

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 07-4008
)
VITO'S PIZZA AND)
ITALIAN RESTAURANT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On October 16, 2007, a duly-noticed final hearing was held in Jacksonville and Tallahassee, Florida, by means of video teleconferencing. The case was considered by Lisa Shearer Nelson, Administrative Law Judge.

APPEARANCES

For Petitioner: Jessica Leigh, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32308

For Respondent: No appearance

STATEMENT OF THE ISSUE

Whether Respondent has committed the violations charged in the Administrative Complaint and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On June 26, 2007, the Department of Business and Professional Regulation, Division of Hotels & Restaurants (the Department or DBPR) issued an Administrative Complaint against Vito's Pizza and Italian Restaurant, asserting violations of Chapter 509, Florida Statutes, and the administrative rules related to fire and food service violations. On July 24, 2007, Respondent filed an Election of Rights form disputing issues of material fact and requesting a hearing pursuant to Section 120.57(1), Florida Statutes. On September 4, 2007, the case was referred to the Division of Administrative Hearings for an assignment of an administrative law judge.

On September 18, 2007, a Notice of Hearing was issued setting the case for hearing via video teleconference on October 16, 2007, a date provided in the Joint Response to Initial Order filed by the parties. The Notice and an Order of Prehearing Instructions was sent to Respondent at the address listed on its election of rights: 3825 Baymeadows Road, Jacksonville, Florida 32217. Exhibit and witness lists were served by Petitioner to Respondent at this same address. No document issued by the Division has been returned as undeliverable.

The case proceeded as noticed. The day of the hearing, Petitioner, Petitioner's witness and the court reporter all appeared at the noticed time. When Respondent did not appear, a

30-minute recess was taken in case Respondent was running late. Counsel for Petitioner attempted to reach Respondent's representative, but reported that she was unable to do so. The case proceeded in Respondent's absence, and Petitioner presented one witness and Petitioner's Exhibits lettered A through C were admitted into evidence. When the hearing adjourned approximately one hour after the noticed time for the hearing, Respondent had not appeared.

On Wednesday, October 17, 2007, a letter was received at the Division from Respondent which says, in its entirety:

Dear Sir:

I deeply apologize for the missing my court date and the miscommunication I received regarding my date in court today, Tuesday, October 16, 2007. I certainly would have been in attendance if I had not been misinformed regarding the date I was requested to attend.

Because the letter did not indicate that it was provided to counsel for Petitioner, a Notice of Ex Parte Communication was issued. After reviewing the letter and the file, the undersigned determined that there was no need to re-convene the hearing. Respondent did not ask for an opportunity to put on evidence. He provided no affidavit or other evidence to support his statement that he thought the hearing was to take place on another day. He does not identify who "misinformed" him regarding the date for hearing and did not indicate that he failed to receive the Notice

of Hearing or Order of Prehearing Instructions and they have not been returned to the Division.

The proceedings were recorded and a transcript was filed October 29, 2007. The parties were given until November 9, 2007, to file Proposed Recommended Orders. The Department's Proposed Recommended Order, which was timely filed, has been carefully considered in this Recommended Order. No similar submission was received from Respondent. However, on November 15, 2007, Respondent filed a document entitled Motion for Rehearing, objecting to Petitioner's Proposed Recommended Order. As will be explained more fully in the Conclusions of Law, Petitioner's Motion for Rehearing is denied.

FINDINGS OF FACT

1. Petitioner is the agency charged with the licensing and regulation of public food service establishments, pursuant to the provisions of Chapter 509, Florida Statutes.

2. Respondent is a restaurant holding food service license number 2608949, in the name of TGF Pizza of Jacksonville, Inc., d/b/a as Vito's Pizza and Italian Restaurant.

3. Respondent's address of record is 3825 Baymeadows Road, Jacksonville, Florida 32217-4364.

4. Bonnie Bradshaw is employed by the Department as a Sanitation and Safety Specialist. In that capacity, she conducts inspections of food service and lodging establishments for compliance with Chapter 509, Florida Statutes; the Food Code; the

National Fire Protection Association Code; and the relevant Florida Administrative Code Rules. Ms. Bradshaw is a certified food manager and a certified special fire safety inspector.

5. Critical violations are violations of the relevant rules and statutes that are more likely to contribute to a food-borne illness, an environmental hazard, or to food contamination.

6. Non-critical violations are those violations that are less likely to contribute to a food-borne illness, an environmental hazard, or to food contamination.

7. On January 25, 2007, Ms. Bradshaw inspected the premises of Vito's Pizza and Italian Restaurant. During the inspection, Ms. Bradshaw prepared a Food Service Inspection Report setting for the findings from her inspection. The Food Service Inspection Report was provided to and signed for by Maria Teresi, who was listed as the manager for the restaurant.

