

STATE OF FLORIDA
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

FLORIDA DEPARTMENT OF
AGRICULTURE AND CONSUMER
SERVICES

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DIVISION OF
ADMINISTRATIVE
HEARINGS

Petitioner,

vs.

DOAH CASE NO. 07-1777
AGENCY CASE NO. A47104

MAHMUD MIZHAR, INC., d/b/a
STONY FOOD MART,

Respondent.

FINAL ORDER

THIS CAUSE, arising under the Florida Food Safety Act, Chapter 500, Florida Statutes, and Florida Administrative Code Chapter 5K-4, came before the Commissioner of Agriculture of the State of Florida for consideration and final agency action after entry of a Recommended Order following a formal hearing held on May 25, 2007, by the Honorable Robert E. Meale, Administrative Law Judge ("ALJ"). The Commissioner of Agriculture, as head of the Department of Agriculture and Consumer Services, has jurisdiction over the subject matter and the parties thereto.

I. BACKGROUND

By the Department's Food Safety Inspection Report and Food Safety Inspection Supplemental Report, both dated February 20, 2007, Petitioner informed Respondent that, as a result of an inspection conducted on February 6, 2007, Petitioner found several violations of the Florida Food Safety Act, Chapter 500, Florida Statutes, and Florida Administrative Code Chapter 5K-4. Respondent requested a formal hearing. After due notice to the parties on May 4,

2007, the final hearing was held on May 25, 2007 by video teleconference at sites in Tallahassee and West Palm Beach, Florida. The ALJ entered a Recommended Order on July 6, 2007.

On July 19, 2007, the Petitioner's Counsel served Petitioner's Exceptions to Recommended Order setting forth two (2) exceptions.

The record consists of all notices, pleadings, motions, intermediate rulings, depositions filed of record, depositions filed in DOAH Case No. 07-1777, evidence admitted and matters officially recognized, the transcript of the proceedings, proposed findings and exceptions, stipulations of the parties, and the Recommended Order of the ALJ.

The Recommended Order is attached and incorporated herein, as Exhibit (1).

II. FINDINGS OF FACT

1. The Commissioner of Agriculture adopts the findings of fact set forth in the attached Recommended Order of the Administrative Law Judge.

III. CONCLUSIONS OF LAW

2. The Petitioner takes exception to the legal conclusions of the ALJ in paragraph 24 and 25 of the July 6, 2007 Recommended Order that the "failure of the opened deli meats to contain a sell-by date is not a violation" and the legal conclusions in paragraph 25 that the Petitioner "has not adopted rules explicitly requiring that meat labels include a sell-by date" and also to paragraphs 28, 29 and 30 to the extent that the ALJ concluded that the failure of the Respondent to label the opened deli meats with a sell-by date is not a violation.

3. The ALJ concluded in paragraph 21 of his Recommended Order that the Department has adopted various chapters of the U.S. Department of Health and Human Services' 2001 Food Code (hereinafter "Food Code"). Although the ALJ cited several sections

of the Food Code in arriving at his Conclusions of Law, the Petitioner maintains that the ALJ failed to recognize adopted Sections of the Food Code which require the Respondent to label deli meats with a sell-by date. Specifically, Petitioner's exception states that the Department adopted Section 3-501.17 of the Food Code by reference in Florida Administrative Code Rule 5K-4.002(4)(a) and (b).

4. Section 3-501.17 of the Food Code provides in pertinent part:

(B) Except as specified in (D) and (E) of this section, refrigerated, ready-to-eat, *potentially hazardous food* prepared and *packaged* by a *food processing plant* shall be clearly marked, at the time the original container is opened in a *food establishment* and if the *food* is held for more than 24 hours, 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 in (A) of this section; and:

(1) The day the original container is opened in the *food establishment* shall be counted as day 1; and

(2) The day or date marked by the *food establishment* may not exceed a manufacturer's use-by date if the manufacturer determined the use-by date based on *food safety*.

(C) *A refrigerated, ready-to-eat potentially hazardous food that is frequently rewrapped, such as lunchmeat or a roast, or for which date marking is impractical, such as soft serve mix or milk in a dispensing machine, may be marked as specified in (A) or (B) of this section, or by an alternative method acceptable to the regulatory authority.*

(D) Paragraphs (A) and (B) of this section do not apply to individual meal portions served or *repackaged* for sale from bulk container upon a *consumer's* request.

(emphasis original)

5. Based on the above-quoted Section, the ALJ's Conclusions of Law in paragraphs 24, 25, 28, 29 and 30 of the Recommended Order are incorrect so far as they conclude that neither State nor Federal law requires sell-by-date labeling of potentially hazardous foods.

6. In regards to the term "potentially hazardous food(s)," the Department's Rule 5K-4.002(4)(a) and (b) also adopted Section 1-210.10 of the Food Code.

