

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF HOTELS AND)	
RESTAURANTS,)	
)	
Petitioner,)	
)	
vs.)	Case Nos. 01-2006
)	01-2007
CHARLES MCMAHAN AND SANDRA)	01-2008
MCMAHAN, d/b/a MIKE'S MUNCHIES,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on July 19, 2001, in Panama City, Florida, before the Division of Administrative Hearings by its Administrative Law Judge, Suzanne F. Hood.

APPEARANCES

For Petitioner: Charles F. Tunnickliff, Esquire
Claudia J. Pamperin, Legal Intern
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Sandra McMahan, no appearance
Charles McMahan, pro se
5324 Thomas Drive
Panama City, Florida 32408

STATEMENT OF THE ISSUES

The issues are whether Respondents are guilty of violating Chapter 509, Florida Statutes, and Rule 61C, Florida Administrative Code, governing operation of a public food service establishment, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On February 12, 1999, Petitioner Department of Business and Professional Regulation (Petitioner) filed an Administrative Complaint in DBPR Case No. 6-99-28, alleging that Respondents Charles and Sandra McMahan, d/b/a Mike's Munchies (Respondents), were guilty of violating the statutes and rules governing the operation of public food service establishments. This complaint included eight alleged violations of the 1997 Food Code, Recommendations of the United States Public Health Service/Food and Drug Administration (Food Code), which is adopted by reference in Rule 61C, Florida Administrative Code.

On May 26, 2000, Petitioner filed an Administrative Complaint in DBPR Case No. 6-00-78, alleging that Respondents were guilty of violating the statutes and rules governing the operation of public food service establishments. This complaint included six alleged violations of the Food Code.

On July 19, 2000, Petitioner filed an Administrative Complaint in DBPR Case No. 6-00-125, alleging that Respondents

were guilty of violating the statutes and rules governing the operation of public food service establishments. This complaint included one alleged violation of the Food Code.

On May 22, 2001, Petitioner referred the above-referenced complaints to the Division of Administrative Hearings. That same day, Petitioner filed a Motion for Consolidation. An order dated June 4, 2001, consolidated the cases.

A Notice of Hearing dated June 5, 2001, scheduled the consolidated cases for hearing.

During the hearing, Petitioner presented the testimony of one witness. Petitioner offered nine exhibits, which were accepted into the record as evidence.

Pursuant to the agreement of the parties, Respondent Charles McMahan made an appearance and testified by telephone. Respondent Sandra McMahan did not make an appearance. Respondents presented no exhibits for admission into evidence.

The court reporter filed the Transcript on August 22, 2001. Petitioner filed a Proposed Recommended Order on August 31, 2001. Respondents did not file proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Petitioner is the state agency charged with regulating the operation of public food service establishments.

2. At all times relevant here, Respondents were licensed to operate Mike's Munchies, a public food service establishment with seating capacity for 38 customers. Respondents operate Mike's Munchies under License Control No. 13-04489R.

3. On August 26-28 and November 18, 1998, Petitioner's inspector visited Respondents' place of business. During these inspections, the inspector observed and documented numerous violations of the Food Code and/or Rule 61C, Florida Administrative Code.

4. The August 26-28 and November 18, 1998, inspections resulted in the issuance of the Administrative Complaint in DOAH Case No. 01-2008. The Administrative Complaint charged Respondent's with violating five provisions of the Food Code and four provisions of the Florida Administrative Code.

5. During the hearing, Petitioner presented clear and convincing evidence that Respondents were guilty of the following violations: (a) The hot dogs in the make table were at 53.2° Fahrenheit; (b) There was no certified food manager; (c) The interior of the upright freezers and freezer compartment of the kitchen refrigerator were dirty; (d) The shelves behind the counter were dirty; (e) The walls, ceiling, floors and equipment were dirty; (f) The interior of the outside storage building was filled with junk and debris; (g) The shelves and storage areas throughout the establishment were cluttered with

litter, debris, and non-food service related items; and (h) Two carbon dioxide tanks in the kitchen hallway were unsecured.

