

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND)
CONSUMER SERVICES,)
)
Petitioner,)
)
vs.) Case No. 97-3807
)
WIMA CORPORATION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case by video teleconference on December 8, 1997, at West Palm Beach, Florida, before Errol H. Powell, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Donald Epstein, President
Wima Corporation
4252 Northwest 55th Place
Coconut Creek, Florida 33073

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent committed the offenses set forth in the Administrative Complaint and, if so, what action should be taken.

PRELIMINARY STATEMENT

By Administrative Complaint dated May 30, 1997, the Department of Agriculture and Consumer Services (Petitioner) charged the Wima Corporation (Respondent) with violating Chapter 500, Florida Statutes, and Chapter 5K-9, Florida Administrative Code. By response dated June 12, 1997, Respondent disputed the allegations of fact and requested a formal hearing. On August 15, 1997, this matter was referred to the Division of Administrative Hearings.

At hearing, Petitioner presented the testimony of four witnesses¹ and entered ten exhibits into evidence. Respondent presented the testimony of three witnesses² and entered fourteen exhibits into evidence.

A transcript of the hearing was ordered. The parties filed post-hearing submissions which have been duly considered.

FINDINGS OF FACT

1. The Department of Agriculture and Consumer Services (Petitioner) is charged with the administration and enforcement of Chapter 500, Florida Statutes, together with the rules promulgated thereunder, relating to food and water sanitation within the State of Florida.

2. Wima Corporation (Respondent) is a water vending machine operator and is located at 4252 Northwest 55th Street, Coconut Creek, Florida. The president of Respondent is Donald Epstein. Respondent has been in the water vending business since 1980 and has never received any notification that its water has caused

anyone to become ill.

3. Respondent is the owner and operator of a water vending machine, Identification Tag No. 5890 (Machine ID Tag No. 5890), located at Lyons Amoco, Lyons Road and Glades Road, Boca Raton, Florida. Machine ID Tag No. 5890 dispenses drinking water, potable water that originates from an approved municipal provider and is processed by reverse osmosis. The drinking water is sold to the general public. Approximately 20 to 50 vends per day are dispensed from Machine ID Tag No. 5890 to the general public who provide their own container for collecting the water. A vend is one gallon of water.

4. On March 3, 1997, one of Petitioner's sanitation and safety inspectors (inspector) collected a vended water sample from Machine ID Tag No. 5890. The inspector collected the first "slug" of water from the spout of Machine ID Tag No. 5890 the same as a paying public consumer. The first "slug" of water is the first water that the first paying public consumer would receive from Machine ID Tag No. 5890. Petitioner's inspector collected 100 ml of water in a sanitary container, sealed the container, and immediately packed the container in ice in order to refrigerate the water sample. The water sample remained in the custody and control of Petitioner's inspector until it was shipped, packed in ice, to Tallahassee, Florida, via Greyhound Bus, for analysis by Petitioner's food laboratory. The shipping process was in accordance with protocol established by

Petitioner.

5. On March 4, 1997, the water sample was received by the Petitioner's food laboratory for analysis. The sample remained in the custody and control of the laboratory staff. The analysis of the water sample was initiated within 30 hours of collection. Upon analysis, the water sample was found to contain 21 coliforms per 100 ml. Florida's safe water standards require a total absence (zero) coliforms. The water sample was contaminated with coliforms and was not appropriate for human consumption. The analysis was performed in accordance with the protocol established by Petitioner.

6. By certified letter, return receipt, dated March 17, 1997, Respondent was notified, among other things; that the water sample was adulterated; that ID Tag No. 5890 was required to be cleaned and sanitized; and that another sample was required to be taken.

7. After the analysis of the water sample showed adulteration, Respondent's president contacted an independent laboratory, Spectrum Laboratories, Inc., (Spectrum), approved by Petitioner, and requested that an analysis of the dispensed water by Machine ID Tag No. 5890. Spectrum forwarded the necessary items to Respondent's president in order for him to obtain a water sample and informed him of the procedure and process in obtaining the sample. On March 19, 1997, Respondent's president obtained the water sample in accordance with Spectrum's

instructions and forwarded the sample to Spectrum. On March 20, 1997, Spectrum performed an analysis of the water sample and found no coliforms. On or about March 24, 1997, Respondent's president forwarded the results of Spectrum's analysis to Petitioner.

