

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND)
CONSUMER SERVICES,)
)
Petitioner,)
)
vs.) Case Nos. 03-0535
) 03-0536
HANDY 89, INC., d/b/a HANDY 89)
SUNOCO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, Lawrence P. Stevenson, Administrative Law Judge of the Division of Administrative Hearings, conducted a formal hearing via video teleconference in the above-styled cases on May 6, 2003, in Fort Myers and Tallahassee, Florida.

APPEARANCES

For Petitioner: John McCarthy, Esquire
Department of Agriculture
and Consumer Services
Mayo Building, Suite 520
407 South Calhoun Street
Tallahassee, Florida 32399-0800

For Respondent: Phil Reis, pro se
1470 Route 46 East
Ledgewood, New Jersey 07825

STATEMENT OF THE ISSUE

Whether Respondent committed the offenses set forth in the Administrative Complaints in these consolidated cases and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On September 23, 2002, the Department of Agriculture and Consumer Services (the Department) issued an Administrative Complaint against Respondent, Handy 89, Inc., d/b/a Handy 89 Sunoco (Handy 89). The Administrative Complaint was based on Department inspections of Handy 89's place of business performed on June 17, July 2, and September 6, 2002, and alleged the following violations: the sewage and wastewater disposal system was not approved by the proper regulatory authority; there was no certified food manager in the store; and mop water was left to stand in the mop bucket and not disposed of in an approved manner.

On December 5, 2002, the Department issued a second Administrative Complaint against Handy 89 based on Department inspections of Handy 89's place of business performed on October 17 and November 21, 2002. The second Administrative Complaint alleged the following violations: the sewage and wastewater disposal system was still not approved by the proper regulatory authority; and there was evidence of the presence of

insects, more particularly insect infestation in milled grains found in the store.

Handy 89 timely filed requests for formal hearing as to both Administrative Complaints. On February 14, 2003, the Department forwarded both matters to the Division of Administrative Hearings (DOAH) for assignment of an Administrative Law Judge and the conduct of formal administrative hearings. The September 23, 2002, Administrative Complaint was assigned DOAH Case No. 03-0535. The December 5, 2002, Administrative Complaint was assigned DOAH Case No. 03-0536. On March 25, 2003, the Department filed a Motion to Consolidate the cases, which was granted by Order dated March 27, 2003. The consolidated cases were scheduled for hearing on April 1, 2003. Pursuant to Handy 89's motion, the hearing was continued and rescheduled for May 6, 2003, when it was held.

At the hearing, the Department presented the testimony of Klaus Kment, a sanitation and safety specialist for the Department's Division of Food Safety; Dr. John Fruin, the chief of the Bureau of Food and Meat Inspection in the Department's Division of Food Safety; and Johanna Whalan, an environmental specialist for the Lee County Health Department. The Department's Exhibits 1 through 5 were admitted into evidence. Handy 89 presented no testimony and offered no exhibits.

One volume of the Transcript was filed at DOAH on May 21, 2003. The second volume of the Transcript was filed on June 12, 2003. On June 23, 2003, Handy 89 filed a request for a 20-day extension of the time for filing proposed recommended orders, which was granted. The Department filed a Proposed Recommended Order on August 7, 2003. Handy 89 did not file a proposed recommended order.

All citations are to Florida Statutes (2002) unless otherwise indicated.

FINDINGS OF FACT

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

1. The Department is the state agency charged with the responsibility for enforcement of the Florida Food Safety Act, Chapter 500, Florida Statutes.

2. Handy 89 is located at 14531 North Cleveland Avenue, North Fort Myers, in Lee County. Since June 2002, Handy 89 has been operating a food establishment without a food permit from the Department.

3. The Department does not inspect or approve septic systems at food establishments. Rather, the Department seeks certification that the food establishment has obtained approval from the local health authority or, in the case of large scale

systems, from the Department of Environmental Protection. In this case, the Lee County Department of Health was the agency responsible for permitting the sewage system at Handy 89.

4. Handy 89's owners applied to Lee County for a Certificate of Occupancy on May 20, 2002. Johanna Whalen, an environmental specialist with the Lee County Department of Health, coordinated with Handy 89 as to the steps required before the certificate could be issued.

