

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF HOTELS AND )  
RESTAURANTS, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 04-3915  
 )  
RICH'S BBQ, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

A formal hearing was conducted in this case on January 21, 2005, in Green Cove Springs, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Elizabeth and Ronald Tillman, pro se  
505 North Orange Avenue  
Green Cove Springs, Florida 32043

STATEMENT OF THE ISSUES

The issues are whether Respondent is guilty of certain violations of the Food Code, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On or about March 1, 2004, Petitioner Department of Business and Professional Regulation (Petitioner) filed an Administrative Complaint against Respondent Rich's BBQ (Respondent). The Administrative Complaint charged Respondent with violations of Chapter 509, Florida Statutes (2003), and the rules promulgated thereto, governing Respondent's operation. Specifically, the Administrative Complaint alleged that Respondent had violated five provisions of the Food Code, 1999 Recommendations of the United States Public Health Service/Food and Drug Administration (Food Code), and one provision of the National Fire Protection Act of 1996.

On March 12, 2004, Respondent requested an administrative hearing to challenge the charges against it. On November 1, 2004, Petitioner referred the request to the Division of Administrative Hearing.

In a Notice Hearing dated November 16, 2004, the undersigned scheduled the hearing for January 21, 2005.

During the hearing, Petitioner presented the testimony of Daniel Fulton, Petitioner's Senior Sanitation and Safety Specialist. Petitioner offered three exhibits that were accepted as evidence.

Respondent's owners, Elizabeth and Ronald Tillman testified on Respondent's behalf. Respondent offered two exhibits that were accepted as evidence.

The Transcript was filed on February 9, 2005. Petitioner filed a Proposed Recommended Order on February 18, 2005. As of the date that this Recommended Order was issued, Respondent had not filed proposed findings of fact and conclusions of law.

All references hereinafter shall be to Florida Statutes (2004) unless otherwise specified.

#### FINDINGS OF FACT

1. At all times material here, Respondent was licensed and regulated by Petitioner. Respondent operated under License No. 20-00805-R, in a leased facility in Green Coves Springs, Florida.

2. On December 26, 2003, Daniel Fulton, Petitioner's Senior Sanitation and Safety Specialist, performed a routine inspection of Respondent's premises. During the inspection, Mr. Fulton prepared a Food Service Inspection Report (FSIR) setting forth his findings. Mr. Fulton gave Respondent's

manager a copy of the report and explained each finding as a citation/violation.

3. On January 27, 2004, Mr. Fulton re-inspected Respondent's premises. During the re-inspection, Mr. Fulton prepared a Callback Inspection Report, setting forth his findings. Based on his observations, Mr. Fulton listed citations on the Callback Inspection Report that had not been corrected after the December 2003 inspection.

4. According to the Callback Inspection Report, the gas equipment in Respondent's pit area still did not have a fire suppression system over it. Typically, this would constitute a critical violation. However, during the hearing, Respondent provided evidence that the Clay County Fire Inspector considered the current configuration of the hood exhaust system to be acceptable to the Clay County Department of Public Safety. Petitioner's Proposed Recommended Order indicates that it has withdrawn the allegation that Respondent violated the National Fire Protection Act of 1996.

5. On January 27, 2004, Mr. Fulton observed that an outside cooker was not properly enclosed, creating a critical violation. The walls that enclosed Respondent's cooker were not at least four feet high. The area was not properly screened between the existing walls and the roof. In fact, the roof did not cover part of the area where the cooker was located.

6. On January 27, 2004, Mr. Fulton observed that a faucet or hose bib did not have a back-flow prevention device. The lack of a back-flow prevention device created a critical violation.

7. On January 27, 2004, Mr. Fulton observed that there was a black substance on the interior of an ice machine's lid. The December 2003 FSIR did not list this citation as a critical concern that must be corrected immediately. However, Mr. Fulton provided persuasive testimony that ice is consumable and that any foreign black substance in the interior of an ice machine constituted a critical violation.

8. During the December 2003 inspection, Mr. Fulton cited Respondent for not having adequate sneeze protection over the soup pot on the buffet bar. Simply placing a lid on the crock pot was not sufficient to provide that protection when customers removed the lid.

9. After the December 2003 inspection, Respondent decided to adjust the height of the crock pot to provide more sneeze protection. In making the adjustments, Respondent was careful not to let the soup become inaccessible for children and disabled customers in wheelchairs.

10. On January 27, 2004, Mr. Fulton observed that the crock pot containing soup at the buffet bar continued to have inadequate sneeze protection for a person of average height,

approximately five feet and six inches. The sneeze protection over the crock pot was not properly adjusted until Mr. Fulton conducted a third inspection in October 2004. The lack of adequate sneeze protection did not constitute a critical violation.

11. On January 27, 2004, Mr. Fulton observed that the inside light of a reach-in cooler was not operational. Respondent ordered the replacement light after the December 2003 inspection, but had not received it at the time of the callback inspection in January 2004. This was not a critical violation.

12. Respondent was aware of all of the above-referenced violations after the December 2003 inspection. Respondent had not corrected them at the time of the January 2004 inspection.