8. On March 25, 1997, a second vended water sample was taken by Petitioner's same inspector from Machine ID Tag No. 5890, using the same procedure and process as before. Also, the water sample was shipped for analysis to Petitioner's food laboratory in Tallahassee using the same procedure and process. The collection and shipping procedure and process were again in accordance with protocol established by Petitioner.

9. On March 26, 1997, the second water sample was received by the Petitioner's food laboratory for analysis. Upon analysis, the second water sample was found to contain 18 coliforms per 100 ml. The water sample was contaminated with coliforms and was not appropriate for human consumption. The analysis was again performed in accordance with the protocol established by Petitioner.

10. By certified letter, return receipt, dated April 10, 1997, Respondent was notified, among other things, that the second water sample was adulterated; that Machine ID Tag No. 5890 would be taken out of service until the source of the contamination was found; and that Machine ID Tag No. 5890 would be immediately placed under a "Stop Use" order.

11. By Stop Use Order dated April 11, 1997, Respondent was notified, among other things, that Machine ID Tag No. 5890 could not be used. Respondent was further notified that Machine ID Tag No. 5890 could resume being used after a showing of no contamination from a water sample taken by Petitioner's inspector and analyzed by Petitioner's food laboratory.

12. Respondent cooperated fully with Petitioner in correcting the problem. Respondent complied with all of Petitioner's requests.

13. On April 16, 1997, a third vended water sample was collected by Petitioner's inspector from Machine ID Tag No. 5890. The same collection procedure and process were followed as in the previous two collections. The same procedure and process were followed in forwarding the water sample to Petitioner's food laboratory as in the previous two collections. All procedures and processes were in accordance with protocol established by Petitioner.

14. On April 17, 1997, Petitioner's food laboratory performed an analysis of the third water sample. The analysis was performed in accordance with the protocol established by Petitioner. Petitioner's laboratory found no coliforms. The water sample was not contaminated and was appropriate for human consumption.

15. Respondent was notified of the results of Petitioner's third analysis. Petitioner permitted the use of Machine ID Tag No. 5890 to resume.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter of these proceedings and the parties thereto pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

17. Chapter 500, Florida Statutes (1995), is referred to as the "Florida Food Safety Act." Petitioner is charged with the administration and enforcement of Chapter 500. Section 500.032,

Florida Statutes (1995).

18. In order for Petitioner to levy a fine against a water vending machine operator, clear and convincing evidence (proof greater than a mere preponderance of the evidence) is required. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996)("an administrative fine deprives the person fined of substantial rights in property;" "[a]dministrative fines . . . are generally punitive in nature;" "[b]ecause the imposition of administrative fines . . . are penal in nature and implicate significant property rights, the extension of the clear and convincing evidence standard to justify the imposition of such a fine is warranted"); Section 120.57(1)(h), Florida Statutes, ("[f]indings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute").

19. In the Administrative Complaint, Petitioner states as Investigative Results the following:

An investigation was conducted by the Department of Agriculture and Consumer Services ("Department") of your business activities. As a result of that investigation, the Department found the following violations of Chapter 500, Florida Statutes, ("the Florida Food Safety Act") and Chapter 5K-9, Florida Administrative Code:

On March 3 and March 25, 1997, violations were noted by the analysis of water from your water vending machine (Identification Tag# 5890) whereby the product was deemed adulterated by the Department's Food Laboratory.³

20. The Administrative Complaint fails to point out which specific statutory provision of Chapter 500 and which rule provision of Chapter 5K-9 that Respondent has violated. A perusal of Chapter 500 is in order.

21. Respondent's water vending machine provided water for human consumption at a cost to the consumer. Subsection 500.03(1)(h), Florida Statutes (1995), defines food and provides in pertinent part:

- (1) For the purpose of this chapter, the term:
- (h) "Food" includes:
 - 1. Articles used for food or drink for human consumption;

* * *

The term includes any . . . beverage; or any ingredient used, intended for use, or sold for human consumption.

The vended water provided by Respondent from the water vending machine is food as defined by Subsection 500.03(1)(h).

22. Chapter 5K-9, Florida Administrative Code, pertains specifically to water vending machines. Rule 5K-9.005, Florida Administrative Code, provides, among other things, that a vended water sample testing positive for total coliforms is unsatisfactory.

