

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF HOTELS AND )  
RESTAURANTS, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 08-2657  
 )  
LUL GRILL CAFE, )  
 )  
Respondent, )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 29, 2008, by video teleconference between Miami and Tallahassee, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Charles Tunnicliff, Esquire  
LeChea Parson, Esquire  
Department of Business and  
Professional Regulation  
Northwood Centre  
1940 North Monroe Street, Suite 42  
Tallahassee, Florida 32399-2022

For Respondent: Eli Weinberg, pro se  
Etty Weinberg, pro se  
LUL Grill Cafe  
Elite Luggage Corporation  
18288 Collins Avenue, No. 2  
Sunny Isles Beach, Florida 33160

STATEMENT OF THE ISSUE

Whether Respondent committed the offenses alleged in the Administrative Complaint and, if so, the penalties that should be imposed.

PRELIMINARY STATEMENT

Respondent is a duly licensed restaurant. On December 27, 2007, Petitioner filed an Administrative Complaint against Respondent that contained factual allegations based on an inspection of Respondent's facility on October 9, 2007, and a call-back inspection on December 12, 2007. Based on those inspections, Petitioner charged Respondent, in separately numbered paragraphs, with the following eight violations of the Food Code:<sup>1</sup>

1. Respondent failed to provide a consumer advisory for raw or undercooked animal products in violation of Rule 3.603.11 of the Food Code.
2. Respondent stored raw chicken over beef and other foods with a lower minimum cooking temperature in violation of Rule 3-302.11(A)(1) of the Food Code.
3. Respondent's employee made bare-hand contact of ready-to-eat food in violation of Rule 3.301.11(B) of the Food Code.
4. There was no hand-wash sink accessible for employee use at all times in the dishwashing area in violation of Rule 5-205.11(A) of the Food Code.
5. Accumulated food debris was observed on the kitchen floor in violation of Rule 6-501.12(A) of the Food Code.
6. A wall in the dishwashing area was soiled with accumulated black debris in violation of Fla. Admin. Code R. 61C-

1.004(6).

7. Light in the walk-in cooler was missing the proper shield, sleeve coating, or covers in violation of Rule 6-202.11 of the Food Code.

8. Respondent failed to provide proof of employee training in violation of Section 509.049, Florida Statutes.<sup>[2]</sup>

Respondent timely requested a formal administrative hearing to challenge the allegations of the Administrative Complaint. On June 4, 2008, the matter was referred to DOAH and this proceeding followed.

At the formal hearing, Petitioner presented the testimony of Ricardo Daniel Unold (a Sanitation and Safety Specialist employed by Petitioner) and offered three sequentially lettered exhibits, each of which was admitted into evidence.

Respondent presented the testimony of Eli Weinberg (one of the owners of the subject restaurant) and offered six sequentially numbered exhibits, each of which was admitted into evidence.

At the request of Petitioner, the undersigned took official recognition of Sections 509.032(6) and 509.049, Florida Statutes; Fla. Admin. Code R. 61C-1.004(6); and Rules 3-603.11, 3-.302.11(a)(1), 3-301.00(b), 5-205.11(a), 6-501.12(a), and 6-202.11, of the Food Code.

A Transcript of the proceedings was filed on December 11, 2008. Petitioner and Respondent filed Proposed Recommended

Orders, which have been duly-considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times relevant to this proceeding, Respondent was a restaurant subject to Petitioner's regulation. That regulation required Petitioner to comply with all relevant provisions set forth in Florida Statutes, Florida Administrative Code, and the Food Code. Petitioner's license number is 2331106.

2. Respondent's address is 18288 Collins Avenue No. 2, Sunny Isles Beach, Florida (the subject premises).

3. Ricardo Daniel Unhold is employed by Petitioner as a Senior Sanitation and Safety Specialist. Mr. Unhold is experienced and properly trained to conduct inspections of food service facilities (and public lodging establishments) to ensure compliance with applicable regulations. Mr. Unhold performs between 800 and 1,400 inspections per year.

4. On October 9, 2007, beginning at 10:20 a.m., Mr. Unhold performed an inspection of the subject premises. As part of the inspection, Mr. Unhold prepared a Food Service Inspection Report (Petitioner's Exhibit B) setting forth his findings. Mr. Unhold reviewed his findings with the person in charge of the subject premises and discussed with that person the deficiencies identified on Exhibit B. Exhibit B reflected that the subject

premises was required to correct the noted deficiencies and that a call-back inspection would be conducted on December 10, 2007.

5. Mr. Unhold performed the call-back inspection of the subject premises on December 12, 2007, at approximately 1:00 p.m. Mr. Unhold prepared a second Food Service Inspection Report (Petitioner's Exhibit C) setting forth his findings. Mr. Unhold reviewed his findings with Mr. Weinberg and explained to him the reasons for the deficiencies identified by Exhibit C. Mr. Unhold's findings included deficiencies that had been noted in the inspection on October 9, 2007, but had not been corrected. The uncorrected deficiencies found during the call-back inspection are the violations at issue in this proceeding.

