

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF HOTELS AND )  
RESTAURANTS, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 05-2733  
 )  
LATIN AMERICAN CAFETERIA, INC., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on September 26, 2005, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Jessica Leigh, Esquire  
Department of Business and  
Professional Regulation  
940 North Monroe Street, Suite 42  
Tallahassee, Florida 32399-2202

For Respondent: No appearance

STATEMENT OF THE ISSUES

The issues in this disciplinary proceeding arise from Petitioner's allegation that Respondent, a licensed restaurant, violated several statutes and rules governing food service establishments. If Petitioner proves one or more of the alleged

violations, then it will be necessary to consider whether penalties should be imposed on Respondent.

PRELIMINARY STATEMENT

On March 30, 2005, Petitioner Department of Business and Professional Regulation, Division of Hotels and Restaurants, issued an Administrative Complaint against Respondent Latin American Cafeteria, Inc., charging the licensed restaurant with various offenses relating to noncompliance with the statutes and rules governing food service establishments. Respondent timely requested a formal hearing to contest these allegations, and, on July 27, 2005, the matter was referred to the Division of Administrative Hearings.

The parties were properly notified that the final hearing would occur at 9:00 a.m. on September 26, 2005. At the designated time and place, the administrative law judge and counsel for Petitioner appeared for final hearing. Respondent's representative, however, did not appear. After waiting approximately 35 minutes and upon review of the file, from which it was determined that Respondent had been given adequate notice of the final hearing, the administrative law judge commenced the proceeding.

Petitioner offered four exhibits, numbered 1 through 4, and each was received in evidence. In addition, Petitioner presented the testimony of its inspector, Jorge Gandolff.

Finally, the undersigned took official recognition of the applicable administrative rules.

The transcript of the final hearing was filed on October 11, 2005, and thereafter the parties were notified that their respective proposed recommended orders would be due on or before October 21, 2005. Petitioner timely submitted a proposed recommended order that has been carefully considered. Respondent did not file a post-hearing submission of any kind.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2005 Florida Statutes.

#### FINDINGS OF FACT

1. Respondent Latin America Cafeteria, Inc. ("Cafeteria") is a licensed food service establishment. As such, Cafeteria is subject to the regulatory and disciplinary jurisdiction of Petitioner Department of Business and Professional Regulation, Division of Hotels and Restaurants (the "Division").

2. On three occasions—February 11, 2005; February 15, 2005; and March 21, 2005—an inspector for the Division named Jorge Gandolff inspected a restaurant located at 2940 Coral Way in Miami, Florida, which establishment was operated by Cafeteria. During each visit, Mr. Gandolff noticed several items that were not in compliance with the laws which govern the facilities and operations of licensed restaurants.

3. As of March 21, 2004, the following deficiencies subsisted: (1) Ready-to-eat, potentially hazardous food had been held more than 24 hours with no date marking, in violation of Food Code Rule 3-501.17(A)<sup>i</sup>; (2) The reach-in freezer door was not durable under normal use conditions, in violation of Food Code Rule 4-201.11; (3) The walk-in cooler door was in poor repair, in violation of Food Code Rule 4-501.11; (4) The gaskets in the walk-in door were in poor repair, also in violation of Food Code Rule 4-501.11; (5) There was no chemical test kit available for persons using chemical sanitizer at three compartment sinks, in violation of Food Code Rule 4-302.14; (6) There was a missing vacuum breaker on the hose bibb at the cookline, in violation of Food Code Rule 5-203.14; (7) Walls in the dishwashing area were soiled with accumulated debris, in violation of Florida Administrative Code Rule 61C-1.004(6); (8) Lights in the rear area of the kitchen lacked the proper shields, sleeve coatings, or covers in violation of Food Code Rule 6-202.11; and (9) Although four or more employees were engaged in food preparation, there was no currently certified food service manager on duty, in violation of Florida Administrative Code Rule 61C-4.023(1).

