

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 06-1594
)
PEPE'S COFFEE SHOP,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on July 21, 2006, by videoteleconference at sites in Lauderdale Lakes and Tallahassee, Florida, before Florence Snyder Rivas, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: John Sawicki, Qualified Representative
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Joseph Trujillo (Owner), pro se
41 Northeast 44th Street
Fort Lauderdale, Florida 33334

STATEMENT OF THE ISSUE

The issue is whether Respondent committed the violations alleged in the Administrative Complaint dated January 4, 2006,

and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated January 4, 2006, the Department of Business and Professional Regulation, Division of Hotels and Restaurants (Petitioner or Division), alleged that Respondent, Pepe's Coffee Shop (Respondent or Pepe's), violated statutes and rules which govern the operations of licensed Florida food service establishments. Respondent timely asserted its right to an administrative hearing to contest the allegations. In due course, Petitioner referred the matter to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct the requested hearing.

The identity of witnesses, exhibits and attendant rulings are reflected in the one-volume transcript of the proceedings filed on August 3, 2006. The Division filed a timely Proposed Recommended Order which has been duly-considered; as of the date of this Recommended Order, no post-hearing submission has been filed on Respondent's behalf.

FINDINGS OF FACT

Based on the evidence and the testimony of witnesses presented, and the entire record in this proceeding, the following findings of fact are made:

1. At all relevant times, the Division is the state agency responsible for licensing, regulating, and inspecting public food service establishments. With particular relevance to this case,

it is the Division's responsibility to establish and enforce rules pertaining to sanitation and public health and safety in accordance with relevant provisions of the Florida Statutes; to ensure compliance with its rules; and to impose discipline in appropriate circumstances.

2. At all relevant times, Pepe's was licensed by the Division as a public food service establishment under license number 1616814; was located at 41 Northeast 44th Street in Ft. Lauderdale, Florida 33060; and was operated and owned by Joseph Trujillo.

3. At all relevant times, Michele Lynn Schneider (Ms. Schneider) was employed by the Division as a sanitation and safety inspector. Ms. Schneider's duties include conducting inspections of Division licensees, including Pepe's. On or about November 16, 2005, Ms. Schneider conducted a routine inspection of Pepe's. Based upon her inspection she documented various sanitation and safety violations and issued a written warning to Pepe's which directed that the violations be remedied within 30 days. On December 22, 2005, Ms. Schneider returned to Pepe's to conduct a re-inspection. Her re-inspection revealed that violations documented at the time of the re-inspection had not been remedied.

4. Violations observed by Ms. Schneider at both the inspection and the re-inspection were "critical" in that they are more likely than other violations to pose an immediate threat to

public health or safety. The violations observed and documented by Ms. Schneider at the inspection and again at the re-inspection were:

- a) Violation 08A-28-1, based upon Ms. Schneider's observation that food was stored five inches above the floor. Food stored less than six inches above the floor is at risk of contamination.
- b) Violation 10-8-1, based upon Ms. Schneider's observation of an ice scoop handle in contact with ice in an ice storage container. Utensil handles such as scoop handles which come in contact with employees' hands and are then placed in food or other consumables pose a risk of cross-contamination.
- c) Violation 12A-03, based upon Ms. Schneider's observation that employees failed to wash their hands in between changing food preparation tasks and/or between handling food and handling money or other non-sanitary items. Failure to wash hands between such tasks poses a risk of cross-contamination.
- d) Violation 31-07-1, based upon Ms. Schneider's observation that there was no dedicated hand washing sink in the dishwashing area. To avoid risk of cross-contamination, handwashing sinks must be located in the dishwashing area and must be used strictly for handwashing. Sinks used for multiple purposes pose a risk of cross-contamination.
- e) Violation 31-08-1, based upon Ms. Schneider's observation that there was no hand washing sink in the food preparation area. To avoid risk of cross-contamination, handwashing sinks must be located in the immediate vicinity of the food preparation area.
- f) Violation 12B-03, based upon

Ms. Schneider's observation of an employee drinking from an open beverage container in a food preparation area. Ms. Schneider later observed the same beverage container next to kitchen utensils. Should the drink spill and the contents come in contact with food or utensils, cross-contamination may occur.