5. Ms. Whalen was familiar with the Handy 89 building because she drove past it every day on her way to work. She knew that the building had been closed to the public for more than one year and that it was serviced by a septic system. Ms. Whalen informed Handy 89 that when a septic system has been out of service for more than one year, it must be upgraded to meet current requirements for such systems. Handy 89 never applied for a construction permit to bring the septic system into full compliance.

6. Klaus Kment is the Department sanitation and safety specialist responsible for inspecting the premises at Handy 89. On June 6, 2002, Mr. Kment authorized Handy 89 to operate as a food establishment. At the time, Mr. Kment was unaware of the problem with Handy 89's septic system. Mr. Kment testified that the Handy 89 building was located in a densely populated area, and he, therefore, assumed that the building was connected to

city water and sewer service. Handy 89 opened for business in early June 2002.

7. Ms. Whalen drove past the Handy 89 store and was surprised to see it opened for business. She contacted the Department's main office in Tallahassee, which relayed her concerns to Mr. Kment in Fort Myers. On June 17, 2002, Mr. Kment conducted an inspection of the Handy 89 premises and cited the facility for failure to have a sewage and wastewater disposal system approved by Lee County, and for failure to have a certified food manager. He assigned Handy 89 an overall rating of "poor."

8. Mr. Kment conducted another inspection of the Handy 89 premises on July 2, 2002. He once again cited the facility for failure to have a sewage and wastewater disposal system approved by Lee County, and for failure to have a certified food manager, and again assigned it an overall rating of "poor." Mr. Kment's inspection report noted that Handy 89 "will need additional time to comply."

9. Mr. Kment waited two months before conducting a third inspection, though he visited the store several times during the interim between inspections. On September 6, 2002, Mr. Kment conducted an inspection of the Handy 89 premises and cited the facility for failure to have a sewage and wastewater disposal system approved by Lee County and for failure to properly

dispose of mop water. Mr. Kment noted that he had visited Handy 89 numerous times, but no progress had been made in obtaining a permit for the sewage system.

10. By the time of the September 6, 2002, inspection, Mr. Norman Lippman of Handy 89 had become certified as a food manager, correcting that repeated violation. Nonetheless, Mr. Kment assigned Handy 89 an overall rating of "poor."

11. By letter dated September 9, 2002, the Department denied Handy 89's application for a food permit based on its failure to obtain a satisfactory sanitation inspection rating. However, Handy 89 continued to operate and to sell products for which a food permit is required, such as dairy products and meat. The Handy 89 store contained more than 12 linear feet of shelving for these food products.

12. On September 23, 2002, the Department issued an Administrative Complaint against Handy 89, citing the repeated violation for the sewage system, as well as the violations for improper disposal of mop water and failure to have a certified food manager. The Department proposed to settle the complaint for payment of \$900.00 and the correction of all violations within 21 days of receipt of the Administrative Complaint. This is the Administrative Complaint at issue in DOAH Case No. 03-0535.

13. On October 17, 2002, Mr. Kment conducted an inspection of the Handy 89 premises and cited the facility for failure to have a sewage and wastewater disposal system approved by Lee County. Mr. Kment also noted the presence of live insect infestation in some self-rising flour on the store shelves. Handy 89 voluntarily destroyed the flour. Due to the failure to make progress on the sewage system, Mr. Kment again assigned Handy 89 an overall inspection rating of "poor."

14. On November 21, 2002, Mr. Kment conducted an inspection of the Handy 89 premises and cited the facility for failure to have a sewage and wastewater disposal system approved by Lee County. He noted that the owner was not present, and that no documentation was left on the premises to indicate any action on the sewage system. Mr. Kment assigned Handy 89 an overall inspection rating of "poor."

15. On December 5, 2002, the Department issued an Administrative Complaint against Handy 89, citing the repeated violation for the sewage system, as well as the violation for insect infestation. The Department proposed to settle the complaint for payment of \$750.00 and the correction of all violations within 21 days of receipt of the administrative complaint. This is the Administrative Complaint at issue in DOAH Case No. 03-0536.

16. Dr. John Fruin, the chief of the Division of Food Safety, testified that the Department cannot give Handy 89 a food permit unless it has an approved septic system and that the Department is without authority to waive that requirement.

