

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 07-1702
)
SONIMAR, INC., d/b/a)
EL CONDOR PASA,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on June 4, 2007, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Elizabeth Duffy, Esquire
Charles Tunnicliff, Esquire
Department of Business and
Professional Regulation
940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

For Respondent: Enrique Su
El Condor Plaza
953 Southwest 71st Avenue
North Lauderdale, Florida 33068

STATEMENT OF THE ISSUES

The issues in this disciplinary proceeding arise from Petitioner's allegation that Respondent, which operates a 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 August 18, 2006, Petitioner Department of Business and Professional Regulation, Division of Hotels and Restaurants, issued an Administrative Complaint against Respondent Sonimar, Inc., d/b/a El Condor Pasa, charging the restaurant operator 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 April 13, 2007, the matter was filed with the Division of Administrative Hearings.

The final hearing took place on June 4, 2007, as scheduled, with both parties present. Petitioner offered five exhibits, numbered 1 through 5, and each was received in evidence. In addition, Petitioner presented the testimony of its inspector, Novelette Williams. Enrique Su, the owner and operator of the restaurant in question, testified on behalf of Respondent. No

Respondent's exhibits were offered. The undersigned took official recognition of the applicable administrative rules.

The transcript of the final hearing was filed on July 9, 2007, and thereafter the parties were notified that their respective proposed recommended orders would be due on or before July 19, 2007. 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 2006 Florida Statutes.

FINDINGS OF FACT

1. At one time, Respondent Sonimar, Inc., d/b/a El Condor Pasa ("Sonimar"), held a Permanent Food Service license. This license expired, however, on December 1, 2005. Thereafter, Sonimar continued to operate a food service establishment without a valid license, and was doing so at all times relevant to this case.

2. Sonimar is subject to the regulatory and disciplinary jurisdiction of Petitioner Department of Business and Professional Regulation, Division of Hotels and Restaurants (the "Division").

3. On two occasions—June 7, 2006, and July 26, 2006—an agent of the Division inspected a restaurant located at 953 Rock Island Road in North Lauderdale, Florida, which establishment

was then (and at the time of the hearing) operated by Sonimar. During each visit, the inspector noticed several items that were not in compliance with the laws which govern the facilities and operations of restaurants.

4. As of July 26, 2006, the following deficiencies subsisted: (1) chlorine sanitizer was not being used to clean food contact surfaces and utensils, in violation of Food Code Rule 4-501.114(A)ⁱ; (2) 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; (3) the operator of the establishment was not licensed, in violation of Section 509.241(2), Florida Statutesⁱⁱ; (4) some ceiling tiles in the kitchen had water stains (evidencing a leak) and there was a visible hole in the kitchen ceiling, in violation of Florida Administrative Code Rule 61C-1.004(6); (5) the door of the walk-in freezer and the floor of the walk-in cooler were in disrepair, in violation of Food Code Rule 4-501.11; and (6) the plumbing located above the three-compartment sink was leaking, in violation of Food Code Rule 5-205.15.

CONCLUSIONS OF LAW

5. 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(2007).

6. 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.

7. 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).

8. 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.

9. Food Code Rule 4-501.114(A) provides as follows:

A chemical SANITIZER used in a SANITIZING solution for a manual or mechanical operation at exposure times specified under ¶ 4-703.11(C) shall meet the criteria specified under § 7-204.11 Sanitizers, Criteria, shall be used in accordance with the EPA approved manufacturer's label use instructions, and shall be used as follows:

(A) A chlorine solution shall have a minimum temperature based on the concentration and pH of the solution as listed in the following chart[.]ⁱⁱⁱ

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

(A) . . . [R]efrigerated, READY-TO EAT, POTENTIALLY HAZARDOUS FOOD (TIME/TEMPERATURE CONTROL FOR SAFETY 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 The day of preparation shall be counted as Day 1.

