

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, DIVISION )  
OF HOTELS AND RESTAURANTS, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 97-3021  
 )  
K. C. LEFFLER ENTERPRISES, INC., )  
d/b/a GIZMO'S REEF DOCKSIDE, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

A formal hearing was held in this case before Division of Administrative Hearings, by Administrative Law Judge, Daniel M. Kilbride, on October 1, 1997, in Orlando, Florida.

APPEARANCES

For Petitioner: Scott R. Fransen  
Chief Assistant General Counsel  
Department of Business  
and Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-0010

For Respondent: K. C. Leffler, pro se  
President, K. C. Leffler Enterprises  
d/b/a Gizmo's Reef Dockside  
4263 North Harbor City Boulevard  
Melbourne, Florida 32935

STATEMENT OF THE ISSUE

Whether Respondent's public food service license should be disciplined for the acts alleged in the Notice to Show Cause.

PRELIMINARY STATEMENT

On April 16, 1997, the Department of Business and Professional Regulation, Division of Hotel and Restaurants, hereinafter the Petitioner, issued a Notice to Show Cause to Respondent. By letter dated May 5, 1997, Respondent requested a formal hearing. On July 1, 1997, this matter was referred to the Division of Administrative Hearings and was set for hearing.

Kenneth Leffler, who is not an attorney, but is the principal of the corporation, was permitted to appear pro se over the objection of Petitioner. Petitioner presented the testimony of two (2) witnesses, Thomas J. Smith and Chester Cole. Petitioner's Exhibits 1 through 6 were admitted into evidence without objection.

Mr. Leffler testified on behalf of the Respondent. Respondent's Exhibits 1 through 5 were admitted in evidence without objection.

No transcript of the proceedings was ordered. The Petitioner filed proposed findings of fact and conclusions of law, which were timely filed by October 11, 1997. Respondent has not filed proposed findings of and conclusions of law as of the date of this Order.

FINDINGS OF FACT

1. At all times material hereto, Respondent was engaged in the preparation and sale to the public of food items. Respondent is a public food service establishment.

2. On January 7, 1997, a safety and sanitation inspector went to the Respondent's public food service establishment to conduct an inspection, and cited numerous violations which were noted on an Inspection Report.

3. One of those violations was that Respondent did not have a proper grease filter system in the exhaust hood because some filters were missing and others did not fit properly.

4. On January 14, 1997, the inspector conducted a call-back inspection. Respondent took corrective action on several violations and brought some of the violations into compliance with the law and rules enforced by the Division. Respondent was notified at that time that a second call-back inspection would be conducted on those items which were not corrected. Respondent was given further opportunity to comply with the law and rules enforced by the Division.

5. The second call-back inspection was conducted on February 11, 1997, and found that two (2) of the violations cited in the routine inspection above continued to be present.

6. These same uncorrected violations were found to exist by the Petitioner on subsequent inspections on April 18, 1997, and on September 29, 1997.

7. In response to the violations noted, a Notice to Show Cause was issued on April 16, 1997. The Notice to Show Cause was served personally on the Respondent's president, Mr. K. C. Leffler.

8. One of the violations noted that the filters, in the exhaust hood over the grill, have spaces between them. A filter must be tight-fitting, and gaps are not permitted. Gaps are not permitted because gaps allow grease-laden air to bypass the filters, and this creates a fire hazard.

9. This violation poses a significant threat to the public health, safety and welfare. This violation is considered critical by the Petitioner. The violation was discussed with Leffler, including the fact that the Division considered this violation critical.

10. Leffler acknowledged the existence of a gap in the exhaust hood filter system, a gap of undetermined length and 3.9 inches wide; the gaps between the filters have been in existence for an extended period of time prior to the first inspection on January 7, 1997, and continued until the date of the hearing. Respondent alleges that standard filters cannot fit in the gaps.

11. The exhaust food filter system contains gaps or spaces; the filters are not "tight-fitting," and were improperly installed, or were missing. Therefore, this violation continued from January 7, 1997 to October 1, 1997, or 267 days.

12. The side lot, part of the same property where Leffler resides, is part of the premises and is inspected with the rest of the establishment. The area has the potential to harbor vermin. Roaches and rats are vermin that may be harbored whenever excessive debris is kept on or about the premises.

