

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND	)	
CONSUMER SERVICES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 99-3163
	)	
HOI PHUN, d/b/a TOWN AND COUNTRY	)	
CHEVRON,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

On September 24, 1999, a formal administrative hearing in this case was held in Tampa, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Angela Dempsey, Esquire  
Department of Agriculture and  
Consumer Services  
Room 515, Mayo Building  
407 South Calhoun Street  
Tallahassee, Florida 32399-0800

For Respondent: No appearance

STATEMENT OF THE ISSUE

The issue in the case is whether the allegations set forth in the Department's Proposed Settlement Agreement and Administrative Complaint dated June 14, 1999, are correct and, if so, what penalty should be imposed.

### PRELIMINARY STATEMENT

On June 14, 1999, the Department of Agriculture and Consumer Services filed an Administrative Complaint against Respondent Hoi Phun, d/b/a Town and Country Chevron. The complaint alleges violations of the Florida Food Safety Act, Chapter 500, Florida Statutes. The Respondent filed a Petition for Formal Hearing. The request was forwarded to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner presented the testimony of one witness and had Exhibits numbered 1-3 and 6 admitted into evidence. The Respondent did not appear at the hearing. No transcript of the hearing was filed. The Petitioner filed a Proposed Recommended Order.

### FINDINGS OF FACT

1. The Department of Agriculture and Consumer Services is the state agency charged with the responsibility for enforcement of the Florida Food Safety Act.

2. At all times material to this case, Respondent Hoi Phun was the owner and operator of Town and Country Chevron, 8616 West Hillsborough Avenue, Tampa, Florida. The Respondent had no certified food manager and had no food permit for the facility.

3. On April 8, 1999, a Department representative inspected the Respondent's premises. At the time of the inspection, the soda machine was visibly dirty and mildewed at the dispenser. The ice machine, located in a back room, was also dirty. The

"warewash" sink was dirty and had no hot water. Chemicals were stored at the wash area. Wastewater was disposed of by dumping on the ground outside and at the rear of the building. A plumbing fixture lacked a "backflow" device that prevents siphonage of potentially unsanitary water into the building's water lines.

4. The April 8, 1999, overall evaluation rating was "poor." A "stop use" order was issued for the ice machine and for the soda machine. The "stop use" order included placing a red "STOP USE" tag and red tape on each machine. Each violation was discussed with the store manager and a copy of the evaluation was provided during the discussion.

5. On April 22, 1999, a Department representative re-inspected the Respondent's premises. The inspection revealed that the April 8 violations were continuing. The "STOP USE" tape and tags placed on the soda and ice machines during the previous inspection had been removed. The inspector saw the soda machine being used. The soda machine drain was clogged.

6. The April 22, 1999, overall evaluation rating was "poor." The "stop use" order was reissued for the ice machine and for the soda machine. Each violation was discussed with the store manager and a copy of the evaluation was provided during the discussion.

7. On May 3, 1999, a Department representative re-inspected the Respondent's premises. The inspection revealed again that

the April 8 violations were continuing. The "STOP USE" tape and tags placed on the soda and ice machines had again been removed.

8. The May 3, 1999, overall evaluation rating was "poor." The "stop use" order was reissued for the ice machine and for the soda machine. Each violation was discussed with the store manager and a copy of the evaluation was provided during the discussion.

9. On May 5, 1999, the Respondent met with the Department representative who conducted the inspections. At that time, the representative released the soda and ice machines from the "stop use" orders.

10. On June 14, 1999, the Department issued a Proposed Settlement Agreement and Administrative Complaint setting forth the allegations addressed herein.

#### CONCLUSIONS OF LAW

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

12. The Department of Agriculture and Consumer Services is responsible for administration of the Florida Food Safety Act. Chapter 500, Florida Statutes.

13. Any person operating a retail food establishment must have a valid food permit. Section 500.12, Florida Statutes. The sale or delivery of food without a valid food permit is a violation of Section 500.04(4), Florida Statutes. The Respondent

operated his food service establishment without a valid food permit.

14. Section 500.04(1), Florida Statutes, prohibits the manufacture, sale or delivery, holding or offering for sale of any food that is adulterated or misbranded.

15. A food is deemed adulterated if it has been produced, prepared, packed, or held under unsanitary conditions whereby it may become contaminated with filth, or whereby it may have been rendered diseased, unwholesome, or injurious to health. Section 500.10(1)(f), Florida Statutes.

16. Section 500.03(1)(h) defines "contaminated with filth" as any food "not securely protected from dust, dirt, and, as far as may be necessary by all reasonable means, all foreign or injurious contamination."