17. Handy 89 offered no testimony or documentary evidence to dispute the Department's case that its sewage system was not permitted by Lee County.

CONCLUSIONS OF LAW

18. DOAH has jurisdiction over the parties and subject matter of this proceeding pursuant to Subsection 120.57(1) and Section 120.569.

19. Because proceedings involving the imposition of administrative fines are penal in nature, the Department has the burden of proving by clear and convincing evidence the specific allegations in the Administrative Complaints. *See, e.g., Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne, Stern & Co.*, 670 So. 2d 932 (Fla. 1996); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987).

20. The definition of "clear and convincing" evidence is adopted from *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), which provides:

[Clear] and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered, the testimony must be precise and explicit and

the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

See also Evans Packing Co. v. Department of Agriculture and Consumer, 550 So. 2d 112, 116 n.5 (Fla. 1st DCA 1989).

21. Section 500.04(4) provides:

The following acts and the causing thereof within the state are prohibited:

* * *

(4) The sale, delivery for sale, holding for sale, or offering for sale of any article in violation of s. 500.12.

22. Section 500.12 provides in relevant part:

(1)(a) A food permit from the department is required of any person who operates a food establishment or retail food store, except:

1. Persons operating minor food outlets, including, but not limited to, video stores, that sell commercially prepackaged, nonpotentially hazardous candy, chewing gum, soda, or popcorn, provided the shelf space for those items does not exceed 12 linear feet and no other food is sold by the minor food outlet.

2. Persons subject to continuous, onsite federal or state inspection.

3. Persons selling only legumes in the shell, either parched, roasted, or boiled.

* * *

(e) The department is the exclusive regulatory and permitting authority for all food outlets, retail food stores, food establishments, convenience stores, and minor food outlets in accordance with this section. Application for a food permit must be made on forms provided by the department, which forms must also contain provision for application for registrations and permits issued by other state agencies and for collection of the food permit fee and any other fees associated with registration, licensing, or applicable surcharges. The details of the application shall be prescribed by department rule.

(f) The department may by rule establish conditions for the manufacturing, processing, packing, holding, or preparing of food; the selling of food at wholesale or retail; or the transporting of food to protect the public health and promote public welfare by protecting the purchasing public from injury by merchandising deceit.

23. The facts found above established that none of the exceptions listed in Section 500.12(1)(a) apply to Handy 89. Therefore, Handy 89 was required to obtain a food permit from the Department in order to operate its business.

24. Rule 5K-4.020(2), Florida Administrative Code, provides in relevant part:

No food permit shall be issued until an inspection has been made of the establishment and its equipment and methods of operation, and these found to comply with the provisions of the Florida Food Safety Act and rules adopted thereunder. . . .

25. Rule 5K-4.004, Florida Administrative Code, sets forth the general requirements for the manufacturing, processing, packing, holding, and retailing of foods. It provides in relevant part:

The provisions of subsections (1) through (6) shall apply in determining whether the facilities, methods, practices and controls used in the manufacture, processing, packing, holding, retailing or offering for sale of foods are in conformance with or are operated or administered in conformity with this rule to assure that food for human consumption is safe.

* * *

(3) SANITARY FACILITIES AND CONTROLS. Each plant shall be equipped with adequate sanitary facilities and accommodations including, but not limited to, the following:

* * *

(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.

26. Rule 5K-4.002, Florida Administrative Code, adopts by reference the relevant provisions of federal regulations and other standards relating to food safety. It provides, in relevant part:

(4) Food Code -- Provisions Adopted.

(a) Chapters 1--7 of the "Food Code 1999" published by the U.S. Public Health Service of the U.S. Department of Health and Human

Services (1999), are hereby adopted by reference as a rule under Chapter 500, F.S., except for the following provisions:

1. 1-201.10(B) (31), (32), (87)
2. 2-102.11
3. 3-304.14(B) (2)
4. 5-203.11(C)
5. 5-402.12
6. 6-202.110

All provisions in the "Food Code 1999" that are adopted herein by reference shall apply to all food establishments regulated by the Florida Department of Agriculture and Consumer Services. . . .

27. Section 5-202.11(A) of the Food Code 1999, adopted by reference in Rule 5K-4.020(4), Florida Administrative Code, provides: "A plumbing system shall be designed, constructed, and installed according to law."

