

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS)
AND PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 98-0367
)
PIZZA HUT OF TITUSVILLE, INC.,)
d/b/a PIZZA HUT #710602,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on June 15, 1998, before Patricia Hart Malono, a duly designated Administrative Law Judge of the Division of Administrative Hearings. The hearing was held via video teleconference, with the Petitioner and the Respondent appearing at Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: Daniel R. Biggins, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1007

For Respondent: Charles S. Caulkins, Esquire
Law Office of Fisher & Phillips LLP
2300 NationsBank Tower
One Financial Plaza
Fort Lauderdale, Florida 33394

STATEMENT OF THE ISSUE

Whether the Respondent committed the violations alleged in the Notice to Show Cause dated October 2, 1997, and, if so, the penalty which should be imposed.

PRELIMINARY STATEMENT

In a Notice to Show Cause dated October 2, 1997, the Department of Business and Professional Regulation, Division of Hotel and Restaurants ("Division"), charged Pizza Hut of Titusville, Inc., d/b/a Pizza Hut #710602, with violating Section 509.281(2), Florida Statutes, by obstructing an inspector of the Division in the discharge of her duties and with violating Section 509.032(2)(b), Florida Statutes, by refusing the inspector access to the restaurant's premises to perform an inspection. Pizza Hut timely requested a formal hearing on the charges, and the Division transmitted the file to the Division of Administrative Hearings for assignment of an administrative law judge. The final hearing was held on June 15, 1998.

At the hearing, the Division presented the testimony of Lisa Bosworth, a Sanitation and Safety Inspector employed by the Division, and of Gene Peters, Ms. Bosworth's supervisor. Petitioner's Exhibits 1 and 2 were offered and received into evidence. Pizza Hut offered the testimony of Scott Navarro, an area supervisor with TriCon Global Restaurants; Mike Keeler, a loss prevention manager for TriCon Global Restaurants; and Justin Mardenfeld, formerly the manager of Pizza Hut #710602.

Respondent's Exhibits A and B were offered and received into evidence. At the Division's request, official recognition was taken of Rule 61C-1.0021(3), Florida Administrative Code.

No transcript of the proceeding was filed with the Division of Administrative Hearings, but the parties timely filed proposed findings of fact and conclusions of law, which have been duly considered.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department of Business and Professional Regulation, Division of Hotels and Restaurants, is the state agency responsible for regulating public food service establishments in Florida and is authorized to impose penalties for violations of Chapter 509, Florida Statutes. Sections 509.032 and .261, Florida Statutes.

2. Pizza Hut #710602 is a public food service establishment located at 10394 West Sample Road, Fort Lauderdale, Florida. The establishment operates under the Division's license control number 16-0869-R.

3. Pizza Hut #710602 is a delivery and carry-out facility with no customer seating. There is, however, a small counter where patrons may eat their pizzas on the premises, if they wish.

The store is located at the end of a strip mall, and it opens for business at 11:00 a.m.

4. On October 2, 1997, the manager of Pizza Hut #710602 arrived shortly before 10:00 a.m. and began carrying out the administrative tasks necessary to prepare to open the premises for business. Pursuant to the established routine for Pizza Hut delivery and carryout facilities, the manager turned off the alarm and set the time-release safe, which opens fifteen minutes after it is set. When the safe opened, the manager began counting the previous night's cash receipts so he could prepare the deposit and take the cash to the bank. The manager was the only employee on the premises.

5. Shortly after 10:00 a.m., while the manager was counting the money from the safe, a woman knocked on the front door of the restaurant and requested that she be allowed into the restaurant to conduct a routine health and safety inspection. She showed the manager her clipboard, which contained a schedule showing that Pizza Hut #710602 was scheduled for inspection on October 2. Although she had identification showing that she was Lisa Bosworth, an inspector employed by the Division, the manager did not request to see her identification, and she did not show it to him. Ms. Bosworth did not see anyone in the facility except the manager.

6. The manager refused to unlock the door for Ms. Bosworth, telling her through the door that he could not unlock the door

because it was Pizza Hut's policy not to allow anyone but scheduled employees access to the premises before the facility was open for business. The manager told Ms. Bosworth to return at 11:00 a.m.

7. Ms. Bosworth went directly to a pay telephone in the adjacent parking lot, a short distance from the Pizza Hut, and called her supervisor to report the manager's refusal to allow her into the facility. She also spoke by telephone with the Division's regional supervisor.

8. Meanwhile, the manager finished preparing the deposit, which totaled approximately \$2,000, and left the facility to go to the bank. As he was going to his car, he noticed Ms. Bosworth at the pay telephone in the parking lot. He approached her and again invited her to return at 11:00 a.m. to conduct her inspection.

9. After the manager left, Ms. Bosworth completed her Food Service Inspection Report while sitting in her car in the parking lot, and then she returned to her office, where she completed more paperwork and spoke with Division personnel. She returned to Pizza Hut #710602 at around 2:30 p.m. on October 2 and obtained the manager's signature on her report, which detailed the events of the morning.

10. Ms. Bosworth usually performs five or six inspections each day and plans her daily inspections according to the location of the facilities on her list for the day. Pizza Hut

#710602 appeared on the list of facilities she was to inspect on October 2, 1997, but she had no set schedule or specific order in which she was required to perform her assigned inspections. She stopped at Pizza Hut #710602 shortly after 10:00 a.m. simply because she had been working in the vicinity of the Pizza Hut that morning.

