

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION, DIVISION)
OF HOTELS AND RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 98-4351
)
DON'S ITALIAN RESTAURANT OF)
SINGER ISLAND, INC., d/b/a)
ITALIAN CONNECTION,¹)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case before Administrative Law Judge Michael M. Parrish of the Division of Administrative Hearings on March 3, 1999, in 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: Mr. Joel Wallach, President
Don's Italian Restaurant of Singer
Island, Inc.
10471 Utopia Circle, South
Boynton Beach, Florida 33437

STATEMENT OF THE ISSUE

This is a license discipline proceeding in which the Petitioner seeks to take disciplinary action against the

Respondent on the basis of alleged violations of Section 509.032(2)(b), Florida Statutes, and Rule 61C-1.002(8)(b), Florida Administrative Code. The alleged violations are set forth in a Notice to Show Cause dated March 26, 1998.

PRELIMINARY STATEMENT

Following the Respondent's timely request for an evidentiary hearing on the allegations set forth in the Notice to Show Cause, this matter was referred to the Division of Administrative Hearings to conduct the requested hearing. At the request of the Respondent, the hearing date was twice rescheduled. At the final hearing on March 3, 1999, the Petitioner presented the testimony of Albert Pistorio, a Sanitation and Safety Inspector employed by the Division of Hotels and Restaurants, and of Gene Peters, who is Mr. Pistorio's supervisor. The Petitioner's Exhibits 1 and 2 were offered and received into evidence. At the Petitioner's request, official recognition was taken of Rules 61C-1.0021(3) and 61C-1.002(8)(b), Florida Administrative Code.

The Respondent presented the testimony of Joel Wallach, the president of the Respondent corporation. The Respondent did not offer any exhibits.

Neither party filed a transcript of the final hearing with the Division of Administrative Hearings. Following the hearing, both parties filed timely Proposed Recommended Orders. The parties' post-hearing proposals have been carefully considered during the preparation of this Recommended Order.²

FINDINGS OF FACT

1. At all times material, the Respondent, Don's Italian Restaurant of Singer Island, Inc. (Don's Italian), doing business as "Italian Connection," operated a public food service establishment located at 3025 South Federal Highway, Delray Beach, Florida. At all times material, this establishment operated under license control number 60-11547-R issued by the Division of Hotels and Restaurants.

2. At all times material to this case, Joel Wallach was the president of Don's Italian, and Mr. Wallach was also actively involved in the operation of the business.

3. The restaurant operated by Don's Italian is a small restaurant. It has a very limited kitchen area. The approximate width of the kitchen working area is five feet.

4. On March 24, 1998, at approximately 11:00 a.m., Al Pistorio, an inspector employed by the Division of Hotels and Restaurants, went to the restaurant operated by Don's Italian to perform a routine inspection as required by the applicable statutory and rule provisions. Mr. Wallach was present when Mr. Pistorio arrived. Mr. Pistorio introduced himself to Mr. Wallach and stated his reason for coming to the restaurant. Mr. Wallach replied with words to the effect that it was a bad day or a bad time for an inspection. Mr. Pistorio nevertheless started walking toward the kitchen to begin his inspection. Mr. Wallach interrupted Mr. Pistorio and repeated that it was a

bad time for an inspection. Mr. Wallach made it clear that he wanted Mr. Pistorio to leave without performing an inspection and to come back at some other time to perform the inspection. Following some further discussion, during which Mr. Wallach continued to object to the inspection being performed at that

time, Mr. Pistorio said he would have to call his office for further instructions.

5. Mr. Pistorio called from the restaurant and one of the supervisory personnel at the local office of the Division of Hotels and Restaurants told Mr. Pistorio he should leave the restaurant and attend to other matters pending further instructions. Thereupon, Mr. Pistorio left the restaurant.

6. About an hour or so later, Mr. Pistorio was contacted by his office and told to return to the restaurant operated by Don's Italian, where he would be met by one of his supervisors. Mr. Pistorio returned to the restaurant, where he was met in the parking lot by his immediate supervisor, Gene Peters. Messrs. Pistorio and Peters entered the restaurant and asked Mr. Wallach if they could conduct an inspection. Mr. Wallach agreed, and the two inspectors immediately commenced the inspection.

