

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 08-2653
)
CARVEL ICE CREAM BAKERY,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on August 20, 2008, by video teleconference at sites in Miami and Tallahassee, Florida, before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings, pursuant to the authority set forth in Sections 120.569 and 120.57(1), Florida Statutes (2008).

APPEARANCES

For Petitioner: John Truitt, Qualified Representative
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Pervez Akhter,
Carvel Ice Cream Bakery
8565 Southwest 24th Street
Miami, Florida 33155-2335

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether Respondent committed the various acts alleged in the Administrative Complaint in violation of the "food code," as more particularly cited below, and if so, what, if any, penalty is warranted.

PRELIMINARY STATEMENT

The Department of Business and Professional Regulation, Division of Hotels and Restaurants (Division), alleged in an Administrative Complaint dated April 8, 2008, that Respondent violated various standards governing public food service establishments. Respondent disputed the allegations and requested an evidentiary hearing pursuant to Section 120.57(1), Florida Statutes, through an Election of Rights form.

On June 4, 2008, the case was referred to the Division of Administrative Hearings and assigned to the undersigned. The case was noticed for hearing on June 17, 2008. The hearing was conducted on August 20, 2008 as scheduled.

At hearing, Petitioner presented the testimony of Maurice Chi, Jorge Gandolff, and Daniel Sterling. Petitioner's Exhibits one through five were admitted into evidence. Respondent testified on his own behalf. Respondent offered no exhibits into evidence.

The proceeding was recorded and transcribed. The Transcript of the final hearing was filed with the Division of Administrative Hearings on October 16, 2008. Petitioner filed a timely Proposed Recommended Order, which has been considered in the preparation of this Recommended Order. Respondent did not submit a proposed recommended order.

FINDINGS OF FACT

1. Petitioner is the state agency charged with regulation of hotels and restaurants pursuant to Chapter 509, Florida Statutes.

2. At all times material to this case, Respondent was a restaurant, Carvel Ice Cream Bakery, located at 8565 Southwest 24 Street, Miami, Florida, holding Food Service license number 2323930.

3. On April 24, 2007, Sanitation and Safety Specialist Chi performed a food service inspection of the Respondent. During the inspection, Mr. Chi observed the handwashing cleanser lacking at the handwashing lavatory at the hand sink at the back prep area, handwash sink lacking proper hand drying provisions at hand sink at the back prep area, handwashing cleanser lacking at handwashing lavatory at restrooms, handwash sink lacking proper hand drying provisions in restrooms, and a toxic/spray item stored by food and food containers.

4. Mr. Chi prepared and signed an inspection report detailing his findings during the inspection.

5. On November 9, 2007, Senior Sanitation and Safety Specialist Gandolff returned to Carvel Ice Cream Bakery. After his inspection, Gandolff prepared a inspection report. The November 9, 2007, Legal Notice Food Service Inspection Report read in pertinent part:

* * *

Violation(s)

* * *

32-16-1: Hand wash sink lacking proper hand drying provisions. Repeat Violation

32-17-1: Handwashing cleanser lacking at handwashing lavatory. Repeat Violation

* * *

41A-08-1: Observed toxic item stored by food prep equipment. Repeat violation.

* * *

6. A critical violation if left uncorrected can lead to food contamination, illnesses or a health threat to the person that eats the food. It also is a violation that poses an immediate danger to the public health and safety.

7. A non-critical violation is a violation that does not pose an immediate danger to the public, but needs to be

addressed because if left uncorrected, it can become a critical violation.

8. Each of the aforementioned violations from the November 9, 2007, inspection are critical violations. The handwashing drying and cleanser violation are critical because, if a food service employee goes to the bathroom or coughs on their hands or doesn't have the ability to clean or dry their hands with proper sanitizers and drying provisions, the employee could transmit their germs to the food they are preparing, and/or such germs can be transferred to the customers consuming the food who could get sick.

9. The toxic chemicals violation is a critical violation because the chemicals can get into the food being prepared or food contact surfaces and cause customers who consume the contaminated food to become ill.

10. March 18, 2008, Sanitation and Safety Specialist Sterling performed the follow-up inspection and determined that two critical violations remained uncorrected from the November 9, 2007 inspection. During the inspection Sterling prepared a Call Back/Re-Inspection Report setting forth the findings from the re-inspection and recommending that an administrative complaint be filed.

11. The first uncorrected violation for which Respondent was cited was Food Code Rule 6-301.12--"hand wash sink lacking

proper hand drying provisions. Back handsink (prep areas) Repeat violation and handwash cleanser lacking at handwashing lavatory. Back handsink (Prep areas) Repeat violation."