5. Ms. Schneider was the only witness at the hearing. Her testimony with regard to the material allegations of the Administrative Complaint was credible, and was unrebutted by Pepe's.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2006).¹

7. Pursuant to Section 509.261, Florida Statutes, Petitioner is empowered to regulate and discipline public food service establishments; upon a finding that a public food service establishment has operated or is operating in violation of Chapter 509, Florida Statutes, or Florida Administrative Code Rules promulgated thereto, discipline may be imposed including administrative fines not to exceed \$1,000.00 per offense; mandatory attendance at the licensee's expense at an educational program sponsored by the Hospitality Education Program; and the suspension, revocation or refusal of a license. In order to take disciplinary action, the Division must provide clear and convincing evidence of the violations alleged to have been committed by the licensee. Department of Banking and Finance,

Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996).

8. Violations of critical laws or rules are defined in Florida Administrative Code Rule 61C-1.0021(2), as "those violations determined by the [Petitioner] to pose a significant threat to the public health, safety, or welfare."

9. Petitioner has alleged violations of the following rules governing public food service establishments:

a. Rule 3-305.11, Food Code, which states in pertinent part:

. . . food shall be protected from contamination by storing the food at least 15 cm (6 inches) above the floor.

b. Rule 3-304.12(A), Food Code, which states in pertinent part:

During pauses in food preparation or dispensing, food preparation and dispensing utensils shall be stored . . . in the food with their handles above the top of the food and the container . . .

c. Rule 2-301.11, Food Code, which states in pertinent part:

Food employees shall keep their hands and exposed portions of their arms clean.

d. Rule 5-204.11, Food Code, which states in pertinent part:

A hand washing facility shall be located:
(A) To allow convenient use by employees in food preparation, food dispensing, and dishwashing areas . . .

e. Rule 2-401.11, Food Code, which states in pertinent part:

. . . an employee shall eat, drink, or use any form of tobacco only in designated areas where the contamination of exposed food; clean equipment, utensils, and linens; unwrapped single-service and single-use articles; or other items needing protection can not result. . . .

10. Petitioner proved by clear and convincing evidence that Respondent violated Rule 3-305.11, Food Code, by storing food less than six inches above the floor.

11. Petitioner proved by clear and convincing evidence that Respondent violated Rule 3-304.12(A), Food Code, by placing an ice scoop handle into the ice in an ice storage container.

12. Petitioner proved by clear and convincing evidence that Respondent violated Rule 2-301.11, Food Code, because employees failed to wash their hands in between changing food preparation tasks and/or between handling food and handling money or other non-sanitary items.

13. Petitioner proved by clear and convincing evidence that Respondent violated Rule 5-204.11, Food Code, by failing to provide a dedicated handwashing sink in the dishwashing area.

14. Petitioner proved by clear and convincing evidence that Respondent violated Rule 5-204.11, Food Code, by failing to provide a dedicated handwashing sink in the food preparation area.

15. Petitioner proved by clear and convincing evidence that Respondent violated Rule 2-401.11, Food Code, by allowing an

employee to drink from an open container in an area not designated for that purpose.

16. The Division has proposed that Respondent pay an administrative penalty in the amount of \$5,500 and attend, at personal expense, a Hospitality Education Program approved by the Division. The proposed penalty is within the Division's authority and is reasonable under the facts and circumstances of this case.

RECOMMENDATION

Upon the foregoing Findings of Fact and Conclusions of Law, it is:

RECOMMENDED that Petitioner enter a final order finding the violations described and imposing an administrative fine on Pepe's in the amount of \$5,500, due and payable on terms prescribed by the Division; and requiring the owner and/or manager of Pepe's to attend, at the licensee's expense, an educational program sponsored by the Hospitality Education Program or other educational program approved by the Division, within 60 days of the date of the final order, and to provide proof thereof to the Division.

DONE AND ENTERED this 22nd day of September, 2006, in
Tallahassee, Leon County, Florida.

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FLORENCE SNYDER RIVAS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of September, 2006.

ENDNOTE

1/ All further references to statutes and rules are to the 2005
versions in effect at the time of Ms. Schneider's inspections.

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.