

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF HOTELS AND )  
RESTAURANTS, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 07-0200  
 )  
HOUSE OF INDIA,<sup>1</sup> )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on July 25, 2007, by video teleconference at sites in Miami and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Elizabeth Duffy, Esquire  
Jose Blanco, Certified Legal Extern  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-2202

For Respondent: Sukhpal Singh, Manager  
House of India  
22 Merrick Way  
Coral Gables, Florida 33134

STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Administrative Complaint and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On October 17, 2006, Petitioner issued an Administrative Complaint alleging that, on September 28 and 29, 2006, Respondent was in violation of Section 6-501.111 of the Food Code. On or about November 6, 2006, Respondent requested "an evidentiary hearing pursuant to Section 120.57(1), Florida Statutes,"<sup>2</sup> on the allegations made against it in the Administrative Complaint. On January 16, 2007, the matter was referred to DOAH for the assignment of a DOAH administrative law judge to conduct the hearing Respondent had requested.

As noted above, the hearing was held on July 25, 2007.<sup>3</sup> Two witnesses testified at the hearing: Douglas Morgadanes (for Petitioner) and Sukhpal Singh (for Respondent). In addition to the testimony of Mr. Morgadanes and Mr. Singh, six exhibits (Petitioner's Exhibits 1 through 5, and Respondent's Exhibit 1) were offered and received into evidence.

At the close of the taking of evidence, the undersigned established a deadline (10 days from the date of the filing with DOAH of the hearing transcript) for the filing of proposed recommended orders.

The Transcript of the hearing (consisting of one volume) was filed with DOAH on August 7, 2007.

Respondent filed its Proposed Recommended Order on August 17, 2007. To date, Respondent has not filed any post-hearing submittal.

#### FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. At all times material to the instant case, Respondent operated the House of India (Restaurant), an eating establishment located in Coral Gables, Florida.

2. Respondent is now, and was at times material to the instant case, the holder of a license issued by Petitioner (license number 2313769) authorizing it to operate the Restaurant as a public food service establishment.

3. On the morning of September 28, 2006, Douglas Morgadanes, a Sanitation and Safety Specialist with Petitioner, conducted an inspection of the premises of the Restaurant. His inspection revealed, among other things, that there were, what he believed to be, "rodent droppings" present in the Restaurant, creating "an unsanitary condition [that] could lead to food borne illnesses" if the food served to patrons became contaminated with these droppings.

4. Before leaving the establishment, Mr. Morgadanes advised Respondent that this "unsanitary condition" had to be corrected within 24 hours.

5. The Restaurant closed immediately following the inspection and an extensive cleanup operation was undertaken.

6. In addition, Respondent had "[its] pest control company," Rentokil Pest Control (Rentokil), come to the Restaurant during or around the early morning hours of September 29, 2006, to perform "follow-up" rodent control services. (Rentokil had just made a "routine service" call to the Restaurant on September 27, 2006.)

7. Mr. Morgadanes conducted a "callback" inspection of the Restaurant on September 29, 2006. His inspection revealed that, notwithstanding Respondent's cleanup and rodent control efforts, there were, what appeared to him to be, rodent droppings<sup>4</sup> in an unused attic area above, and "a little bit to the side" of, the Restaurant's kitchen.

8. Respondent was unable to produce for Mr. Morgadanes during the "callback" inspection documentation reflecting that Rentokil had been to the Restaurant to provide rodent control services.

9. Respondent subsequently sent such documentation to Mr. Morgadanes' office by facsimile transmission.

10. The documentation for the September 29, 2006, service call (9/29 Documentation) contained the following entries under "Service Performed by Rentokil" and "Cooperation Requested from Customer":

Service Performed by Rentokil: Inspected and service[d] facility for pest[s]. Found no activity. Put out glue in kitchen underneath kitchen sink around hole near the back door.

Cooperation Requested from Customer:

Proofing Adequate?  Yes  No Please fix hole underneath sink to prevent rodent harborage.

Sanitation Needed?  Yes  No Please clean dishwashing station.

11. These entries on the 9/29 Documentation clearly and convincingly establish that, although Respondent had done cleanup work and retained the services of Rentokil in an effort to minimize the presence of rodents in the Restaurant, it had not eliminated harborage conditions on the premises.<sup>5</sup>

12. After receiving the documentation from Respondent, Petitioner issued the Administrative Complaint that is the subject of the instant controversy.

13. This was the second time in less than a year that Petitioner had charged Respondent with violating Section 6-301.14 of the Food Code. A prior charge (filed in DBPR Case No. 2005064978) had been disposed of by stipulation,

the terms of which were "adopted and incorporated" in a Final Order issued by Petitioner on January 12, 2006. There was no admission or finding of guilt. The "stipulated disposition" of the charge was Respondent's payment of a fine of \$500.00 and attending a hospitality education program.