28. In Chapter 64E-6, Florida Administrative Code, the Department of Health sets forth the state standards for on-site sewage treatment and disposal systems. This was the rule chapter employed by Ms. Whalen of the Lee County Department of Health to determine the requirements for Handy 89's on-site sewage treatment system. In particular, Rule 64E-6.001(4), Florida Administrative Code, provides:

Except as provided for in s. 381.00655, F.S., any existing and prior approved system which has been placed into use and which

remains in satisfactory operating condition shall remain valid for use under the terms of the rule and permit under which it was approved. . . . If a prior approved existing system has been approved by the DOH county health department within the preceding three years, and the system was determined to be in satisfactory operating condition at that time, a new inspection is not required unless there is a record of failure of the system. If it is determined that a new inspection is not required, there will be no charge for this application, but reapproval shall be required. A commercial system out of service for more than one year shall be brought into full compliance with current requirements of this Chapter prior to the system being placed into service. If the use of a building is changed or if additions or alterations to a building are made which will increase domestic sewage flow, change sewage characteristics, or compromise the integrity or function of the system, the onsite sewage treatment and disposal system serving such building shall be brought into full compliance with the provisions and requirements of these rules. . . . (Emphasis added.)

29. The Department established by clear and convincing evidence that the sewage system at Handy 89 was a commercial system that had been out of service for more than one year. Handy 89 was, therefore, obligated to bring the system into full compliance with current requirements before it could receive a food permit to operate its business. The Department established by clear and convincing evidence that, despite being given ample time to do so, Handy 89 failed to take any meaningful steps to bring its sewage system into compliance. The Department

established by clear and convincing evidence that Handy 89 operated its business without a food permit from June 2002 until at least the time the second Administrative Complaint was issued on December 2, 2002.

30. Section 500.121 provides in relevant part:

(1) In addition to the suspension procedures provided in s. 500.12, the department may impose a fine not exceeding \$5,000 against any retail food store or food establishment that has violated this chapter, which fine, when imposed and paid, shall be deposited by the department into the General Inspection Trust Fund. The department may revoke or suspend the permit of any such retail food store or food establishment if it is satisfied that the retail food store or food establishment has:

(a) Violated any of the provisions of this chapter. . . .

* * *

(3) Any administrative order made and entered by the department imposing a fine pursuant to this section shall specify the amount of the fine and the time limit for payment thereof, not exceeding 15 days, and, upon failure of the permit holder to pay the fine within that time, the permit is subject to suspension.

* * *

(5) The department shall post a prominent closed-for-operation sign on any food establishment that has had its permit suspended or revoked. The department shall also post such a sign on any establishment judicially or administratively determined to be operating without a permit. It is a misdemeanor of the second degree, punishable

as provided in s. 775.082 or s. 775.083, for any person to deface or remove such closed-for-operation sign or for any food establishment to open for operation without a permit or to open for operation while its permit is suspended or revoked. The department may impose administrative sanctions for violations of this subsection.

RECOMMENDATION

Based on all the evidence of record, it is

RECOMMENDED that the Department of Agriculture and Consumer Services enter a final order finding that Handy 89 committed the violations alleged in the Administrative Complaints; ordering Handy 89 to pay an administrative fine in the amount of \$5,000.00 within 15 days of receipt of the final order, and ordering that a closed-for-operation sign be prominently posted on Handy 89's food establishment until such time as Handy 89 has obtained a food permit pursuant to Chapter 500.

DONE AND ENTERED this 5th day of September, 2003, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
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 5th day of September, 2003.

COPIES FURNISHED:

Norman Lippman
Handy 89 Sunoco
14531 North Cleveland Avenue
North Fort Myers, Florida 33903

John McCarthy, Esquire
Department of Agriculture and
Consumer Services
Mayo Building, Suite 520
407 South Calhoun Street
Tallahassee, Florida 32399-0800

Phil Reis
1470 Route 46 East
Ledgewood, New Jersey 07825

Brenda D. Hyatt, Bureau Chief
Bureau of License and Bond
Department of Agriculture and
Consumer Services
407 South Calhoun Street, Mail Station 38
Tallahassee, Florida 32399-0800

Richard D. 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 should be filed with the agency that will issue the Final Order in this case.