6. On December 12, 2007, Mr. Weinberg could not provide Mr. Unhold with proof that his employees had been trained as required by Section 509.049, Florida Statutes. The testimony of Mr. Unhold established that this failure is a critical violation<sup>3</sup> because untrained employees may not be aware of the importance of proper hygiene and proper food handling, which can result in contaminated food and the exposure of the consumer to food-borne illness. Petitioner established the allegations of Paragraph 8 of the Administrative Complaint by clear and convincing evidence.

7. On December 12, 2007, Mr. Unhold observed an employee of the restaurant handling ready-to-eat food without gloves or

utensils. This inappropriate handling of food, referred to by Mr. Unhold "bare-hand contact", is a violation of Rule 3.301.11(B) of the Food Code. Mr. Unhold's testimony established that this should be considered a critical violation because bare-handed contact of ready-to-eat food presents a danger of cross-contaminating food. Petitioner established the allegations of paragraph 3 of the Administrative Complaint by clear and convincing evidence.

8. On December 12, 2007, Mr. Unhold observed that there was no consumer advisory warning label advising that consuming raw or undercooked meats could be hazardous to the consumer's health as alleged in paragraph 1 of the Administrative Complaint. Mr. Unhold considered this to be a critical violation. Petitioner established the factual allegations of paragraph 1 by clear and convincing evidence. Petitioner alleged that the fact that there was no consumer warning label constituted a violation of Rule 3.603.11 of the Food Code. Respondent operates as a kosher restaurant and does not serve raw seafood or undercooked meat. Whether Respondent is required to provide the warnings set forth in Rule 3.603.11 of the Food Code will be discussed in the Conclusions of Law section of this Recommended Order.

10. On December 12, 2007, Respondent stored raw chicken in a bin directly above a bin of raw meat. If chicken juices were

to spill on to raw meat, a consumer of the cooked meat could be exposed to salmonella because chicken needs to be cooked to a temperature of 165° Fahrenheit while meat needs to be cooked only to 145 Fahrenheit. The testimony of Mr. Unhold established that such storage creates a health risk for the consumer and should, consequently, be considered a critical violation. Petitioner established the violation alleged in paragraph 2 by clear and convincing evidence.

11. On December 12, 2007, Mr. Unhold observed a hand sink that was used to store chemical bottles and towel and was unavailable for employee hand washing. Mr. Weinberg testified that the sink observed by Mr. Unhold was not used for employee hand-washing, but that another small sink was used for that purpose. Mr. Unhold could not recall the additional sink referred to by Mr. Weinberg, but he testified that all hand sinks should be used for no purpose other than employee hand washing and that those sinks should be accessible to employees at all times. Petitioner alleged in paragraph 4 of the Administrative Complaint that the use of the hand sink to store chemical bottles and towels violated Rule 5-205.11(A) of the Food Code. Petitioner proved that allegation by clear and convincing evidence. The fact that the employees had another sink that could use for hand-washing should be considered in

determining the penalty that should be imposed for the violation.

12. On December 12, 2007, Mr. Unhold observed food debris on the kitchen floor. Specifically, he observed grease and onion peel on the floor. The floor should be clean to avoid attracting vermin. Rule 6-202.12(a) of the Food Code requires that the licensee's physical facilities be cleaned as often as necessary to keep them clean. There is no exception for a working kitchen during the hours the facility is open for business. Petitioner proved the allegations of paragraph 5 of the Administrative Complaint by clear and convincing evidence.

13. On December 12, 2007, Mr. Unhold observed accumulated black debris in the dishwashing area of the wall that appeared to be a mold-like substance. Mr. Unhold was concerned that an employee could come into contact with the accumulated black debris and thereafter contaminate dishes in the dishwashing area. Mr. Unhold's testimony established that this is a violation of Florida Administrative Code Rule 61C-1.004(6), which requires the premises to be kept clean. Petitioner established the violation alleged in paragraph 6 of the Administrative Complaint by clear and convincing evidence.

14. On December 12, 2007, Mr. Unhold observed that the light bulb in the walk-in cooler was missing a proper shield. Mr. Unhold testified that without a shield, a light bulb that



bursts could deposit shards of glass in the food stored in the cooler. Mr. Unhold's testimony established that this is a violation of Rule 6-202.11 of the Food Code as alleged in paragraph 7 of the Administrative Complaint. Petitioner established the violation alleged in paragraph 7 of the Administrative Complaint by clear and convincing evidence.

CONCLUSIONS OF LAW

15. DOAH has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

16. Petitioner has been statutorily delegated the authority to "carry out all of the provisions of [Chapter 509, Florida Statutes] and all other laws relating to the inspection or regulation of . . . public food service establishments for the purpose of safeguarding the public health, safety, and welfare." § 509.032, Fla. Stat.

17. Each "public food service establishment" must have a license from Petitioner prior to the commencement of operation. § 509.241, Fla. Stat.

18. Subsection 509.049(8)(a), Florida Statutes, provides in relevant part, as follows:

(8) The following are violations for which the division may impose administrative fines of up to \$1,000 on a public food service establishment . . . :

(a) Failure of a public food service establishment to provide proof of training pursuant to subsection (5) upon request by the division . . .