13. In June 2004, Elizabeth Tillman, one of Respondent's owners took over Respondent's day-to-day management. By the time that Mr. Fulton inspected the premises in October 2004, all violations had been corrected except for violations that required building construction by a new owner of the leased premises.

#### CONCLUSIONS OF LAW

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

15. Petitioner has the burden of proving by clear and convincing evidence that Respondent has violated Chapter 509, Florida Statutes, as alleged in the Administrative Complaint, and is therefore subject to an administrative fine. See Dept. of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932(Fla. 1996). Petitioner has met its burden in every respect.

16. In setting forth Petitioner's duties, Section 509.032, Florida Statutes, states as follows in relevant 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 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. The division has responsibility for quality assurance. Each licensed establishment shall be inspected at least biannually . . . and shall be inspected at such other times as the division determines is necessary to ensure the public's health, safety, and welfare. . . .

\* \* \*

(d) The division shall adopt and enforce sanitation rules consistent with law to ensure the protection of the public from food-borne illness in those establishments licensed under this chapter. These rules shall provide the standards and requirements for obtaining, storing, preparing,

processing, serving, or displaying food in public food service establishments, approving public food service establishment facility plans, conducting necessary public food service establishment inspections for compliance with sanitation regulations . . . and for other such responsibilities deemed necessary by the division. . . .

\* \* \*

(3) SANITARY STANDARDS; EMERGENCIES; TEMPORARY FOOD SERVICE EVENTS.--The division shall: (a) Prescribe sanitary standards which shall be enforced in public food service establishments. . . .

\* \* \*

(6) RULEMAKING AUTHORITY.--The division shall adopt such rules as are necessary to carry out the provisions of this chapter.

17. Petitioner has adopted rules that incorporate certain provisions of the Food Code, 2001 Recommendations of the United States Public Health Service/Food and Drug Administration, the 2001 Food Code Errata Sheet (August 23,2002), and Supplement to the 2001 FDA Food Code (August 29, 2003 (Food Code). See Fla. Admin. Code Rules 61C-1.001, 61C-1.004(1), 61C-4.010(1), 61C-4.010(5), and 61C-4.010(6).

18. Florida Administrative Code Rule 61C-4.010(1) incorporates Food Code Rule 3-306.11, which states as follows in pertinent part:

Except for nuts in the shell and whole, raw fruits and vegetables that are intended for hulling, peeling, or washing by the



consumer before consumption, food on display shall be protected from contamination by the use of packaging; counter, service line, or salad bar food guards; display cases; or other effective means.

Respondent violated this provision of the Food Code by failing to provide adequate sneeze protection for the soup pot.

19. Florida Administrative Code Rule 61C-4.010(5) incorporates Food Code Rule 4-601.11(b), which states as follows in pertinent part:

The food-contact surfaces, of cooking equipment and pans shall be kept free of encrusted grease deposits and other soil accumulations.

Respondent violated this provision of the Food Code by failing to keep the interior of the ice machine clean and free of any foreign black substance.

20. Florida Administrative Code Rule 61C-1.004(1) incorporates Food Code Rule 5-202.14, which states as follows in relevant part:

A backflow or backsiphonage-prevention device installed on a water supply system shall meet American Society of Sanitary Engineering (A.S.S.E.) standards for construction, installation, maintenance, inspection, and testing for that specific application and type of device.

Respondent violated this provision of the Food Code by not having a back-flow prevention device attached to the faucet or hose bib.

21. Florida Administrative Code Rule 61C-4.010(6) incorporates Food Code Rule 6-202.15, which states as follows in relevant part:

(a) Except as specified in [paragraphs] (b), (c) and (e) and under [paragraph] (d) of this section, outer openings of a food establishment shall be protected against the entry of insects and rodents by:

- (1) Filling or closing holes and other gaps along floors, walls, and ceilings;
- (2) Closed, tight-fitting windows; and
- (3) Solid, self-closing, tight-fitting doors.

Respondent violated this provision of the Food Code by failing to properly enclose an outside cooker.

22. Florida Administrative Code Rule 61C-4.010(6) incorporates Food Code Rule 6-303.11(b), which provides a follows in pertinent part:

(b) At least 220 lux (20 foot candles):

\* \* \*

(2) Inside equipment such as reach-in and under-counter refrigerators.

Respondent violated this provision of the Food Code by failing to have the appropriate light in a reach-in cooler.

23. Pursuant to Section 509.261(1)(a), Florida Statutes, any public food establishment that has operated or is operating

in violation of Chapter 509, Florida Statutes, or the applicable rules, is subject to fines not to exceed \$1,000.00 per offense. In this case, clear and convincing evidence indicates that Respondent was guilty of violating four provisions of the Food Code in January 2004.

RECOMMENDATION

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

RECOMMENDED:

That Petitioner enter a final order requiring Respondent to pay an administrative penalty in the amount of \$1,000.00.

DONE AND ENTERED this 9th day of March, 2005, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the  
Division of Administrative Hearings  
this 9th day of March, 2005.

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.