8. During the January 25, 2007, inspection, there were four or more employees engaged in food preparation without a certified food manager being present. Food managers ensure that proper hand-washing techniques are used, proper food temperatures are met and that employees are healthy. Failure to have a food service manager present when four or more employees are engaged in food preparation is considered a critical violation.

9. No consumer advisory for raw and undercooked products was displayed at the establishment at the time of the January 24, 2007, inspection. Failure to post such an advisory is also

considered a critical violation because of the need to advise consumers that eating raw or undercooked products could increase their risk of food-borne illness.

10. Ms. Bradshaw also observed an unused and unprotected opening in the panel box, and the exit signs were not properly illuminated. Both are considered critical violations. The panel box opening presents a fire or shock hazard, and the failure to have the exit sign illuminated impairs the ability of consumers to exit in the case of an emergency.

11. In addition, an electrical outlet in the electric closet was missing a cover plate. This is also considered a critical violation because of the fire or shock hazard presented.

12. The Food Service Inspection Report issued January 25, 2007, stated that violations in the operation of the establishment must be corrected by May 25, 2007.

13. On May 30, 2007, Ms. Bradshaw returned to Respondent's establishment for a re-inspection. At that time, she noted that none of the critical violations previously noted had been corrected. No certified food service manager was on the premises although four or more employees were engaging in food preparation; exit signs were not properly illuminated; no consumer advisory on undercooked or raw animal products was posted; the unused opening in the panel box was unprotected and the electrical outlet in the electric closet still was missing a cover plate.

14. Ms. Bradshaw prepared a Call Back Inspection Report as a result of her inspection on May 30, 2007. The inspection report was provided to and signed by Marie Teresi as manager.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

16. The Division of Hotels and Restaurants within the Department of Business and Professional Regulation is charged with the licensing and regulation of public lodging establishments and public food service establishments pursuant to Section 20.165 and Chapter 509, Florida Statutes.

17. Any public food establishment that has violated the provisions of Chapter 509 or the rules authorized by Chapter 509 is subject to fines of up to \$1,000.00 per offense; mandatory attendance at an educational program sponsored by the Hospitality Program; suspension, revocation or refusal of a license. In order to impose any such penalties, the Department must demonstrate the allegations against Respondent by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern & Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

18. A "public food service establishment" is defined in Section 509.013(5)(a), Florida Statutes, as follows:

"Public food service establishment" means any building, vehicle, place, or structure where food is prepared, served, or sold for immediate consumption 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.

19. Respondent is a food service establishment as defined by Section 509.013(5)(a).

20. Each public food service establishment must have a license in order to operate. § 509.241, Fla. Stat.

21. Chapter 3 of the Food Code has been incorporated by reference into the rules governing public food service establishments. Fla. Admin. Code R. 61C-4.010(1). Provisions of the Food Code relevant to this case include:

3-603.11 (A) Except as provided in paragraph 3-401.11(C) and Subparagraph 3-401.11(D)(3) and under paragraph 3-801.11(D), if an animal food such as beef, eggs, fish, lamb, milk, pork, poultry, or shellfish is served or sold raw, undercooked, or without otherwise being processed to eliminate pathogens, either in ready-to-eat form or as an ingredient in another ready-to-eat good, the permit holder shall inform customers of the significantly increased risk of consuming such foods by way of a disclosure and reminder, as specified in paragraphs (B) and (C) of this section using brochures, deli case or menu advisories, label statements, table tents, placards, or other effective written means.

(B) Disclosure shall include:

(1) A description of the animal-derived foods, such as "oysters on the half shall (raw oysters)," "raw-egg Caesar salad," and "hamburgers (can be cooked to order):" or

(2) Identification of the animal-derived foods by asterisking them to a footnote that states that the items are served raw or undercooked, or contain (or may contain) raw or undercooked ingredients.

(C) Reminder shall include asterisking the animal-derived foods requiring disclosure to a footnote that states:

(1) Regarding the safety of these items, written information is available upon request;

(2) Consuming raw or undercooked meats, poultry, seafood, shellfish, or eggs may increase your risk of foodborne illness; or

(3) Consuming raw or undercooked meats, poultry, seafood, shellfish, or eggs may increase your risk of foodborne illness, especially if you have certain medical conditions.

22. The Division of Hotels and Restaurants has also incorporated Chapter 101 of the National Fire Protection Association Code into its rules. See Fla. Admin. Code R. 61C-1.004(5). Relevant portions of National Fire Protection Association Code provide:

70,110.12(a): Unused cable or raceway openings in boxes, raceways, auxiliary gutters, cabinets, cutout boxes, meter socket enclosures, equipment cases, or housings shall be effectively closed to afford protection substantially equivalent to the wall of the equipment. Where metallic plugs or plates are used with nonmetallic enclosures, they shall be recessed at least 6 mm (1/4 in.) from the outer surface of the enclosure.