6. During the inspections on August 26-28 and November 18, 1998, the inspector observed a dog in the establishment. The dog was not a prohibited animal because it was a "support animal" for Respondents' disabled son.

7. On March 30, 2000, Petitioner's inspector visited Respondent's establishment. During this visit, the inspector observed numerous violations of the Food Code and/or Rule 61C, Florida Administrative Code. The inspector also noted that Mike's Munchies was below the minimum standards of a Florida food service establishment and had been below those standards for several prior inspections.

8. At the conclusion of the March 30, 2000, inspection, the inspector gave Respondents a food service inspection report. The report stated that Respondents had failed to comply with previous inspections, and as a result thereof, Petitioner might issue a notice to show cause why Petitioner should not assess sanctions against Respondents' license.

9. The March 30, 2000, inspection resulted in the issuance of the Administrative Complaint in DOAH Case No. 01-2006. The Administrative Complaint charged Respondents with violating five provisions of the Food Code and two provisions of the Florida Administrative Code.

10. During the hearing, Petitioner presented clear and convincing evidence that Respondents were guilty of the following violations: (a) The interior of the upright freezer and the upright refrigerator was dirty and moldy; (b) The shelf under the counter was dirty, littered with paper, dirty clothing and junk; (c) The floors of the dishwashing room and the kitchen were dirty; (d) The grounds around the rear of the building were littered with debris; and (e) The shelves, worktable and corridor outside the walk-in cooler were dirty and littered with junk.

11. On March 30, 2000, the dog inside the establishment was not a prohibited animal because it was a "support animal" for Respondents' disabled son. Additionally, the outside mop sink was not without the required water pressure because it had an inside turn-on valve that provided water pressure to the sink on an as needed basis.

12. On June 14, 2000, Petitioner's inspector performed a routine inspection at Respondents' place of business. During this visit, the inspector observed numerous violations of the Food Code and/or Rule 61C, Florida Administrative Code. On the June 14, 2000, food service inspection report, the inspector recommended that Petitioner issue an emergency order based upon a severe and immediate threat to the public.

13. The June 14, 2000, inspection resulted in the issuance of the Administrative Complaint in DOAH Case No. 01-2007. The Administrative Complaint charged Respondents with violating one provision of the Food Code.

14. During the hearing, Petitioner proved by clear and convincing evidence that all surfaces in Respondents' establishment were dirty to sight and touch.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. Sections 120.569 and 120.57(1), Florida Statutes.

16. Petitioner must prove the material allegations by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996), and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

17. Section 509.261(1), Florida Statutes, authorizes Petitioner to suspend or revoke a license and to impose a fine not exceeding \$1,000 per offense for violations of Chapter 509, Florida Statutes, or the rules promulgated pursuant thereto.

18. Section 509.032(2)(a), Florida Statutes, requires that Petitioner conduct periodic inspections of restaurants to assure the public health, safety, and welfare.

19. Section 509.032(2)(d), Florida Statutes, requires Petitioner to adopt and enforce sanitation rules consistent with

law to ensure the protection of the public from food-borne illness in establishments licensed under Chapter 509, Florida Statutes.

20. Rule 61C-1.004, Florida Administrative Code, as amended on July 2, 1998, states as follows in relevant part:

The following general requirements and standards shall be met by all public lodging and public food service establishments:

(1) Water, plumbing and waste.
Except as specifically provided in these rules, standards for water, plumbing and waste shall be governed by Chapter 5, Food Code, herein adopted by reference. For the purposes of this section, the term "food establishment" as reference in the Food Code shall apply to all public lodging and public food establishments as defined in Chapter 509, F.S.

* * *

(2) Public bathrooms.

* * *

(d) For the purposes of this section, the term toilet shall mean a flush toilet properly plumbed, connected and discharging to an approved sewage disposal system. In a bathroom where more than one toilet is provided, each toilet shall be separated by a partition from adjoining fixtures and a door shall be provided which will partially conceal the occupant from outside view.

* * *

(6) All building structural components, attachments and fixtures shall be kept in good repair, clean and free of obstructions.

* * *

(9) Fire safety equipment.

* * *

(d) Carbon dioxide and helium tanks shall be adequately secured so as to preclude any danger to safety.

