

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 08-0995
)
BIG APPLE PIZZA,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on October 1, 2008, in Orlando, Florida, before Jeff B. Clark, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charles F. Tunnickliff, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-2202

For Respondent: Vinchaso Burtuto, President
Big Apple Pizza
4976 Millenia Boulevard, Suite C
Orlando, Florida 32839

STATEMENT OF THE ISSUES

Whether Respondent committed the violations alleged in the Administrative Complaint dated April 22, 2008, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

In an Administrative Complaint dated October 29, 2007, Petitioner, Department of Business and Professional Regulation, Division of Hotels and Restaurants, charged that on August 22 and October 29, 2007, Respondent, Big Apple Pizza Company @ Millenia, Inc., was found to be in violation of Chapter 509, Florida Statutes (2007),¹ rules promulgated as authorized by Chapter 509, Florida Statutes, and regulations governing public food service establishments in Florida. In particular, Respondent was charged with violations of Sections 509.032, 509.039, and 509.049, Florida Statutes; Florida Administrative Code Rules 61C-1.004(6), 61C-1.004(9)(D), 61C-1.0021 and 61C-4.010(7); and Rules 3-304.14(B)(2) and 6-301.11 of the United States Department of Agriculture Food Code (Food Code).

Respondent timely disputed the facts alleged in the Administrative Complaint and requested an administrative hearing. Petitioner forwarded the matter to the Division of Administrative Hearings on February 25, 2008, for assignment of an Administrative Law Judge. An Initial Order was sent to both

parties on February 25, 2008. By Notice of Hearing dated March 7, 2008, the case was scheduled for final hearing on April 29, 2008, in Orlando, Florida. On April 23, 2008, a Joint Motion for Continuance was filed. The case was continued to June 19, 2008. On June 17, 2008, a second Joint Motion for Continuance was filed. The case was rescheduled for hearing on October 1, 2008.

The final hearing was conducted, as rescheduled, on October 1, 2008. At the hearing, Petitioner presented the testimony of two witnesses: Andrea Piel, a sanitation and safety specialist; and Michael Campbell, supervisor of inspectors. Petitioner's Exhibits A through D were offered and received into evidence. Vinchaso Burtuto, Respondent's president, testified. Pursuant to Petitioner's request, official recognition was taken of Subsections 509.032(2)(b) and (c) and 509.032(6) and Section 509.039, Florida Statutes; Florida Administrative Code Rules 61C-1.002(5)(B), 61C-1.004(6), 61C-1.004(7), 61C-1.004(9)(D), 61C-1.004(11), 61C-4.010(7) and 61C-4.023(1); Rules 3-304.14(B)(2) and 6-301.11 of the Food Code; and National Fire Protection Association (Code) 96, 11.1.2.

The one-volume Transcript of the proceedings was filed with the Division of Administrative Hearings on November 12, 2008. Extensions of time were granted Respondent for filing a proposed

recommended order. Both parties filed Proposed Recommended Orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following Findings of Fact are made:

1. Petitioner is the state agency responsible for inspecting and regulating public food service establishments in Florida.

2. Respondent, Big Apple Pizza Company @ Millenia, Inc., is a permanent food service establishment holding License No. 5811720.²

3. On August 22, 2007, Andrea Piel inspected the premises of Respondent. A Food Service Inspection Report was prepared on site which noted a number of violations. This Food Service Inspection Report was received and signed by "Vinnie Burruto [sic]" on the day of the inspection. Respondent was notified both verbally and in writing on the inspection report that violations must be corrected by the next unannounced inspection.

4. A critical violation is one that, if not corrected, is more likely than other violations to cause an imminent food-borne illness, contamination, or environmental hazard.

5. A non-critical violation is one that relates to good retail practices, such as general cleanliness, organization, and maintenance of the facility.

6. On October 22, 2007, Andrea Piel attempted to perform a follow-up inspection on Respondent's premises, but was denied access to the kitchen. This was acknowledged by Respondent's witness. The excuse offered for refusing Petitioner's inspector access, that he had just received a food shipment, is unacceptable.

7. On October 29, 2007, Respondent's premises were re-inspected by Michael Campbell. A Call Back Inspection Report was prepared which noted the following "critical violations": no soap at hand-wash sink in kitchen; no required food manager certification available; and no required proof of employee food handler training available. In addition, the following "non-critical" violations were noted: prep surfaces were not sanitized after use and prior to reuse; no sanitizing buckets were available with any measurable sanitizer in them; a sponge was found in the three-compartment sink; ceiling tiles were missing in the kitchen; and carbon dioxide tanks were not properly secured. Each of these violations is a repeat violation, not corrected from the initial inspection.

8. Petitioner withdrew and did not offer any evidence regarding violations of National Fire Protection Association

(Code) 96, 11.1.2., and Florida Administrative Code Rules 61C-1.002(5)(B), 61C-1.004(11), and 61C-4.010(7).

9. Vinchaso Burtuto, Respondent's witness, was not on Respondent's premises during the "call-back" inspection. The credibility of his testimony is eroded by the fact that he was not present.

10. The inspection reports and citations of specific violations of Inspectors Piel and Campbell are credible and present clear and convincing evidence of the reported violations.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

12. In the Administrative Complaint, Petitioner seeks to discipline Respondent's license and/or to impose an administrative fine. Accordingly, Petitioner must prove the allegations in the Administrative Complaint by "clear and convincing" evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

13. "Clear and convincing evidence" is:

[Evidence] that entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy. 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.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994); Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

14. Petitioner presented evidence of three critical violations and three non-critical violations noted on the "call-back" inspection of October 29, 2007, and enumerated in the Administrative Complaint. No credible evidence was presented that challenged the findings that three critical violations and four non-critical violations were observed during the October 29, 2007, call-back, inspection. In addition, Respondent, through its president, refused to allow Petitioner's inspector to conduct an inspection on October 22, 2007, an egregious violation of Subsection 509.032(b), Florida Statutes, which could result in the revocation of Respondent's license.

See Fla. Admin. Code R. 61C-1.0021. Petitioner has met the burden of proving that Respondent violated Sections 509.032, 509.039 and 509.49, Florida Statutes; Florida Administrative Code Rules 61C-1.004(6), 61C-1.004(9)(D), 61C-4.023(1); and Rules 3-304.14(B)(2) and 6-301.11 of the Food Code, as alleged in the Administrative Complaint, clearly and convincingly.

15. Section 509.261, Florida Statutes, reads as follows:

(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 division, 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.

RECOMMENDATION

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

RECOMMENDED that Petitioner, Department of Business and Professional Regulation, Division of Hotels and Restaurants, enter a final order finding that:

1. Respondent, Big Apple Pizza, committed the violations as alleged in the Administrative Complaint;

2. An administrative fine of four thousand dollars (\$4,000.00) be imposed for the violations incidental to Respondent's failure to cure the violations as determined during the "call-back" inspection of October 29, 2007;

3. An additional administrative fine of one thousand dollars (\$1,000.00) be imposed for the October 22, 2007, violation wherein Petitioner's inspector was denied access to Respondent's premises; and

4. The owner(s) of Respondent be required to attend, at personal expense, an educational program sponsored by the Hospitality Education Program.

DONE AND ENTERED this 22nd day of December, 2008, in Tallahassee, Leon County, Florida.



JEFF B. CLARK
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 December, 2008.

ENDNOTES

^{1/} All references are to 2007 Florida Statutes, unless otherwise indicated.

^{2/} It is noted that Big Apple Pizza Company @ Millenia, Inc. is listed as an "inactive" corporation by the Department of State.

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.