CONCLUSIONS OF LAW

4. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

5. Section 509.261, Florida Statutes, sets forth the acts for which the Division may impose discipline. This statute 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 [D]ivision, 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.

(2) For the purposes of this section, the division may regard as a separate offense each day or portion of a day on which an establishment is operated in violation of a "critical law or rule," as that term is defined by rule.

6. By rule, the Division has defined the term "Food Code" as follows:

(14) Food Code - Food Code, 2001  
*Recommendations of the United States Public Health Service/Food and Drug Administration including Annex 3: Public Health Reasons/Administrative Guidelines and Annex 5: HACCP Guidelines of the Food Code, the 2001 Food Code Errata Sheet (August 23,*

2002), and *Supplement to the 2001 FDA Food Code* (August 29, 2003).

Fla. Admin. Code R. 61C-1.001(14)(italics in original).

7. Florida Administrative Code Rule 61C-4.010 provides in relevant part as follows:

(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 establishments 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.

8. Food Code Rule 3-501.17 provides in pertinent part:

(A) . . . [R]efrigerated, ready-to-eat, *potentially hazardous food* prepared and held in a *food establishment* for more than 24 hours shall be clearly marked to indicate the date or day by which the *food* shall be consumed on the *premises*, sold, or discarded, based on the temperature and time combinations specified below:

(1) 5°C (41°F) or less for a maximum of 7 days; or

(2) 7°C (45°F) or between 5°C (41°F) and 7°C (45°F) for a maximum of 4 days in existing refrigeration *equipment* that is not capable of maintaining the *food* at 5°C (41°F) or less if:

- (a) The *equipment* is in place and in use in the *food establishment*, and
- (b) Within 5 years of the *regulatory authority's* adoption of this *code*, the *equipment* is upgraded or replaced to maintain *food* at a temperature of 5°C (41°F) or less.

The day of preparation shall be counted as Day 1.

(Italics in original.)

- 9. Food Code Rule 4-201.11 provides:

EQUIPMENT and UTENSILS shall be designed and constructed to be durable and to retain their characteristic qualities under normal use conditions.

- 10. Food Code Rule 4-501.11 provides:

(A) EQUIPMENT shall be maintained in a state of repair and condition that meets the requirements specified under Parts 4-1 and 4-2.

(B) EQUIPMENT components such as doors, seals, hinges, fasteners, and kick plates shall be kept intact, tight, and adjusted in accordance with manufacturer's specifications.

(C) Cutting or piercing parts of can openers shall be kept sharp to minimize the creation of metal fragments that can contaminate *food* when the container is opened.

(Italics in original.)

- 11. Food Code Rule 4-301.14 provides:

A test kit or other device that accurately measures the concentration in mg/L of SANITIZING solutions shall be provided.

12. Florida Administrative Code Rule 61C-1.004 provides in pertinent part as follows:

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

\* \* \*

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

13. Food Code Rule 6-202.11 provides:

(A) Except as specified in ¶ (B) of this section, light bulbs shall be shielded, coated, or otherwise shatter-resistant in areas where there is exposed FOOD; clean EQUIPMENT, UTENSILS, and LINENS; or unwrapped SINGLE-SERVICE and SINGLE-USE ARTICLES.

(B) *Shielded, coated, or otherwise shatter-resistant bulbs need not be used in areas used only for storing FOOD in unopened packages, if:*

(1) *The integrity of the packages can not be affected by broken glass falling onto them; and*

(2) *The packages are capable of being cleaned of debris from broken bulbs before the packages are opened.*

(C) An infrared or other heat lamp shall be protected against breakage by a shield surrounding and extending beyond the bulb so that only the face of the bulb is exposed.

(Italics in original.)