21. Rule 61C-4.010, Florida Administrative Code, as amended on December 6, 2000, provides as follows in pertinent part:

(1) Food Supplies and Food Protection -- except as specifically provided in this rule, public food service establishments shall be subject to the provisions of Chapter 3, Food Code, herein adopted by reference.

* * *

(5) Food Equipment, Utensils and Linens -- public food service establishment shall be subject to the provisions of Chapter 4, Food Code, herein adopted by reference.

(6) Physical Facilities -- except as specifically provided in these rules, the physical facilities at public food service establishments shall be subject to the provisions of Chapter 6, Food Code, herein adopted by reference. Public food service establishments and all parts of property used in connection with their operations shall be kept free of litter. The walking and driving surfaces of all exterior areas of food service establishments shall be effectively maintained so as to minimize dust. These surfaces shall be graded to prevent pooling of water.

22. Rule 61C-4.023, Florida Administrative Code, as amended on January 18, 1998, states as follows in pertinent part:

(1) All managers who are responsible for the storage, preparation, display, and serving of foods to the public shall have passed a written certification test approved by the division demonstrating a basic knowledge of food protection practices regulated and administered by the division or an agency of state government outside Florida which has been approved by the division. Those managers who successfully pass the certification examination shall be issued a certificate which is valid for a period of five years from the date of issuance. All establishments shall designate in writing the food service manager or managers for each location. Establishments that have four or more employees at one time engaged in the storage, preparation or serving of food shall have at least one certified manager present at all times when said activities are taking place. All other establishments shall have a certified manager or managers responsible for all periods of operation but said manager or managers need not be present at all times. It shall be the responsibility of the certified manager or managers to inform all employees under their supervision and control who engage in the storage, preparation, or serving of food, to do so in accordance with acceptable sanitary practices as described in this chapter.

23. Chapter 3, paragraph 501.16 of the Food Code states as follows in part:

3-501.16 Potentially Hazardous Food, Hot and cold Holding.

Except during preparation, cooking, or cooling, or when time is used as the public health control as specified under § 3-501.19, Potentially Hazardous Food shall be maintained:

* * *

(b) At 5°C (41°F) or less, except as specified under ¶(C) of this section and §§3-501.17, 3-501.18, and 4-204.111.

24. Chapter 4, paragraph 601.11 of the Food Code states as follows in part:

4-601.11 Equipment, Food-Contact Surfaces, Nonfood-Contact Surfaces, and Utensils.

(A) Equipment food-contact surfaces and utensils shall be clean to sight and touch.

* * *

(C) Nonfood-contact surfaces of equipment shall be kept free of an accumulation of dust, dirt, food residue, and other debris.

25. Chapter 5, paragraph 103.12 of the Food Code states as follows in part:

5-103.12 Pressure.

Water under pressure shall be provided to all fixtures, equipment, and nonfood equipment that are required to use water except that water supplied as specified under ¶¶5-104.12(A) and (B) to a temporary food establishment or in response to a temporary interruption of a water supply need not be under pressure.

26. Chapter 6, paragraph 501.12 of the Food Code provides as follows in part:

6-501.12 Cleaning, Frequency and
Restrictions

(A) The physical facilities shall be cleaned as often as necessary to keep them clean.

27. Chapter 6, paragraph 501.114 of the Food Code states as follows in part:

6-501.114 Maintaining Premises,
Unnecessary Items and Litter.

The premises shall be free of:

(A) Items that are unnecessary to the operation of maintenance of the establishment such as equipment that is nonfunctional or no longer used; and

(B) Litter.

28. Chapter 6, paragraph 501.115 of the Food Code states as follows in part:

6-501.115 Prohibiting Animals.

(A) Except as specified in ¶¶ (B) and (C) of this section, live animals may not be allowed on the premises of a food establishment.

