

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF HOTELS AND)	
RESTAURANTS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 05-2757
)	
HARRISON'S GRILL AND BAR,)	
)	
Respondent.)	
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RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on October 5, 2005, in Clearwater, Florida, before T. Kent Wetherell, II, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jessica Leigh, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399

For Respondent: No appearance

STATEMENT OF THE ISSUE

The issue is whether Respondent committed the violations alleged in the Administrative Complaint and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

Through an Administrative Complaint dated April 28, 2005, the Department of Business and Professional Regulation, Division of Hotels and Restaurants (Division) alleged that Respondent, Harrison's Grill and Bar (Harrison's), violated the statutes and rules governing restaurant operations in a number of respects. Through an Election of Rights form dated May 6, 2005, Harrison's disputed the facts alleged in the Administrative Complaint and requested a hearing.

On July 29, 2005, the Division referred the matter to the Division of Administrative Hearings (DOAH) for the assignment of an administrative law judge to conduct the hearing requested by Harrison's. The final hearing was scheduled for and held on October 5, 2005.

No appearance was made on behalf of Harrison's at the hearing. The Division was given the option of treating Harrison's failure to appear as a withdrawal of the request for an evidentiary hearing, which would have resulted in jurisdiction over this case being relinquished to the Division for a hearing under Section 120.57(2), Florida Statutes. However, the Division chose to put on its case and proceed to the issuance of a Recommended Order.

The Division presented the testimony of Laura Kennedy. The Division's Exhibits 1 through 4 were received into evidence.

Official recognition was taken of the statutes, rules, and other authorities listed in the Division's Exhibit 5.

The Transcript of the final hearing was filed on October 12, 2005. The parties were given 10 days from that date to file their proposed recommended orders (PROs). The Division filed a PRO on October 20, 2005. Harrison's did not file a PRO. The Division's PRO has been given due consideration.

FINDINGS OF FACT

1. Harrison's is licensed by the Division as a permanent food service establishment. Harrison's license number is 6213138.

2. Laura Kennedy, a sanitation and safety inspector for the Division, conducted a routine inspection of Harrison's on March 16, 2005.

3. Based upon her inspection, Ms. Kennedy documented 28 areas in which Harrison's was in violation of the statutes and rules governing restaurant operations.

4. One of the violations, No. 35A-01, was based upon Ms. Kennedy's observation of ten dead roaches in Harrison's dry storage area. She required Harrison's to correct that violation within 24 hours.

5. Ms. Kennedy conducted a "call-back" inspection of Harrison's on March 17, 2005, to determine whether the roaches had been cleaned up, which they had been.

6. Ms. Kennedy gave Harrison's 30 days to correct the remainder of the violations that she documented during her inspection on March 16, 2005.

7. Ms. Kennedy conducted a "call-back" inspection of Harrison's on April 19, 2005, to determine whether the other violations had been corrected. During the inspection, Ms. Kennedy noted that some of the violations had been corrected, but that others had not been corrected.

8. Five of the uncorrected violations were "critical" violations because, according to Ms. Kennedy, they posed an immediate threat to the public health. Three of the uncorrected violations were "non-critical" because, according to Ms. Kennedy, they posed a risk to the public health but not an immediate threat.

9. The critical violations that had not been corrected at the time of Ms. Kennedy's "call-back" inspection on April 19, 2005, were Nos. 45-17, 45-10, 45-30, 46-11, and 8A-04.

10. Violation No. 45-17 was based upon Ms. Kennedy's observation that the tag on the fire suppression system on the hood over the cooking area was out of date. The tag is supposed to be updated every six months, but the tag observed by Ms. Kennedy at Harrison's was dated July 2003.

11. Violation No. 45-10 was based upon Ms. Kennedy's observation that the portable fire extinguishers were out of

date. Fire extinguisher tags are supposed to be updated every year, but the tags on the extinguishers at Harrison's reflected that two of them had not been inspected since December 2002 and another had not been inspected since July 2003.