17. The Respondent offered for sale, and sold, food that was "not securely protected" from contamination, and in doing so, violated Section 500.04(1), Florida Statutes.

500.172(1), Florida Statutes provides as follows:

When the department or its duly authorized agent finds, or has probable cause to believe, that any food or food-processing equipment is in violation of this chapter or any rule adopted under this chapter so as to be dangerous, unwholesome, fraudulent, or unsanitary within the meaning of this chapter, an agent of the department may issue and enforce a stop-sale, stop-use, removal, or hold order, which order gives notice that such article or processing equipment is, or is suspected of being, in violation and has been detained or embargoed and which order warns all persons not to remove, use, or

dispose of such article or processing equipment by sale or otherwise until permission for removal, use, or disposal is given by the department or the court. It is unlawful for any person to remove, use, or dispose of such detained or embargoed article or processing equipment by sale or otherwise without such permission.

18. In this case, stop use orders were issued related to the soda and ice machines. The "STOP USE" tags were removed and the machines continued to be used, constituting a violation of 500.172(1), Florida Statutes. Additionally, Section 500.04(8), Florida Statutes, prohibits the "removal, disposal, or use of a detained or embargoed article or food-processing equipment in violation of s. 500.172."

19. The Department is authorized to adopt rules related to the implementation of the Florida Food Safety Act. Section 500.09(3), Florida Statutes.

20. The Respondent failed to provide proper cleaning of the soda and ice machines, and "warewash" sink area, and therefore violated Rule 5K-4.004(4)(c), Florida Administrative Code, which provides as follows:

All utensils and product-contact surfaces of equipment shall be cleaned as frequently as necessary to prevent contamination of food and food products. Nonproduct-contact surfaces or equipment used in the operation of food plants should be cleaned as frequently as necessary to minimize accumulation of dust, dirt, food particles, and other debris.

21. The Respondent failed to properly dispose of wastewater and failed to maintain an appropriate backflow device on the

facilities plumbing in violation of Rule 5K-4.004(3)(b)and(c),

Florida Administrative Code, which provides as follows:

(b) Sewage disposal -- Sewage disposal shall be made into an approved sewerage system or disposed of through other approved means, in accordance with applicable provisions of state sanitary code.

(c) Plumbing -- Plumbing shall be sized, installed, and maintained in accordance with applicable provisions of the state sanitary code, and maintained to:

1. Carry sufficient quantities of water to required locations throughout the plant.

2. Properly convey sewage and liquid disposable waste from the plant.

3. Not constitute a source of contamination to foods, food products or ingredients, water supplies, equipment, or utensils or create an unsanitary condition.

4. Provide adequate floor drainage in all areas where floors are subject to flooding-type cleaning or where normal operations release or discharge water or other liquid waste on the floor.

22. The Respondent failed to maintain appropriate

facilities for hand washing in violation of Rule 5K-4.004(3)(e),

Florida Administrative Code, which provides as follows:

Adequate and convenient facilities for hand washing and, where appropriate, hand sanitizing shall be provided at each location in the plant where good sanitary practices require employees to wash or sanitize and dry their hands. Such facilities, where appropriate, shall be furnished with running water at a suitable temperature for hand washing, effective hand-cleaning and sanitizing preparations, sanitary towel service or suitable drying devices and, where appropriate, easily cleanable waste receptacles. The use of 'common' towel is forbidden.

23. Rule 5K-4.021(3), Florida Administrative Code, requires that food establishments designate a certified food manager and post written notice of the designation within the establishment. The Respondent had no certified food manager employed at the facility.

24. The Department is authorized to assess a fine of \$5,000 for each violation of the Florida Food Safety Act. Section 500.121(1), Florida Statutes. In this case, the Department is seeking a total fine of \$5,000. There is no information that suggests that the fine sought is inappropriate to the circumstances of this case.

#### 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 imposing a fine of \$5,000 against the Respondent.

DONE AND ENTERED this 26th day of October, 1999, in Tallahassee, Leon County, Florida.

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WILLIAM F. QUATTLEBAUM  
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  
[www.doah.state.fl.us](http://www.doah.state.fl.us)



Filed with the Clerk of the  
Division of Administrative Hearings  
this 26th day of October, 1999.

COPIES FURNISHED:

Angela Dempsey, Senior Attorney  
Department of Agriculture and  
Consumer Services  
515 Mayo Building  
407 South Calhoun Street  
Tallahassee, Florida 32399-0800

Hoi Phun  
Town and Country Chevron  
8616 West Hillsborough Avenue  
Tampa, Florida 33615

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

Richard Tritschler, General Counsel  
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 must be filed with the agency that will issue the final order in this case.