14. Florida Administrative Code Rule 61C-4.023(1) provides in pertinent part as follows:

All managers who are responsible for the storage, preparation, display, and serving of foods to the public shall have passed a certification test approved by the division



demonstrating a basic knowledge of food protection practices as adopted in this chapter. Those managers who successfully pass an approved certification examination shall be issued a certificate by the certifying organization, which is valid for a period of five years from the date of issuance. Each licensed establishment shall have a minimum of one certified food protection manager responsible for all periods of operation. The operator shall designate in writing the certified food protection manager or managers for each location. A current list of certified food protection managers shall be available upon request in each establishment. When four or more employees, at one time, are engaged in the storage, preparation or serving of food in a licensed establishment, there shall be at least one certified food protection manager present at all times when said activities are taking place. The certified food protection manager or managers need not be present in the establishment during those periods of operation when there are three or fewer employees engaged in the storage, preparation, or serving of foods. It shall be the responsibility of the certified food protection 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.

(Emphasis added.)

15. Being penal in nature, the foregoing statutes and rules "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Department of Professional Regulation, Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992).

16. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a professional license is penal in nature. State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Division must prove the charges against Cafeteria by clear and convincing evidence. Department of Banking and Finance, Div. of Securities and Investor Protection v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996)(citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Department of Business & Professional Regulation, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

17. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Court of Appeal, Fourth District, canvassed the cases to develop a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

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.

Id. The Florida Supreme Court later adopted the fourth district's description of the clear and convincing evidence standard of proof. Inquiry Concerning a Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp., Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

18. The undersigned has determined, as a matter of ultimate fact, that the Division established Cafeteria's guilt regarding noncompliance with the following laws: Food Code Rule 3-501.17(A) (one violation), Food Code Rule 4-201.11 (one violation), Food Code Rule 4-501.11 (two violations), Food Code Rule 4-302.14 (one violation), Florida Administrative Code Rule 61C-1.004(6) (one violation), Food Code Rule 6-202.11 (one violation), and Florida Administrative Code Rule 61C-4.023(1) (one violation). In making these determinations, the undersigned concluded that the plain language of the applicable statutes and rules, being clear and unambiguous, could be applied in a straightforward manner to the historical events at hand without simultaneously examining extrinsic evidence of legislative intent or resorting to principles of interpretation.

It is therefore unnecessary to make additional legal conclusions concerning these violations.

19. Although Cafeteria in fact violated Food Code Rule 5-203.14, the undersigned is unable to make a finding of guilt in connection with such noncompliance because, the Division having elected not to adopt the provisions of Chapter 5 of the Food Code as a rule, no basis exists in Florida law for punishing Cafeteria's disobedience of this particular federal guideline.

20. The Division has urged the undersigned to recommend that Cafeteria be fined \$3,000 and ordered to attend an educational program sponsored by the Hospitality Education Program. This penalty is well within the statutorily authorized guidelines and, under the circumstances, is reasonable and just.

#### RECOMMENDATION

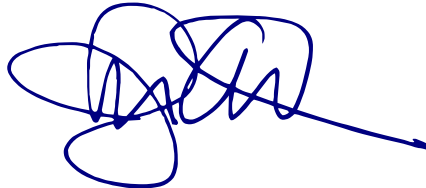
Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Division enter a final order:

(a) finding Cafeteria guilty in accordance with the foregoing Recommended Order; (b) ordering Cafeteria to pay an administrative penalty in the amount of \$3,000, due and payable to the Division of Hotels and Restaurants, 1940 North Monroe Street, Tallahassee, Florida 32399-1011, within 30 calendar days after the filing of the final order with the agency clerk; and

(c) directing Cafeteria to send an appropriate principal to an

educational program sponsored by the Hospitality Education Program.

DONE AND ENTERED this 2nd day of November, 2005, in Tallahassee, Leon County, Florida.



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JOHN G. VAN LANINGHAM  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 2nd day of November, 2005.

ENDNOTE

<sup>i/</sup> The Food Code is a publication of the U.S. Food and Drug Administration, portions of which have been adopted by reference as rules of the Division. See Fla. Admin. Code R. 61C-4.010.

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.