#### CONCLUSIONS OF LAW

14. Petitioner has been statutorily delegated the authority to "carry out all of the provisions of [Chapter 509, Florida Statutes] and all other laws relating to the inspection or regulation of . . . public food service establishments for the purpose of safeguarding the public health, safety, and welfare." § 509.032, Fla. Stat.

15. A "public food service establishment," as that term is used in Chapter 509, Florida Statutes, is defined in Section 509.013(5)(a), Florida Statutes, as follows:

"Public food service establishment" means any building, vehicle, place, or structure, or any room or division in a building, vehicle, place, or structure where food is prepared, served, or sold for immediate consumption on or in the vicinity of the premises; called for or taken out by customers; or prepared prior to being delivered to another location for consumption.

16. Each "public food service establishment" must have a license from Petitioner prior to the commencement of operation. § 509.241, Fla. Stat.

17. Disciplinary action may be taken against the holder of such license for "operating in violation of [Chapter 509, Florida Statutes] or the rules of [Petitioner] . . . ." Such disciplinary action may include one or more of the following penalties: license revocation, with the licensee unable to "apply for another license for that location prior to the date on which the revoked license would have expired"; license suspension (for a period not exceeding 12 months), with the licensee able to "apply for reinstatement or renewal of the license" following the suspension period; imposition of an administrative fine not to exceed \$1,000 for each separate offense<sup>6</sup>; and "[m]andatory attendance, at personal expense, at an educational program sponsored by the Hospitality Education Program." § 509.261, Fla. Stat.

18. "[T]he rules of [Petitioner]," violation of which subject a licensee to disciplinary action pursuant to Section 509.261, Florida Statutes, include Florida Administrative Code Rule 61C-4.010(6), which provides, in pertinent part, as follows:<sup>7</sup>

61C-4.010 Sanitation and Safety  
Requirements.

\* \* \*

(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. . . .

\* \* \*

19. Section 6-501.111 is part of Chapter 6 of the Food Code (which is incorporated by reference in Florida Administrative Code Rule 61C-4.010(6)). It provides as follows:

Section 6-501.111 Controlling Pests

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

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

(B) Using methods, if pests are found, such as trapping devices or other means of pest control as specified under §§ 7-202.12, 7-206.12, and 7-206.13; and

(D) Eliminating harborage conditions.

20. "No revocation [or] suspension . . . of any [public food service establishment] license is lawful unless, prior to the entry of a final order, [Petitioner] has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57." § 120.60(5), Fla. Stat.

21. The licensee must be afforded an evidentiary hearing if, upon receiving such written notice, the licensee disputes the alleged facts set forth in the administrative complaint.

§§ 120.569(1) and 120.57, Fla. Stat.



22. At the hearing, Petitioner bears the burden of proving that the licensee engaged in the conduct, and thereby committed the violations, alleged in the administrative complaint. Proof greater than a mere preponderance of the evidence must be presented. Clear and convincing evidence of the licensee's guilt is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Pic N' Save of Central Florida v. Department of Business Regulation, 601 So. 2d 245, 249 (Fla. 1st DCA 1992); and § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute . . . .").

23. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). It is an "intermediate standard." Id. For proof to be considered "'clear and convincing' . . . 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." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

24. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific factual allegation(s) made in the charging instrument. Due process prohibits an agency from taking penal action against a licensee based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); and Luskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999).

25. Furthermore, "the conduct proved must legally fall within the statute or rule claimed [in the administrative complaint] to have been violated." Delk, 595 So. 2d at 967. In deciding whether "the statute or rule claimed to have been violated" was in fact violated, as alleged by Petitioner, if there is any reasonable doubt, that doubt must be resolved in favor of the licensee. See Whitaker v. Department of Insurance and Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); and Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

26. The Administrative Complaint issued in the instant case alleges that, on September 28 and 29, 2006, Respondent was in violation of Section 6-501.111 of the Food Code as evidenced by

rodent droppings found in the Restaurant during inspections on those days.

27. As noted above, Section 6-501.111 of the Food Code specifies measures that must be taken to "minimize" the presence of rodents and other pests on the premises of a public food service establishment.<sup>8</sup> These measures include "[e]liminating harborage conditions."

28. The record evidence clearly and convincingly establishes that Respondent violated Section 6-501.111 of the Food Code on September 28 and 29, 2006, as alleged in the Administrative Complaint, by not "eliminating harborage conditions" at the Restaurant. Accordingly, disciplinary action may be taken against Respondent pursuant to Section 509.261, Florida Statutes.