19. Section 509.261(1), Florida Statutes, provides that any public food services establishment that has operated or is operating in violation of Chapter 509, Florida Statutes, or the rules promulgated thereunder, is subject to license revocation; license suspension; imposition of administrative fines not to exceed \$1,000.00 per offense; and mandatory attendance, at personal expense, at an educational program sponsored by the Hospitality Education Program (established pursuant to Section 509.302, Florida Statutes).

20. Petitioner bears the burden of proving that the licensee committed the violations alleged in the administrative complaint by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Pic N' Save of Central Florida v. Department of Business Regulation, 601 So. 2d 245, 249 (Fla. 1st DCA 1992); and § 120.57(1)(j), Fla. Stat.

21. Paragraph 1 alleges that Respondent failed to provide the consumer warning required by Rule 3-603.11 of the Food Code. Except in circumstance inapplicable to this proceeding, that Rule requires the consumer warning under the following

circumstances: “. . . if an animal food such as beef, eggs, fish, lamb, milk, port, 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 food. . . .” The testimony of Mr. Weinberg established that Respondent operates as a kosher restaurant and does not serve any raw or uncooked products (other than vegetables). Consequently, it is concluded that Respondent was not required to give the consumer warning required by Rule 3-603.11 of the Food Code, and that Respondent is not guilty of the offense alleged in paragraph 1 of the Administrative Complaint.

22. Petitioner met its burden of establishing by clear and convincing evidence that Respondent committed the violations alleged in paragraphs 8, 3, 2, 4, 5, 6 and 7 of the Administrative Complaint. Accordingly, disciplinary action may be taken against Respondent pursuant to Sections 509.049(8)(a), and 509.261(1), Florida Statutes.

23. No disciplinary guidelines have been referenced by Petitioner.

24. The recommended penalties that follow are within the range of penalties Petitioner is authorized to impose. In determining the penalty that should be imposed, the undersigned has considered that the violations of paragraphs 8, 3, and 2 are

critical violations. The undersigned has also considered that paragraphs 4-7 are considered non-critical violations. As to the paragraph 4 violation the undersigned has considered that there was another hand sink available for the use of the employees. As to the paragraph 5 violation, the undersigned has considered that the inspection was conducted while the restaurant was opened and there was no determination as to how long the debris had been on the floor.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that Petitioner enter a final order finding Respondent not guilty of the violation alleged in paragraph 1 of the Administrative Complaint. It is further RECOMMENDED that the final order find Respondent guilty of the violations alleged in the remaining numbered paragraphs of the Administrative Complaint. It is further RECOMMENDED that Administrative Fines be imposed against Respondent as follows: \$1,000.00 for paragraph 8; \$1,000.00 for paragraph 3; \$1,000.00 for paragraph 2; \$100.00 for paragraph 4; \$100.00 for paragraph 5; \$200.00 for paragraph 6; and \$100.00 for paragraph 7, for a total of \$3,500.00. It is further RECOMMENDED that Respondent send a manager at its expense to attend an educational program sponsored by Petitioner's Hospitality Education Program.

DONE AND ENTERED this 12th day of January, 2009, in  
Tallahassee, Leon County, Florida.



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CLAUDE B. ARRINGTON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 12th day of January, 2009.

ENDNOTES

<sup>1/</sup> Any reference to the Florida Administrative Code is to the version of the Florida Administrative Code as of the date of the alleged violations. The term "Food Code" is defined by Florida Administrative Code Rule 61C-1.001(14). References in this Recommended Order to the Food Code are to the documents specified in that definition. Respondent is required to comply with the applicable sections of the Food Code pursuant to Florida Administrative Code Rule 61C-4.010(1). Petitioner's Administrative Complaint sets forth verbatim the applicable portions of the statutes and rules Respondent has allegedly violated. Those statutes and rules are incorporated herein by reference. The references to Florida Statutes in this Recommended Order are to Florida Statutes (2008).

<sup>2/</sup> This is intended to be a summary of the allegations set forth in the Administrative Complaint. Any question as to those allegations should be resolved by reviewing that pleading in its entirety.

In its Administrative Complaint, Petitioner incorrectly cites the authority in Paragraph 8 as being "509.049 F.A.C." which is presumed to be a reference to the Florida Administrative Code. The reference should have been to Florida Statutes. The

undersigned has construed this to be a scrivener's error that has caused Respondent no prejudice.

At the formal hearing and in its Proposed Recommended Order, Petitioner addressed the alleged violations in the paragraphs numbered sequentially from 1 to 8 in the Administrative Complaint in the following order: 8, 3, 1, 2, 4, 5, 6, and 7. For ease of reference, the undersigned has used the order adopted by Petitioner.

<sup>3/</sup> Whether a violation is a critical violation or a non-critical violation goes only to the penalty that should be imposed for the violation. During his testimony, Mr. Unhold defined the term "critical violation" to be the type violation that contributes directly to foodborne illness, contamination, health risk, and illness. That definition is accepted as being consistent with the following provision set forth in Florida Administrative Code Rule 61C-1.0021(2):

(2) Violations of critical laws or rules are those violations determined by the division to pose a significant threat to the public health, safety, or welfare. . . .

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.