7. Within just a couple of minutes, Mr. Wallach approached the two inspectors as they were discussing conditions in the restaurant that appeared to be minor violations. Mr. Wallach appeared to be agitated and placed a hand on Mr. Peters' shoulder to get his attention. Mr. Peters told him to remove his hand. Mr. Wallach became angry and confrontational and ordered Mr. Peters to leave the restaurant. During the course of this confrontation, Mr. Peters told Mr. Wallach that he would be subject to fines if he prevented the inspectors from completing their inspection. Mr. Wallach continued to demand that

Mr. Peters leave the restaurant, but did agree that Mr. Pistorio could remain and finish the inspection. Thereupon, Mr. Peters went out into the restaurant parking lot and Mr. Pistorio resumed his efforts to inspect the restaurant.

8. A minute or two later, Mr. Wallach noticed that Mr. Pistorio was writing up a violation based on the morning incident. Mr. Wallach again became upset and angry and began to speak to Mr. Pistorio in a confrontational and abusive manner. Mr. Wallach's abusive comments to Mr. Pistorio included the threat that if Mr. Pistorio was going to write him up for violations, ". . . I'll throw your ass out, too." Under these hostile circumstances, it was not possible for Mr. Pistorio to continue his inspection without fear of further unpleasantries, so he promptly left the restaurant and joined Mr. Peters in the parking lot. Both inspectors left the restaurant premises without being able to complete an inspection of the restaurant.

9. It is the policy and practice of the Division of Hotels and Restaurants to inspect restaurants during hours of operation, usually between the hours of 9:00 a.m. and 5:00 p.m. It is also a policy and practice to conduct the inspections without prior notice to the restaurant. Unannounced inspections are more likely to reveal the normal condition in which the restaurant facilities are maintained. Restaurant inspections are often made during peak meal times in order to observe whether proper sanitary practices are maintained during periods of peak

activity.

CONCLUSIONS OF LAW

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

11. In cases of this nature, the Division of Hotels and Restaurants bears 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 Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Section 120.57(1)(h), Florida Statutes. ("Findings 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.").

12. The Respondent is charged with violation of the following statutory and rule provisions: Section 509.032(2)(b), Florida Statutes, and Rule 61C-1.002(8), Florida Administrative Code. Section 509.032, Florida Statutes, reads as follows, in pertinent part:

- (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.

13. 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.

14. The Petitioner seeks the imposition of administrative penalties against Don's Italian 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.

15. The facts in this case are based on clear and convincing evidence. The facts show that the Respondent violated

Rule 61C-1.002(8), Florida Administrative Code, by interfering with and preventing the efforts of the inspectors who were trying to perform a statutorily authorized inspection. Such conduct is a serious violation.³

16. In its Proposed Recommended Order, the Petitioner argues that the appropriate penalty in this case is an administrative fine in the amount of \$1,000. Upon consideration of all of the factors argued by the Petitioner, that appears to be an appropriate penalty.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be issued in this case concluding that the Respondent has violated Rule 61C-1.002(8), Florida Administrative Code, and imposing a penalty consisting of an administrative fine in the amount of \$1,000.

DONE AND ENTERED this 29th day of March, 1999, in Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of March, 1999.

ENDNOTES

^{1/} The style of this case has been modified to state the complete name of the Respondent corporation.

^{2/} The Proposed Recommended Order submitted by the Petitioner is, for the most part, consistent with the findings and conclusions reached by the judge, following a consideration of all of the evidence and the applicable statutes, rules, and decisional law. Extensive portions of the Petitioner's proposed findings and conclusions have been incorporated into this Recommended Order.

^{3/} The serious nature of the violation is reflected in the fact that under Section 509.281(2)(b), Florida Statutes, "[a]ny operator who obstructs or hinders any agent of the division in the proper discharge of the agent's duties" is guilty of a misdemeanor of the second degree.

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.