11. Section 509.241(2), Florida Statutes, provides in pertinent part as follows:

APPLICATION FOR LICENSE.--Each person who plans to open a public lodging establishment or a public food service establishment shall apply for and receive a license from the division prior to the commencement of operation.

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

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

(1) Water, plumbing and waste. Except as specifically provided in these rules, standards for water, plumbing and waste shall be governed by Chapter 5, Food Code, herein adopted by reference. For the purposes of this section, the term "food establishment" as referenced in the Food Code shall apply to all public lodging and public food establishments as defined in Chapter 509, F.S.

* * *

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

13. Food Code Rule 4-501.11 provides in pertinent part as follows:

(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.

14. Food Code Rule 5-05.15 provides:

A PLUMBING SYSTEM shall be:

- (A) Repaired according to LAW; and
- (B) Maintained in good repair.

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 Sonimar 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]llthough 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 Sonimar's guilt regarding noncompliance with the following laws: Food Code Rule 4-501.114(A) (two violations); Food Code Rule 3-501.17 (one violation); Section 509.21(2), Florida Statutes (one violation);

Florida Administrative Code Rule 61C-1.004(6) (two violations); Food Code Rule 4-501.11 (one violation), and Food Code Rule 5-205.15 (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. The Division has urged the undersigned to recommend that Sonimar be fined \$2,800 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.

20. The Division also urges that Sonimar's license be suspended for 8 days beginning on the first Monday after (a) Sonimar's appellate rights have been exhausted and (b) Sonimar has acquired a new license. Such a penalty, however, would be inconsistent with Section 509.261(3), Florida Statutes, which provides as follows:

The division shall post a prominent closed-for-operation sign on any public lodging establishment or public food service establishment, the license of which has been suspended or revoked. The division shall

also post such sign on any establishment
judicially or administratively determined to
be operating without a license. It is a
misdemeanor of the second degree, punishable
as provided in s. 775.082 or s. 775.083, for
any person to deface or remove such closed-
for-operation sign or for any public lodging
establishment or public food service
establishment to open for operation without
a license or to open for operation while its
license is suspended or revoked. The
division may impose administrative sanctions
for violations of this section.

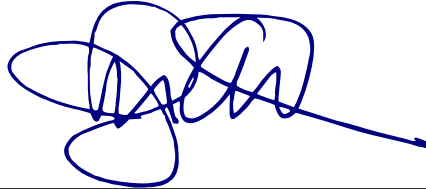
(Emphasis added.) As the plain language of the foregoing
statute informs, the legislature has directed the Division to
close the doors of all restaurants determined to be operating
without a license. The establishment located at 953 Rock Island
Road, North Lauderdale, Florida, falls into that category. The
undersigned therefore declines to recommend the imposition of an
eight-day suspension against a license that has yet to be
issued.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of
Law, it is RECOMMENDED that the Division enter a final order:
(a) finding Sonimar guilty in accordance with the foregoing
Recommended Order; (b) ordering Sonimar to pay an administrative
penalty in the amount of \$2,800, due and payable to the Division
of Hotels and Restaurants, 1940 North Monroe Street,
Tallahassee, Florida 32399, within 30 calendar days after the
filing of the final order with the agency clerk; and (c)

directing Sonimar to send an appropriate principal to an educational program sponsored by the Hospitality Education Program.

DONE AND ENTERED this 8th day of August, 2007, in Tallahassee, Leon County, Florida.



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 8th day of August, 2007.

ENDNOTES

ⁱ/ 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.

ⁱⁱ/ Mr. Su admitted at hearing that Sonimar still had not renewed its license and hence was operating without one.

ⁱⁱⁱ/ This is the chart that Food Code Rule 4-501.114(A) incorporates:

Minimum Concentration	Minimum Temperature	
	pH 10 or less °C (°F)	pH 8 or less °C (°F)
MG/L		
25	49 (120)	49 (120)
50	38 (100)	24 (75)
100	13 (55)	13 (55)

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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.