12. Violation No. 45-30 was based upon Ms. Kennedy's observation that Harrison's did not have the required inspection report for the fire suppression system for the hood over the cooking area.

13. The purpose of requiring a current tag and inspection report on the hood fire suppression system and current tags on the portable fire extinguishers is to ensure that those devices are in good working order in the event of a fire. As a result, the out-of-date tags are considered to be critical violations.

14. Violation No. 46-11 was based upon Ms. Kennedy's observation that the emergency exit signs over Harrison's side doors and the back door were not illuminated. This is a critical violation because the purpose of the illuminated signs is to guide restaurant patrons to an exit in the event of an emergency.

15. Violation No. 8A-04 was based upon Ms. Kennedy's observation of uncovered food in the walk-in cooler. This is a critical violation because uncovered food is subject to contamination.

16. The non-critical violations that had not been corrected at the time of Ms. Kennedy's "call-back" inspection on April 19, 2005, were Nos. 32-14, 22-02, and 23-01.

17. Violation No. 32-14 was based upon Ms. Kennedy's observation that there was no hand-washing soap at a sink in the kitchen. The absence of soap did not pose an immediate threat to the public health, but it is required so that employees involved in the preparation of food can wash their hands for their own hygiene and for the protection of the restaurant's patrons.

18. Violation No. 22-02 was based upon Ms. Kennedy's observation of built-up of grease in the oven. Violation No. 23-01 was based on Ms. Kennedy's observation of built-up of grease on the sides of equipment in the cooking area. The built-up grease did not pose an immediate threat to the public safety, but cleanliness in the cooking area is important so as not to attract vermin and to prevent contamination of the food being cooked.

19. Ms. Kennedy documented the violations described above on the Food Service Inspection Reports that she prepared at the time of her inspections.

20. Copies of the reports were provided to Harrison's at the end of each inspection, as reflected by the signature of

Rafma Balla on each report. Mr. Balla is identified on the reports as Harrison's manager/owner.

21. The record does not reflect whether the violations described above have been corrected by Harrison's since Ms. Kennedy's last inspection on April 19, 2005.

22. Harrison's was provided due notice of the date, time, and location of the final hearing, but no appearance was made on its behalf at the hearing.

CONCLUSIONS OF LAW

23. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2004).¹ See also Fla. Admin. Code R. 61C-1.0021(4).

24. The Division is the state agency responsible for licensing and regulating public food service establishments such as Harrison's. See §§ 509.032 and 509.241, Fla. Stat.

25. As part of its duties, the Division is authorized to inspect food service establishments to determine whether they are in compliance with the statutes and rules governing restaurant operations. See § 509.032(2), Fla. Stat.; Fla. Admin. Code R. 61C-1.002(8).

26. The Division is authorized to adopt sanitation and safety standards for public food service establishments, and it

is authorized to enforce the Fire Prevention Code adopted by the State Fire Marshall. See § 509.032(2)(d), (6), Fla. Stat.

27. The rules adopted by the Division for public food service establishments are contained in Florida Administrative Code Rule Chapters 61C-1 and 61C-4. The Division's rules incorporate by reference various provisions of the Food Code adopted by the U.S. Food and Drug Administration. See, e.g., Fla. Admin. Code R. 61C-1.001(14), 61C-1.004(1), (4), 61C-4.010(1), (3), (5), (6).

28. The Division has the burden to prove the existence of the violations alleged in the Administrative Complaint by clear and convincing evidence. See Dept. of Banking & Finance v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

29. The Division met its burden of proof. Ms. Kennedy's testimony regarding her observations during her initial and "call-back" inspections of Harrison's was un rebutted and was persuasive.

30. Harrison's out-of-date hood fire suppression system, Violation Nos. 45-17 and 45-30, is a violation of Florida Administrative Code Rule 69A-21.304 (formerly Rule 4A-21.304) and National Fire Protection Association (NFPA) Standard 96, Section 8-2, which require such systems to be inspected at least every six months and require the owner of the system to keep a copy of the inspection report.