7. That Section provides:

(65) *Potentially Hazardous Food*

- (a) “*Potentially hazardous food*” means a *food* that is natural or synthetic and that requires temperature control because it is in a form capable of supporting:
- (i) The rapid and progressive growth of infectious or toxigenic microorganisms;
 - (ii) the growth and toxin production of *Clostridium botulinum*; or
 - (iii) In raw shell *eggs*, the growth of *Salmonella Enteritidis*.

(emphasis original)

8. Paragraph 11 of the ALJ’s Recommended Order states that “the inspector found opened deli meats that had not been labeled with a date. After opening, despite refrigeration, the bacterium known as listeria monocytogenes may contaminate the opened meat and render it unfit for human consumption, so a label showing a sell-by date is useful to ensure product freshness and food safety.” Listeriosis, the name of the general group of disorders caused by listeria monocytogenes, can cause septicemia, meningitis, encephalitis, and intrauterine or cervical infections in pregnant women. U.S. Food and Drug Administration, *Foodborne Pathogenic Microorganisms and Natural Toxins Handbook*, (1992) available at <http://www.cfsan.fda.gov/~mow/intro.html>. Thus, the deli meats sold by the Respondent are within the definition of potentially hazardous foods as defined by Section 1-210.10(65) of the Food Code and, therefore, were required by law to be labeled with a sell-by date.

9. Petitioner also takes exception to paragraphs 24, 25, 28, 29, and 30 of the Recommended Order because the ALJ failed to conclude that the Respondent’s failure to label the opened deli meat with a sell-by date was a violation of Section 500.10(1)(f), Florida Statutes. The ALJ concluded that the Respondent’s rat infestation and the close proximity between open cleansers and food inside Respondent’s store were both violations of Section 500.10(1)(f), Florida Statutes, because they “created an unacceptable risk of food

contamination.” The ALJ should have also concluded that the lack of a sell-by date on open deli meat was also a violation of Section 510.10(1)(f) based upon his finding that the lack of a sell-by date could contribute to the contamination of the deli meat with harmful bacteria.

10. After a full review of the record, the Commissioner of Agriculture has determined that the exceptions asserted by the Petitioner are supported by clear and convincing evidence and meets the essential requirements of the law. The Department has adopted by reference federal regulations which require meats such as those sold by Respondent to be labeled with a sell-by date. The lack of a sell-by-date labeling created a situation in which the deli meats were “held under insanitary conditions whereby it may become contaminated with filth, or whereby it may have been rendered diseased, unwholesome, or injurious to health.” F.S.A. § 510.10(1)(f). Accordingly, Respondent’s failure to affix a sell-by date on the deli meats offered for sale was a violation of Section 5K-4.002(4)(a), F.A.C. and Section 510.10(1)(f), Florida Statutes.

11. Except for the foregoing exceptions, the Commissioner of Agriculture adopts the Conclusions of Law made by the ALJ in his Recommended Order.

Accordingly, it is thereupon

ORDERED AND ADJUDGED

A. The Commissioner of Agriculture adopts the recommendations of the ALJ set forth in the attached Recommended Order with the exceptions noted above.

B. Respondent, MAHMUD MIZHAR, INC., D/B/A STONY FOOD MART, has violated provisions of the Florida Food Safety Act, Chapter 500, Florida Statutes, and Florida Administrative Code Chapter 5K-4, and an administrative fine in the amount of \$1,500.00 shall be imposed against the Respondent, MAHMUD MIZHAR, INC., D/B/A STONY FOOD

MART.

NOTICE OF RIGHT TO APPEAL

Any party to these proceedings adversely affected by this Final Order is entitled to seek review of this order pursuant to Section 120.68, Fla. Stat. (2007), and Rule 9.110, Florida Rules of Appellate Procedure. Review proceedings must be initiated by filing a petition for review or notice of appeal with the Agency Clerk of the Florida Department of Agriculture and Consumer Services, Room 509 Mayo Building, Tallahassee, Florida 32399-0800. A copy of the petition for review or notice of appeal, accompanied by the filing fees prescribed by law must also be filed with the appropriate District Court of Appeal within thirty (30) days of the date this Order was filed with the Agency Clerk.

DONE AND ORDERED this 9th day of August, 2007.

CHARLES H. BRONSON
COMMISSIONER OF AGRICULTURE

BY: 

Terry L. Rhodes, Assistant Commissioner
Florida Department of Agriculture
and Consumer Services

Filed with the Agency Clerk this 9th day of August, 2007.



Agency Clerk

Copies to: Mahmud Mizhar, Inc., d/b/a Stony Food Mart, Respondent;
David W. Young, Senior Attorney, for Petitioner
State of Florida, Division of Administrative Hearings