13. The evidence clearly demonstrates the condition of the lot. It shows personal property leaning against a fence, piled in the yard, and forming substantial clutter.

14. The evidence is clear and convincing that the condition of the yard is a violation of the rules of the Petitioner.

#### CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction of the parties and subject matter of these proceedings. Section 120.569 and 120.57(1), Florida Statutes.

16. Petitioner is the agency charged with regulating the operation of public food service establishments by licensing and inspecting such establishments in the state of Florida, pursuant to Chapter 509, Florida Statutes, for the purpose of safeguarding the public health, safety and welfare. Section 509.032(1), Florida Statutes. Licensure is not a prerequisite to regulation or enforcement action by the Petitioner. Section 509.261(1), Florida Statutes.

17. Respondent holds a license, numbered 15-01855R, from the Division, to operate a public food service establishment.

18. License revocation proceedings are penal in nature. The burden of proof in this case is on the Petitioner to establish proof of the allegations in the Notice to Show Cause by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

19. The Division has enforcement authority of rules adopted by the State Fire Marshall pursuant to Chapter 633, Florida Statutes. Section 509.211(2), Florida Statutes.

20. The State Fire Marshall has adopted National Fire Protection Association 96 (1994) as the Standards for the Installation of Equipment for Removal of Smoke and Grease-laden Vapors from Commercial Cooking Equipment. Rule 4A-21.302(6), Florida Administrative Code.

21. NFPA 96 (1994), Section 3-2.3, provides that:

Grease filters shall be listed and constructed of steel or listed equivalent material and shall be of rigid construction that will not distort or crush under normal operation, handling, and cleaning conditions. Filters shall be tight fitting and firmly held in place.

22. A condition, shown to have existed on the date of the initial inspection and on the last inspection date, January 7, 1997, and October 1, 1997, raises a presumption that the condition continued from day-to-day, at least on each day shown, and all intermediate dates. S. Gard, Florida Evidence, Section 3:36 (1980 ed.)

23. Section 509.261, Florida Statutes, and Rule 61C-1.0021(2), Florida Administrative Code, provide that each day a critical violation occurs may be considered a separate offense. The violation of this fire safety rule is a critical violation.

24. Petitioner has adopted rules prescribing the sanitary standards which are enforced in public food service establishments

pursuant to its authority under Section 509.221, Florida Statutes. The rules adopted include the section noted below, as found in Chapter 61C, Florida Administrative Code, at the time Respondent was cited for violation of the Rules of the Division.

25. Rule 61C-4.010(5)(b), Florida Administrative Code, provides in pertinent part that:

Public food service establishments and all parts of property used in connection with their operations shall be kept free of litter.

26. The definition for "litter" includes "a disorderly accumulation of objects, esp. carelessly discarded waste materials or scraps." The American Heritage Dictionary, Second College Edition.

27. The material leaning against the fence and in the yard is litter. There is no exemption from the provision merely because the Respondent resides on the premises and states that the litter is in his "yard" and is not used in connection with the restaurant.

28. The violation of this rule is a non-critical violation.

29. Any public food service establishment that is operating in violation of Chapter 509 or the rules of the Division is subject to the imposition of administrative fines not to exceed \$1,000 per violation, and the suspension or revocation of its license. Section 509.261(1), Florida Statutes.

30. Petitioner has carried its burden of proving by clear and convincing evidence, each of the violations cited in the Notice to Show Cause on April 22, 1997.

RECOMMENDATION

Based upon the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED that the Secretary enter a Final Order finding the Respondent guilty of violating Rules 4A-21.302(6), Florida Administrative Code, and 6C-4.010(5)(b), Florida Administrative Code.

It is further RECOMMENDED that Respondent shall be assessed an administrative fine in the amount of \$1,000 for the fire code violations, and \$250 for each of the litter violations, for a total of \$1,250; and that a Cease and Desist Order be issued requiring Respondent to bring the violations into compliance within 60 days of the date of the Final Order or its license will be suspended.

DONE AND ORDERED this 5th day of November, 1997, in Tallahassee, Leon County, Florida.

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DANIEL M. KILBRIDE  
Administrative Law Judge  
Division of Administrative Hearings  
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1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
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Filed with the Clerk of the



Division of Administrative Hearings  
this 5th day of November, 1997.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.