12. Respondent was also cited for a violation of Food Code Rule 7-201.11--"observed item stored in food preparation area/ammonia base product located on top of PREP COUNTER (Blue colored) and (another dark green liquid not labeled inside a bottle of Windex)Repeat violation."

13. Respondent has been in the restaurant business almost thirty-five years. Respondent has never had a customer sick from Carvel Ice Cream Bakery. Respondent admitted that on the inspection dates that soap was missing out of the bathrooms and there were not napkins on the sink because the ice cream cake maker uses a sanitary rag instead of napkins. However, napkins were available to the cake maker not on the sink. Moreover, since the last inspection on March 28, 2008, Respondent has placed napkins on the sink.

14. Respondent testified credibly that the toxic liquid was Windex and it comes in a gallon size that he puts in a smaller bottle. Respondent's procedure is to keep the Windex under the sink. However, Respondent has young teenagers working at the restaurant and that if the Windex was out during the inspections, the young workers had left it there carelessly while cleaning up.

15. Respondent challenged the Administrative Complaint and requested a hearing. No dispute exists that the request for hearing was timely filed.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2008).

17. Petitioner has jurisdiction over the operation of public lodging establishments and public food service establishments, pursuant to Section 20.165 and Chapter 509, Florida Statutes.¹

18. The Division is authorized to take disciplinary action against the holder of such a license for operating in violation of Chapter 509, Florida Statutes, or the rules implementing that chapter. Such disciplinary action may include suspension or revocation of the license, imposition of an administrative fine not to exceed \$1,000.00 for each separate offense, and mandatory attendance, at personal expense, at an educational program sponsored by the Hospitality Education Program. § 509.261, Fla. Stat.

19. Here, the Division seeks to discipline Respondent's license and/or to impose an administrative fine. Accordingly, the Division has the burden of proving the allegations charged

in the Administrative Complaint against the Respondent 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).

20. A licensee is charged with knowing the practice act that governs his/her license. Wallen v. Florida department of Professional Regulation, Division of Real Estate, 568 So. 2d 975 (Fla. 3d DCA 1990).

21. The Administrative Complaint alleged that on April 24, 2007, November 9, 2007, and March 18, 2008, Respondent violated Food Code Rules 6-301.12 and 7-201.11.

22. Food Code Rule 6-301.12 states in pertinent part:

Hand Drying Provision. Each handwashing lavatory or group of adjacent lavatories shall be provided with: (A) Individual, disposable towels; (B) A continuous towel system that supplies the user with a clean towel; or (C) A heated-air hand drying device.

23. Food Code Rule 7-201.11 states:

Separation. Poisonous or toxic materials shall be stored so they cannot contaminate food, equipment, utensils, linens, and single-service and single-use articles by: (A) Separating the poisonous or toxic materials by spacing or partitioning;' and (B) Locating the poisonous or toxic materials in an area that is not above food, equipment, utensils, linens, and single-service or single-use articles. This paragraph does not apply to equipment and utensil cleaners and sanitizers that are stored in warewashing areas for availability

and convenience if the materials are stored to prevent contamination of food, equipment, utensils, linens, and single-service and single-use articles.

24. The Division met its burden of establishing by clear and convincing evidence that Respondent was in violation of Food Code Rules 6-301.12 and 7-201.11, as alleged in the Administrative Complaint. The record is clear that Respondent did not provide proper hand drying provisions in the food preparation area or proper handwashing cleanser at the handwashing lavatory in the food preparation area during the inspections of April 24, 2007, November 9, 2007, and March 18, 2008. Additionally, in this matter, the evidence demonstrates that a toxic item was stored in the food preparation areas on April 24, 2007, November 9, 2007, and March 18, 2008.

25. The Division proposed a total administrative fine of \$2,000.00. As part of the Department's penalty recommendation, the Department did not interject Respondent's previous disciplinary action. Thus, the undersigned is not considering it.

26. The undersigned recognizes that Food Code 6-301.12 is a critical violation. However, Section 509.261, Florida Statutes, provides that fines shall not exceed \$1000 per offense. In this instance, \$1000 is deemed to be excessive and the undersigned feels that \$500 is more appropriate.

RECOMMENDATION

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

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

1. Finding that Carvel Ice Cream Bakery violated Food Code Rules 6-301.12 and 7-201.11;

2. Imposing an administrative fine of \$1,500.00, payable to the Division of Hotels and Restaurants, 1940 North Monroe Street, Tallahassee, Florida 32399-1011; and

3. Imposing mandatory attendance, at Respondent's expense, at an educational program sponsored by the Hospitality Education Program.

DONE AND ENTERED this 13th day of November, 2008, in
Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of November, 2008.

ENDNOTE

^{1/} Unless otherwise indicated, all references are to the 2007 Florida Statutes since there are no material changes between the 2007 and 2008 statutes referenced.

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.