23. A food is deemed adulterated if the food "has been produced, prepared, packed, or held under insanitary [sic] conditions whereby it may become contaminated with filth, or whereby it may have been rendered diseased, unwholesome, or

injurious to health." Subsection 500.10(1)(f), Florida Statutes (1995). Based on the analysis of the two vended water samples taken by Petitioner, the water being dispensed by Respondent's Machine ID Tag No. 5890 on March 3 and 25, 1997, was adulterated.

24. The "manufacture, sale or delivery, holding or offering for sale of any food that is adulterated" is prohibited. Subsection 500.04(1), Florida Statutes (1995).

25. Section 500.459, Florida Statutes (1995), pertains specifically to water vending machines. The Legislative intent stated in Subsection 500.459(1) is "to protect the public health through licensing and establishing standards for water vending machines to ensure that consumers obtaining water through such means . . . are assured that the water meets acceptable standards for human consumption." As an operating standard, a "water vending machine must be maintained in a clean and sanitary condition." Subsection 500.459(4)(f), Florida Statutes (1995).

26. Petitioner has shown by clear and convincing evidence that Respondent's water vending machine was not maintained in a clean and sanitary condition in that the vended water was adulterated in violation of Subsections 500.459(4)(f), and 500.04(1), Florida Statutes (1995), and Rule 5K-9.005, Florida Administrative Code.

27. Petitioner is authorized by Section 500.511, Florida Statutes (1995), to impose an administrative fine for violations associated with water vending machines. Section 500.511 provides

in pertinent part:

(2) ENFORCEMENT AND PENALTIES.-In addition to the provisions contained in ss. 500.453-500.511, the department [Petitioner] may enforce ss. 500.453-500.511 in the manner provided in s. 500.121. Any person who violates a provision of ss. 500.453-500.511 or any rule adopted under such section shall be punished as provided in such sections. However, criminal penalties may not be imposed against any person who violates a rule.

28. Section 500.121, Florida Statutes (1995), authorizes Petitioner to, among other things, "impose a fine not exceeding \$5,000 against any retail food store or food establishment that has violated [the Florida Food Safety Act]". Subsection 500.121(1). Consequently, pursuant to Subsection 500.511(2), Petitioner is authorized to impose an administrative fine not exceeding \$5,000 against a water vending machine operator.

29. As a penalty, Petitioner suggests the imposition of a \$5,000 fine. Such a penalty is too harsh. Respondent cooperated fully with Petitioner in correcting the problem. Also, shortly after the contamination was discovered by Petitioner, Respondent had its own analysis performed and forwarded the results to Petitioner even though Petitioner did not consider the results of the analysis. Further, no evidence of prior disciplinary action by Petitioner against Respondent was presented.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Agriculture and Consumer Services enter a final order:

1. Finding that the Wima Corporation violated Subsections 500.459(4)(f), and 500.04(1), Florida Statutes (1995), and Rule 5K-9.005, Florida Administrative Code.

2. Imposing a \$500 administrative fine against Wima Corporation.

DONE AND ENTERED this 7th day of April, 1998, in Tallahassee, Leon County, Florida.

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847

Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of April, 1998.

ENDNOTES

- ^{1/} Respondent's president was called as a witness by Petitioner.
- ^{2/} Respondent's president also testified on behalf of Respondent.
- ^{3/} This sentence was italicized in the Administrative Complaint.

COPIES FURNISHED:

Linton B. Eason, Esquire
Department of Agriculture and
Consumer Services
515 Mayo Building
Tallahassee, Florida 32399-0800

Donald Epstein, President
Wima Corporation
4252 Northwest 55th Place
Coconut Creek, Florida 33073

Brenda D. Hyatt, Chief
Bureau of Licensing and Bond
Department of Agriculture

508 Mayo Building
Tallahassee, Florida 32399-0800

Richard Tritschler, General Counsel
Department of Agriculture and
Consumer Services
The Capitol, Plaza Level 10
Tallahassee, Florida 32399-0810

Honorable Bob Crawford
Consumer of Agriculture
Department of Agriculture and
Consumer Services
The Capitol, Plaza Level 10
Tallahassee, Florida 32399-0810

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.