31. Harrison's out-of-date portable fire extinguishers, Violation No. 45-10, is a violation of NFPA Standard 10, Section

4-4.1. That standard, which is incorporated by reference in Florida Administrative Code Rule 61C-1.004(9)(a), provides that portable fire extinguishers "shall be subjected to maintenance, not more than one year apart." See also Fla. Admin. Code R. 61C-1.004(9)(b) (requiring state-approved service tag to be attached to each extinguisher).

32. Harrison's non-illuminated exit signs, Violation No. 46-11, is a violation of Florida Administrative Code Rule 61C-1.004(10). That rule requires that "[e]xits shall be clearly marked with approved illuminated signs."

33. The uncovered food in the walk-in cooler, Violation No. 8A-04, is a violation of Section 3-302.11(A)(4) of the Food Code, which provides that "FOOD shall be protected from cross-contamination by . . . storing the FOOD in packages, covered containers, or wrappings."

34. The absence of hand-washing liquid, Violation No. 32-14, is a violation of Section 6-301.11 of the Food Code, which provides that "[e]ach handwashing lavatory or group of 2 lavatories shall be provided with a supply of hand cleaning liquid, powder, or bar soap."

35. It is not clear what regulation, if any, Harrison's violated with respect to the accumulated grease in the oven and on the sides of equipment in the cooking area, Violation Nos. 22-02 and 23-01. The Food Code sections cited by the Division for these violations are Sections 4-601.11(A) and (C), and

according to the documentation provided by the Division in this case (see Exhibit 5), those sections provide:

(A) EQUIPMENT FOOD-CONTACT SURFACES and UTENSILS shall be cleaned:

(1) . . . before each use with a different type of raw animal FOOD such as beef, FISH, lamb, pork, or POULTRY;

(2) Each time there is a change from working with raw FOODS to working with READY-TO-EAT FOODS;

(3) Between uses with raw fruits and vegetables and with POTENTIALLY HAZARDOUS FOOD;

(4) Before using or storing a FOOD TEMPERATURE MEASURING DEVICE; and

(5) At any time during the operation when contamination may have occurred

* * *

(C) . . . if used with POTENTIALLY HAZARDOUS FOOD, EQUIPMENT FOOD-CONTACT SURFACES and UTENSILS shall be cleaned throughout the day at least every 4 hours.

36. These provisions do not appear to be applicable, particularly with respect to the accumulated grease on the sides of the equipment. But see Dept. of Business & Professional Reg. v. Church's Chicken, Case No. 04-389 (DOAH Aug. 6, 2004; DBPR Sep. 22, 2004) (finding a violation of Food Code Section 4-601.11 for grease build-up on top of oven)²; Dept. of Business & Professional Reg. v. McDonalds No. 11546, Case No. 03-2408 (DOAH Oct. 23, 2003; DBPR Jan. 27, 2004) (finding violation of Food

Code Section 4-601.11(A) for built-up food debris in the reach-in freezer); and Dept. of Business & Professional Reg. v. Middle East Connections, Case No. 02-2572 (DOAH Nov. 5, 2002; DBPR Dec. 19, 2002) (finding violation of Food Code Section 4-601.11(A) for dried food debris on the dish shelves and grease on the hood filters).

37. Section 509.261, Florida Statutes, provides in pertinent part:

(1) Any . . . public food service establishment that has operated or is operating in violation of this chapter or the rules of the division . . . 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.

38. In this case, the Division proposed a fine of \$3,400, and a requirement that Respondent attend an educational program sponsored by the Hospitality Education Program. See Division's PRO, at 12.

39. The proposed fine is well within the range established by Section 509.261, Florida Statutes, but it is not proportionate with the fines imposed by the Division in recent cases, which typically range from \$250 to \$500 for each critical violation and less for each non-critical violation.³

40. Violation Nos. 22-02 and 23-01 cannot be taken into account when calculating the fine because, as stated above, the Food Code sections quoted by the Division do not clearly encompass the cited violations. However, even if those violations are not considered, the evidence was clear and convincing that Harrison's committed five critical violations and one non-critical violation.