29. In its Proposed Recommended Order, Petitioner proposes that the undersigned recommend that, as punishment for Respondent's committing the violations alleged in the Administrative Complaint, Respondent's license be suspended for four days and it be required to pay an administrative fine of \$1,000.00 and attend, at its own expense, a hospitality education program.

30. In the undersigned's view, this is too harsh a penalty, given the efforts that Respondent did make to minimize the presence of rodents in the Restaurant.

31. Taking into account the totality of circumstances (including these efforts made by Respondent, as well as the disposition of the charge filed against Respondent in DBPR Case No. 2005064978), the undersigned concludes that a more reasonable and appropriate penalty would be to merely require Respondent to pay an administrative fine of \$1,000.00 and attend, at its own expense, a hospitality education program, without suspending its license.

RECOMMENDATION

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

RECOMMENDED that Petitioner issue a final order finding that Respondent committed the violations alleged in the Administrative Complaint and disciplining Respondent therefor by imposing a fine of \$1,000.00 and directing that Respondent attend, at its own expense, a hospitality education program.

DONE AND ENTERED this 22nd day of August, 2007, in Tallahassee, Leon County, Florida.

**S**

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STUART M. LERNER  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 22nd day of August, 2007.

ENDNOTES

<sup>1</sup> House of India is the "doing business as" name of Suni House of India, Inc.

<sup>2</sup> All references to Florida Statutes in this Recommended Order are to Florida Statutes (2006).

<sup>3</sup> The hearing was originally scheduled for March 22, 2007, but was twice continued.

<sup>4</sup> While it is not apparent from the record that Mr. Morgadanes had sufficient expertise to determine that the droppings he observed on September 28 and 29, 2006, were the product of rodents, Respondent does not dispute that these droppings were indeed, as Mr. Morgadanes determined, rodent feces. Whether these droppings were fresh or not, the evidentiary record does not reveal.

<sup>5</sup> The 9/29 Documentation can be relied upon to make a finding concerning Respondent's failure to eliminate harborage conditions in the Restaurant inasmuch as it was Respondent that offered this documentation into evidence (as part of Respondent's Exhibit 1) and it did so without limitation or reservation. Cf. Guzman v. IBP, Inc., 2000 Neb. App. LEXIS 261 \*8-9 (Neb. Ct. App. 2000)("IBP asserts that the information on exhibit 53 is uncorroborated hearsay. Thus, IBP concludes that we should not rely on the report in our review of this case. While IBP's contentions might be well taken if it had not offered the exhibit or if the exhibit was received over IBP's objections on these grounds, IBP waived these objections by offering the exhibit, and we consider it for what it is worth-- . . . . Finally, IBP ignores the fact that Guzman may support her case not only by her own evidence, but by the evidence produced by IBP as well."); and State v. Holliday, 110 Ore. App. 426, 428 n.1 (Or. Ct. App. 1992)("Defendant waived any objection to the lack of certification or supporting affidavits for the records by offering them as his exhibit.").

<sup>6</sup> Section 509.261(2), Florida Statutes, provides that, "[f]or the purposes of this section, [Petitioner] 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." "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."

<sup>7</sup> "[T]he rules of [Petitioner]" also include the following provision found in Florida Administrative Code Rule 61C-1.004(3):

61C-1.004 General Sanitation and Safety Requirements.

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

\* \* \*

(3) Vermin control - Effective control measures shall be taken to protect against the entrance into the establishment, and the breeding or presence on the premises of rodents, flies, roaches and other vermin. All buildings shall be effectively rodent-proofed, free of rodents and maintained in a rodent-proof and rodent-free condition. All windows used for ventilation must be screened, except when effective means of vermin control are used. Screening material shall not be less than 16 mesh to the inch or equivalent, tight-fitting and free of breaks. Insecticides or rodenticides, when used, shall be used in compliance with Chapter 5E-14, F.A.C., herein adopted by reference.

\* \* \*

Respondent, however, was not charged with, and therefore cannot be found guilty of, violating this rule provision. See Willner v. Department of Professional Regulation, Board of Medicine, 563

So. 2d 805, 806 (Fla. 1st DCA 1990)("[A]ppellant correctly argues that three of the violations were not charged in the administrative complaints against him. We, therefore, set aside the findings of guilt and the fines for violation of Section 458.331(1)(h), Florida Statutes (1981); Section 458.331(1)(t), Florida Statutes (1981); and Section 458.331(1)(n), Florida Statutes (1983)."); and Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992)("[T]he conduct proved must legally fall within the statute or rule claimed [in the administrative complaint] to have been violated.").

<sup>8</sup> The presence of rodents or their droppings at a public food service establishment is not in and of itself a violation of Section 6-501.111 of the Food Code. It is merely proof of such a violation.

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.