishment in the State of Florida, unless exempted under Section 500.12(1)(a) 1., 2., and 3., Florida Statutes. Respondents fail to recognize or cite any authority that would allow the Polk County Ordinance to preempt the statutory authority given the Department under Section 500.12(1)(a), Florida Statutes, to require a food permit of any person operating a food establishment unless exempted under Section 500.12(1)(a) 1., 2., and 3., Florida Statutes. To bolster their argument that only one permit is required for all vendors within the confines of World Market, Respondents cite Rule 5K-4.020(5)(a), Florida Administrative Code, which requires only one permit for multiple food operations at a single location, notwithstanding that the location may qualify for two or more food permits. This rule applies only to multiple food operations at one location where the food operations and the location have common ownership, for example, a grocery store with several food operations such as a retail bakery or seafood market within its confines under common ownership. This rule does not apply in the instant case since there is no common ownership between Respondents' food establishment and Market World.

26. Respondents' contention that if they are required to obtain a food permit that they should be allowed to purchase a food permit in the category of Limited Sales is without merit. Respondents' business does not fall within the category of Limited Sales as defined in Rule 5K-4.020(1)(j), Florida Administrative Code, because Respondents' food establishment does not come within any of the definitions set out in Rule 5K-020(1)(a) through (i), Florida Administrative Code, or meet the minimum annual gross food sales set out in Rule 5K-020(j), Florida Administrative Code.

27. There was no evidence that Respondents in any fashion interfered with, or attempted to interfere with, the Department's inspection of Respondents' food establishment. Therefore, after considering the circumstances surrounding this case, any penalty imposed should be tempered so that the penalty will not be onerous and create a "chilling effect" on Respondents or others who may wish to challenge an action by the Department or any other agency.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law it is recommended that the Department of Agriculture and Consumer Services enter a final order requiring the Respondents to obtain a food permit for the partial year of 1994, and for a full year for 1995 and 1996, and assessing an administrative fine in the amount of \$100.00. It is further recommended that no late fees be assessed for failure to renew a food permit that was never issued.

RECOMMENDED this 30th day of August, 1996, at Tallahassee, Florida.

WILLIAM R. CAVE, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of August, 1996.

APPENDIX TO RECOMMENDED ORDER CASE NO. 96-1154

The following constitutes my specific rulings, pursuant to Section 120.59(2), Florida Statutes, on all of the proposed findings of fact submitted by the parties in this case.

Department's Proposed Findings of Fact.

1. Proposed findings of fact 1 through 4 are adopted in substance as modified in Findings of Fact 1 through 17.

Respondents' Proposed Findings of Fact.

1. Proposed findings of fact 1 - 4, 11, 13, 14, 17 and 18 are adopted in substance as modified in Findings of Fact 1 through 17.

2. Proposed findings of fact 5 and 6 are neither material nor relevant.
3. Proposed finding of fact 7, as stated, is argument rather than a finding of fact.
4. Proposed findings of fact 8 - 10 and 15 are unnecessary as findings of fact. However, they are covered in the Preliminary Statement.
5. Proposed finding of fact 16 is covered in the Conclusions of Law rather than in the Findings of Fact.
6. The first two sentences of proposed finding of fact 19 are adopted in substance as modified in Finding of Fact 14. The balance of proposed finding of fact 19, as stated, is argument rather than a finding of fact.
7. There was no proposed finding of fact 12

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to the Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should consult with the agency that will issue the final order in this case concerning their rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.