11. It is the Division's policy to inspect food service establishments during operating hours. The Division's Sanitation and Safety Supervisor testified that, in the Division's view, operating hours includes anytime anyone is working on the premises of a public food service establishment. The supervisor also testified that the reason for inspecting establishments before and after the hours they are open for business is to observe activities involving food preparation, to take the temperature of refrigerators and freezers to ensure that they are adequate for food storage, to observe the practices used in cleaning the facilities and in receiving goods, and to observe general business practices involving food safety issues. The Division does relatively few before- and after-hours inspections, although such inspections are part of the Division's normal routine.

12. As a result of a growing number of robberies of fast-food restaurants, Pizza Hut instituted a policy approximately four years ago limiting access to its establishments at times when they are not open for business. The policy is contained in

section 2.1 of Pizza Hut's January 1996 Administrative Guide, which provides that, with respect to premises security: "Do not open front door(s) during non-business hours to anyone, except known scheduled employees or known vendors. Establish and verify picture ID of the person PRIOR to opening doors or allowing that person to enter the premises." The manager of Pizza Hut #710602 was relying on this policy when he refused to allow Ms. Bosworth to enter the premises before 11:00 a.m.

13. When the Division inspector requested access to Pizza Hut #710602 shortly after 10:00 a.m. on October 2, 1997, the only employee on the premises was the manager, who was performing administrative duties having no relationship to the public health, safety, and welfare. Nonetheless, access for the purpose of inspection was requested at a reasonable time and during what could reasonably be considered the establishment's operating hours.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Section 120.57(1), Florida Statutes (1997).

15. In its Notice to Show Cause, the Division identified the possible penalties for the violations alleged as including suspension or revocation of the license of Pizza Hut #710602 or the imposition of an administrative fine. Consequently, the

Division has the burden of proving the allegations in the Notice to Show Cause by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932, 933-34 (Fla. 1996). It should be noted, however, that the material issues of fact in this case are largely undisputed, so that the primary issue to be resolved is the scope of the Division's right of access to inspect food service establishments.

16. The duties of the Division are set forth in Section 509.032, Florida Statutes, as follows:

(1) GENERAL.- The division shall carry out all of the provisions of this chapter and all other applicable laws and rules relating to the inspection or regulation of public lodging establishments and public food service establishments for the purpose of safeguarding the public health, safety, and welfare. . . .

(2) INSPECTION OF PREMISES.-

(a) The division has responsibility and jurisdiction for all inspections required by this chapter. . . .

(b) For purposes of performing required inspections and the enforcement of this chapter, the division has the right of entry and access to public lodging establishments and public food service establishments at any reasonable time.

17. Rule 61C-1.002(8), Florida Administrative Code, provides in pertinent part:

(b) Division personnel shall inspect all public food service establishments and other places where food is served to or prepared for service to the public as often as necessary for enforcement of the provisions of law and rule and protection of the public's health, safety and welfare. . . .

Persons operating a public food service establishment shall permit division personnel right of entry during operating hours to observe food preparation and service, and if necessary examine records of the establishment to obtain pertinent information pertaining to food and supplies purchased, received or used.

18. Although the Division has charged Pizza Hut with violating both Section 509.032(2)(b) and Section 509.281(2), Florida Statutes, Section 509.032(2)(b) merely sets forth the authority of the Division to conduct inspections of public food service establishments. The statutory violation is stated in Section 509.281(2)(b), which provides:

Any operator who obstructs or hinders any agent of the division in the proper discharge of the agent's duties; who fails, neglects, or refuses to obtain a license or pay the license fee required by law; or who fails or refuses to perform any duty imposed upon it by law or rule is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. Each day that such establishment is operated in violation of law or rule is a separate offense.

19. Based on the findings of fact herein, the Division has proven by clear and convincing evidence that Pizza Hut violated Section 509.281(2)(b) in that the Division's inspector was hindered in the proper discharge of her duty to inspect Pizza Hut #710602 when she was refused access to the establishment by the manager at approximately 10:15 a.m. on October 2, 1997.

20. Rather than charging Pizza Hut with the criminal violation specified in Section 509.281(2)(b), the Division seeks the imposition of administrative penalties against Pizza Hut

pursuant to Section 509.261, Florida Statutes, which provides in pertinent part:

(1) Any public . . . food establishment that has operated or is operating in violation of this chapter or the rules of the division, . . . may be subject by the division to:

(a) Fines not to exceed \$1,000 per offense;

(b) Mandatory attendance, at personal expense, at an educational program sponsored by the Hospitality Education Program; and

(c) The suspension, revocation, or refusal of a license issued pursuant to this chapter.

The Division also cites Rule 61C-1.0021(3), Florida Administrative Code, as authority to impose administrative penalties in this case. That rule provides that "[a]n operator who has been determined by the director to have obstructed or hindered an inspector in the proper discharge of the inspector's duties shall have his license revoked." The Division does not, however, suggest that the license of Pizza Hut #710602 be revoked; rather, it suggests that, if a violation is found, a fine be levied.

21. The recommended penalty in this case is based upon a consideration of the gravity of the violation, the severity of the harm which could have resulted from the violation, and the extent to which the applicable statutes and rules were violated.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Business and Professional Regulation, Division of Hotels and Restaurants,

enter a final order finding that Pizza Hut of Titusville, Inc.,
d/b/a Pizza Hut #710602, violated Section 509.281(2)(b), Florida
Statutes, and imposing an administrative fine in the amount of
\$250.00.

DONE AND ENTERED this 3rd day of August, 1998, in
Tallahassee, Leon County, Florida.

PATRICIA HART MALONO
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of August, 1998.

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.