(B) Live animals may be allowed in the following situation if the contamination of food, clean equipment, utensils, and linens, and unwrapped single-use articles cannot result:

* * *

(3) In areas that are not used for food preparation such as dining and sales areas, support animals such as guide dogs that are trained to assist an employee or other person who is handicapped, are controlled by

the handicapped employee or person, and are not allowed to be on seats or tables

29. DOAH Case No. 01-2008 relates to inspections of Respondents' establishment that occurred on August 26-28, 1998, and November 18, 1998. Petitioner has met his burden of proving that Respondents are guilty of violating the following paragraphs of the Food Code: (a) 3-501.16(B), relating to temperature of potentially hazardous food; (b) 4-601.11(A), relating to cleanliness of equipment food-contact surfaces and utensils; (c) 4-601.11(C), relating to cleanliness of nonfood-contact surfaces of equipment; and (d) 6-501.114, relating to litter on premises. Petitioner also met its burden that Respondent violated the following rules: (a) Rules 61C-1.004(6) and 61C-4.010(5), Florida Administrative Code, relating to the maintenance and cleanliness of the physical facility, including all building structural components, attachments and fixtures; (b) Rule 61C-1.004(9)(d), Florida Administrative Code, relating to the unsecured carbon dioxide tanks; and (c) Rule 61C-4.023(1), Florida Administrative Code, relating to the lack of a certified food manager.

30. On the other hand, Respondents presented persuasive testimony that the dog on the premises qualified as a "support animal" that was kept in the establishment's office. Therefore,

Respondents are not guilty of violating paragraph 6-501.115 of the Food Code.

31. DOAH Case No. 01-2006 relates to Petitioner's inspections of Respondents' establishment that occurred on March 30, 2000. Petitioner presented clear and convincing evidence that Respondents were guilty of the following violations on March 30, 2000: (a) failure to keep all equipment food-contact and nonfood-contact surfaces and utensils clean; and (b) failure to keep the physical facility clean. Therefore, Respondents are guilty of violating paragraphs 4-601.11(A), 4-601.11(c), and 6-501.12 of the Food Code. Petitioner also met its burden of proving that Respondent were in violation of Rule 61C-4.010(6)(b), Florida Administrative Code, because there was no certified food manager on March 30, 2000.

32. Petitioner's March 30, 2000, inspection report, together with its comments sheet, does not indicate that Respondents violated Rule 61C-1.004(2)(d), Florida Administrative Code, by failing to have running water under pressure in the public bathrooms. Instead, the March 30, 2000, inspection report indicates that Respondent had no water pressure for an outside mop sink in violation of paragraph 5-103.12 of the Food Code. However, persuasive testimony at the hearing indicates that Respondents had a special turn-off valve in the establishment that would provide water pressure to the

outside sink on an as needed basis. Therefore, Respondents have not violated paragraph 5-103.12 of the Food Code.

33. The Administrative Complaint in DOAH Case No. 01-2006 contains an allegation that Respondents had a dog in the restaurant. Persuasive evidence indicates that the dog was a "support animal" for Respondents' son. Therefore, Petitioner is not guilty of violating paragraph 6-501.115 of the Food Code.

34. DOAH Case No. 01-2007 related to the June 14, 2000, inspection of Respondents' establishment. The Administrative Complaint charged Respondents with one violation of the Food Code. Petitioner met its burden of proving, by clear and convincing evidence, that Respondents violated paragraph 4-601.11(A) of the Food Code. The food-contact surfaces of equipment and utensils in the restaurant were not clean to sight and touch.

RECOMMENDATION

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

RECOMMENDED:

That Petitioner enter a final order imposing administrative fines in the amount of \$1,200 in DOAH Case No. 01-2006; \$500 in DOAH Case No. 01-2007; and \$8,000 in DOAH Case No. 01-2008, and suspending Respondents' license until they begin making monthly

payments on said fines in a minimum amount as determined by
Petitioner.

DONE AND ENTERED this 7th day of September, 2001, in
Tallahassee, Leon County, Florida.

SUZANNE F. HOOD
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

Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of September, 2001.

COPIES FURNISHED:

Charles McMahan
Sandra McMahan
5324 Thomas Drive
Panama City, Florida 32408

Claudia J. Pamperin, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2002

Charles F. Tunnicliff, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Susan R. McKinley, Director
Division of Hotels and Restaurants
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Hardy L. Roberts, III, General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

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.