

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 03-2408
)
MCDONALDS NO. 11546,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on September 8, 2003, in Orlando, Florida, before Jeff B. Clark, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charles F. Tunnickliff, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-2202

For Respondent: No appearance

STATEMENT OF THE ISSUES

Whether Respondent committed the offenses set forth in the Administrative Complaint and, if so, what action should be taken.

PRELIMINARY STATEMENT

On August 29, 2002, the Department of Business and Professional Regulation, Division of Hotels and Restaurants (Petitioner) filed an Administrative Complaint against McDonalds No. 11546 (Respondent), DH&R Case No. 04-02-439. Petitioner charged Respondent with the following violations: (1) violation of Florida Administrative Code Rule 61C-4.023(4)(a), "there was no proof of employee training available for employees employed for sixty days or more"; (2) violation of Section 3-304.14(B)(2), 1999 Food Code, Recommendations of the United States Public Health Service, Food and Drug Administration (incorporated into Florida law by Florida Administrative Code Chapter 61C), "there were wiping cloths on the food prep counters that were not stored in sanitizer"; (3) violation of Section 4-601.11(A), 1999 Food Code, Recommendations of the United States Public Health Service, Food and Drug Administration, "the reach-in freezer by the grill had old food debris built-up on the inside"; and (4) violation of Section 6-501.111, 1999 Food Code, Recommendations of the United States Public Health Service, Food and Drug Administration, "observed flies in the kitchen area."

On September 17, 2002, Respondent disputed the allegations of fact in the Administrative Complaint and requested a hearing.

These matters were referred to the Division of Administrative Hearings on June 26, 2003.

An Initial Order was sent to both parties on July 1, 2003. On July 28, 2003, the case was scheduled for final hearing on September 8, 2003, in Orlando, Florida.

At the hearing, Petitioner presented the testimony of one witness, Carolyn Miller, an inspector employed by Petitioner, and offered three exhibits which were received into evidence and marked Petitioner's Exhibits 1 through 3. Respondent failed to appear.

A transcript of the hearing was ordered by Petitioner. The Transcript, consisting of one volume, was filed on October 1, 2003. Petitioner timely filed its post-hearing submission, which was considered in the preparation of this Recommended Order. All citations are to Florida Statutes (2003), unless otherwise indicated.

FINDINGS OF FACT

1. Petitioner is the state agency charged with regulating and inspecting restaurants. Respondent is licensed and regulated by Petitioner. Respondent's permanent food service license number is 6902905.

2. Respondent's license address is 3785 Orlando Drive, Sanford, Florida 32773-5686.

3. Petitioner's inspector inspected Respondent on July 8, 2002. Several deficiencies were noted by the inspector. Among the deficiencies were the following: (1) violation of Florida Administrative Code Rule 61C-4.023(4)(a), "there was no proof of employee training available for employees employed for sixty days or more"; (2) violation of Section 3-304.14(B)(2), 1999 Food Code, Recommendations of the United States Public Health Service, Food and Drug Administration (incorporated into Florida Law by Florida Administrative Code Chapter 61C), "there were wiping cloths on the food prep counters that were not stored in sanitizer"; (3) violation of Section 4-601.11(A), 1999 Food Code, Recommendations of the United States Public Health Service, Food and Drug Administration, "the reach-in freezer by the grill had old food debris built-up on the inside"; and (4) violation of Section 6-501.111, 1999 Food Code, Recommendations of the United States Public Health Service, Food and Drug Administration, "observed flies in the kitchen area." One deficiency of critical concern was that Respondent's employees had failed to complete their food service training.

4. The Food Service Inspection Report of the July 8, 2002, inspection advised Respondent:

WARNING: Violations in the operation of your establishment must be corrected by July 22, 2002 at 8:00 AM.