41. A fine of \$2,600 -- \$500 for each of the critical violations and \$100 for the non-critical violation -- is appropriate under the circumstances of this case.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is


RECOMMENDED that the Division issue a final order that:

1. Imposes an administrative fine of \$2,600 on Harrison's for Violation Nos. 45-17, 45-10, 45-30, 46-11, 8A-04, and 32-14, payable on terms prescribed by the Division in the final order; and

2. Requires Harrison's to correct the critical violations related to the portable fire extinguishers, hood fire suppression system, and exit signs within 15 days of the date of the final order, and to provide proof thereof to the Division; and

3. Requires Harrison's owner and/or manager to attend an educational program sponsored by the Hospitality Education Program within 60 days of the date of the final order, and to provide proof thereof to the Division.

DONE AND ENTERED this 28th day of October, 2005, in Tallahassee, Leon County, Florida.



T. KENT WETHERELL, II
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of October, 2005.

ENDNOTES

1/ All statutory references in this Recommended Order to the 2004 version of the Florida Statutes in effect at the time of Ms. Kennedy's inspections.

2/ It is noted that the Recommended Order in the Church's Chicken case (at pages 11-12) quoted Food Code Section 4-601.11 as follows:

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

* * *

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

3/ See, e.g., Dept. of Business & Professional Reg. v. Amici's Pizza, Case No. 05-2094 (DOAH Sep. 22, 2005) (\$500 fine for two critical violations involving failure to maintain food coolers at the proper temperature); Dept. of Business & Professional Reg. v. Twistee Treat, Case No. 05-1761 (DOAH July 26, 2005) (\$300 fine for two non-critical violations); Dept. of Business & Professional Reg. v. Bagel Restaurant, Case No. 05-822 (DOAH May 27, 2005; DBPR June 10, 2005) (\$100 fine for two non-critical violations, including the absence of a sign over sink to remind employees to wash hands); Dept. of Business & Professional Reg. v. Bacco's Ristorante Italiano, Case No. 05-0612 (DOAH July 5, 2005; DBPR Aug. 1, 2005) (\$1,000 fine for four violations, including \$250 fines for failing to have hand-washing sinks in food preparation areas); Dept. of Business & Professional Reg. v. Rich's BBQ, Case No. 04-3915 (DOAH Mar. 9, 2005; Apr. 26, 2005) (\$1,000 for five violations, three of which were critical); Dept. of Business & Professional Reg. v. Countrytime Pub, Case No. 04-3583 (DOAH Jan. 25, 2005) (\$500 fine for failure to provide inspection report for fire extinguishers, which is a critical violation); Dept. of Business & Professional Reg. v. American Table Family Restaurant, Case No. 04-1364 (DOAH Jun. 8, 2004; DBPR Aug. 11, 2004) (\$2,000 fine for two critical violations); Dept. of Business & Professional Reg. v. Nickel

City Bar and Grille, Case No. 04-1363 (DOAH July 28, 2004; DBPR Aug. 12, 2004) (\$2,400 fine for six violations, including failure to clearly mark exits with approved illuminated exit signs); Dept. of Business & Professional Reg. v. Godfathers Pizza, Case No. 03-4054 (DOAH July 1, 2004; DBPR July 22, 2004) (\$1,000 fine for five violations, including failure to clearly mark exits with illuminated exit signs); Dept. of Business & Professional Reg. v. Captain Hugh's Seafood, Case No. 02-4828 (DOAH June 27, 2003; DBPR July 9, 2004) (\$1,000 fine for five violations, including failure to maintain hood fire system inspection report); Dept. of Business & Professional Reg. v. Coffee Salom Tropical, Case No. 02-4210 (DOAH Jan. 16, 2003; DBPR Jun. 20, 2003) (\$1,000 fine for two critical violations); and Dept. of Business & Professional Reg. v. Middle East Connections, Case No. 02-2572 (DOAH Nov. 5, 2002; DBPR Dec. 19, 2002) (\$2,000 fine for three violations, two of which were critical).

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.