70,300.31: Suitable covers shall be installed on all boxes, fittings, and similar enclosures to prevent accidental contact with energized parts or physical damage to parts or insulation.

23. The Division of Hotels & Restaurants has also adopted rules with the following requirements:

61C-1.004 General Sanitation and Safety Requirements.

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

* * *

(10) Means of access must permit unobstructed travel at all times and be maintained free of obstructions and fire hazards. Halls, entrances and stairways shall be clean, ventilated and well-lighted day and night. Hall and stair runners shall be kept in good condition. Hand rails shall be installed on all stairways and guard rails around all porches and steps. Adequate means of exit shall be provided pursuant to NFPA 101. Exits shall be clearly marked with approved illuminated signs.

61C-4.023 Food Protection Manager Certification and Public Food Service Employee Training.

(1) All managers who are responsible for the storage, preparation, display, and serving of foods to the public shall have passed a certification test approved by the division demonstrating a basic knowledge of food protection practices as adopted in this chapter. Those managers who successfully pass an approved certification examination shall be issued a certificate by the certifying organization, which is valid for a period of five years from the date of issuance. Each licensed establishment shall have a minimum of one certified food protection manager responsible for all periods of operation. The operator shall designate in writing the certified food protection manager or managers for each location. A current list of certified food protection managers shall be available upon request in each establishment. When four or more employees, at one time, are engaged in

the storage, preparation or serving of food in a licensed establishment, there shall be at least one certified food protection manager present at all times when said activities are taking place. The certified food manager or managers need not be present in the establishment during those periods of operation when there are three or fewer employees engaged in the storage, preparation, or serving of foods. It shall be the responsibility of the certified food protection manager or managers to inform all employees under their supervision and control who engage in the storage, preparation, or serving of food, to do so in accordance with acceptable sanitary practices as described in this chapter.

24. The Administrative Complaint charged that on January 25, 2007, and May 30, 2007, Respondent violated the applicable rules in the following respects: 1) no consumer advisory on raw/undercooked animal products was provided; 2) exit signs were not properly illuminated; 3) an unused opening in the panel box was unprotected; 4) an electrical outlet in the electric closet was missing a cover plate; and 5) there was no certified food protection manager on duty with four or more employees engaged in food preparation.

25. There is clear and convincing evidence to substantiate all five violations charged. Respondent violated Section 3-603.11 of the Food Code by failing to provide a consumer advisory for raw or undercooked animal products. Respondent violated Florida Administrative Code Rule 61C-1.004(10) by failing to have exit signs properly illuminated. Section 70,110.12(a) of the National Fire Protection Association Code was violated by leaving

an unused panel in the panel box unprotected, and Section 70,300.31 of the same Code was violated by failing to have a cover plate on an electrical outlet in the electric closet. Finally, Respondent violated Florida Administrative Code Rule 61C-4.023(1), by failing to have a certified food protection manager present when there were four or more employees engaged in the storage, preparation or service of food.

26. Respondent filed a "Motion for Rehearing" after formal hearing in this case. In that Motion, it refers to the correspondence faxed to the Division of Administrative Hearings on the day scheduled for hearing. It also states that, at some unstated day, the writer's father was hospitalized requiring his attention; that the parties did not confer five days prior to the final hearing; and that he objects to the Petitioner's Proposed Recommended Order.

27. Florida Administrative Code Rule 28-106.2015(5) requires a respondent in a licensing proceeding to include the respondent's name, address, and telephone number in a request for hearing. Respondent gave the Baymeadows Road address in its request for hearing. Rule 28-106.208 requires that written notice for all hearings be provided to parties at their address of record. Appropriate notice of the hearing was given in accordance with the rule.

28. Finally, Florida Administrative Code Rule 28-106.210 allows for a continuance of a hearing for good cause shown, and

requires that except in cases of emergency, requests for continuance must be made at least five days prior to the date noticed for the hearing. No such motion was ever filed in this case.

29. While Respondent claims that he did not understand when the final hearing would take place, the Notice of Hearing was not returned to the Division. Respondent has not claimed that he did not receive the notice. Further, Respondent's Motion for Rehearing refers to requirements in the Order of Prehearing Instructions issued the same day as and mailed with the Notice of Hearing. He has provided only an unverified statement that he was confused as to the date. Even upon learning that the hearing had taken place, he has not indicated what evidence, if any, he had intended to present. Under these circumstances, no basis for "rehearing" the case has been presented, and Respondent's Motion is denied.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered that finds that Respondent in violation of the charges alleged in the Administrative Complaint, imposing an administrative fine in the amount of \$2,000.00, and requiring Respondent to attend an educational program sponsored by the Hospitality Education Program.

DONE AND ENTERED this 28th day of November, 2007, in
Tallahassee, Leon County, Florida.

S

LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
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this 28th day of November, 2007.

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.