5. On July 25, 2002, Petitioner's inspector returned for a re-inspection of the deficiencies noted during the July 8, 2002, inspection. The four deficiencies mentioned in paragraph 3, supra, had not been corrected. During the re-inspection, the following observations were made: "53B No proof of employee certification available for employees employed 60 days or more"; "21 Wiping cloths for food prep counters - no sanitizer"; "22 Mini freezer @ grill w/ old food debris built up on inside of reach in"; and "35 Flies in kitchen areas."

6. Respondent did not appear at the final hearing and, therefore, did not present any mitigating circumstances.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Sections 120.569 and 120.57(1).

8. Petitioner is the state agency that has jurisdiction over the operation of public food service establishments. Chapter 509 and Section 20.165. Respondent is a licensed food service establishment.

9. License revocation proceedings and proceedings involving the levying of administrative fines are penal in nature. The burden of proof is on Petitioner to establish by clear and convincing evidence the truthfulness of the allegations in the Administrative Complaint. Department of

Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

10. A licensee is charged with knowing the practice act that governs its license. Wallen v. Florida Department of Professional Regulation, Division of Real Estate, 568 So. 2d 975 (Fla. 3d DCA 1990).

11. The 1999 Food Code, Recommendations of the United States Public Health Service, Food and Drug Administration, is incorporated into Florida law by Florida Administrative Code Chapter 61C.

12. Florida Administrative Code Rule 61C-4.023(4)(a) reads as follows:

(4) Public Food Service Employee Training.

(a) All public food service employees must receive training on professional hygiene and foodborne disease prevention. Professional hygiene includes personal cleanliness and hygienic practices in accordance with the Food Code and techniques to prevent cross contamination. Foodborne disease prevention training must include the types and causes of foodborne illness, identification of potentially hazardous food, and how to control or eliminate harmful bacteria in a food service establishment.

13. Section 3-304.14(B)(2), 1999 Food Code, Recommendations of the United States Public Health Service, Food and Drug Administration, reads as follows:

(B) Cloths used for wiping food spills shall be:

* * *

(2) Moist and cleaned as specified under section 4-802.11(D), stored in a chemical sanitizer at a concentration specified in section 4-501.114, and used for wiping spills from food-contact and nonfood-contact surfaces of equipment.

14. Section 4-601.11(A), 1999 Food Code, Recommendations of the United States Public Health Service, Food and Drug Administration, reads as follows:

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

15. Section 6-501.111, 1999 Food Code, Recommendations of the United States Public Health Service, Food and Drug Administration, reads as follows:

The presence of insects, rodents, and other pests shall be controlled to minimize their presence on the premises by:

(A) Routinely inspecting incoming shipments of food and supplies;

(B) Routinely inspecting the premises for evidence of pests;

(C) Using methods, if pests are found, such as trapping devices or other means of

pest control as specified under sections 7-202.12, 7-206.12, and 7.206.13; and

(D) Eliminating harborage conditions.

16. Petitioner demonstrated by clear and convincing evidence that Respondent violated Florida Administrative Code Rule 61C-4.023(4)(a) and Sections 3-304.14(B)(2), 4-601.11(A), and 6-501.111, 1999 Food Code, Recommendations of the United States Public Health Service, Food and Drug Administration.

17. As to a penalty, Section 509.261 provides in pertinent part:

(1) Any public lodging establishment or public food service establishment that has operated or is operating in violation of this chapter or the rules of the division, operating without a license, or operating with a suspended or revoked license 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.

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:

1. Finding that Respondent committed the violations alleged in the Administrative Complaint.
2. Imposing an administrative fine of \$2,500.00 payable within 45 days of the filing of the final order.
3. Requiring Respondent's manager(s) to attend a Hospitality Education Program class within 60 days of the filing of the final order and to provide proof of such attendance to the Division of Hotels and Restaurants.

DONE AND ENTERED this 23rd day of October, 2003, in Tallahassee, Leon County, Florida.

S

JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of October, 2003.

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.