

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 08-2658
)
SZECHUAN PANDA,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case on August 5, 2008, in Gainesville, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charles Tunnichliff, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Yu Zeng Kang, pro se
Szechuan Panda
3830 Southwest 13th Street
Gainesville, Florida 32608

STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Administrative Complaint dated April 25, 2008, and, if so, what disciplinary action should be taken against Respondent.

PRELIMINARY STATEMENT

On April 25, 2008, Petitioner filed an Administrative Complaint, DBPR No. 2008-024115, against Respondent, alleging violations of Chapter 509, Florida Statutes, and the rules promulgated thereunder. The charges are stated with specificity in the Conclusions of Law.

Respondent timely requested a disputed-fact hearing, and the cause was referred to the Division of Administrative Hearings on or about June 4, 2008.

Respondent's principal, Yu Zeng Kang, appeared at the final hearing and requested that Nan Su, whom he had brought with him, be utilized as interpreter. Mr. Kang and Mr. Su were each examined in accord with Section 90.606, Florida Statutes. The undersigned having been satisfied by their answers under oath that translation was necessary because Mr. Kang could not understand or express himself in the English language, and the undersigned being further satisfied that Mr. Su was qualified and competent by education, training, and experience to provide such a translation, but was not biased for or against Mr. Kang, and Petitioner having stipulated to the qualifications of Mr. Su

and to the process of translation, Mr. Su was sworn to make an accurate translation.

Upon Petitioner's request, official recognition was taken of Section 509.032(6), Florida Statutes (2007), and of Florida Administrative Code Rules 61C-1.004(6) and 61C-1.004(9)(d), as presented. However, in light of the recent case of Dept. of Business and Professional Regulation, Division of Hotels and Restaurants v. Bono's Barbecue Sports Bar, DOAH Case No. 07-4197 (RO: December 21, 2007), and Petitioner's representation that several rules had recently been amended to deal with notice issues raised in that case, Petitioner was required to provide a "hard copy" of the Food Code it deemed applicable to this case within 10 days of the hearing. Petitioner timely complied by filing a copy of the *Food Code, 2001, Chapters 1-7, Annex 3 and Annex 5, Summary of Changes, Errata Sheet, and Supplement*, and notice of websites where references might be found. Respondent raised no objection to this process or to the final document filed.

At hearing, Daniel Fulton, Senior Sanitation and Safety Specialist, testified on behalf of Petitioner, and Petitioner had 10 exhibits admitted in evidence. Petitioner's Exhibits 7-10 (certified Orders) were conditionally admitted, for use only in the event one or more charges in the Administrative Complaint were proven on their own merit, and then only for purposes of

mitigation or aggravation of penalty. Respondent presented the oral testimony of Yu Zeng Kang and had no exhibits admitted in evidence.

A Transcript was filed on August 21, 2008.

Petitioner timely-filed, on September 2, and Respondent timely-filed on August 22, 2008, Proposed Recommended Orders, each of which has been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material hereto, Respondent was licensed as a public food service establishment in the State of Florida by the Petitioner Department of Business and Professional Regulation, Division of Hotels and Restaurants.

2. Respondent's business address is "Szechuan Panda," 3830 Southwest 13th Street, Gainesville, Florida 32608.

3. Critical violations are violations that, if not corrected, can have a direct impact on cross-contamination and food-borne illness. This, in turn, causes an immediate threat to public health. Non-critical violations are violations that, if not corrected, can have an impact on the creation of critical violations.

4. On December 19, 2007, Inspector Daniel Fulton performed a Complaint Food Service Inspection at Szechuan Panda. During that inspection, Inspector Fulton prepared and signed an

inspection report setting forth violations he encountered during the inspection. From the time it was prepared until the date of the hearing, the inspection report has not been altered.

5. On December 19, 2007, Mr. Fulton observed live roaches in Szechuan Panda in both the food preparation and food service areas. Inspector Fulton cited this as a critical violation because live roaches carry many diseases. Those diseases can be spread when the roaches crawl over clean or unclean food preparation equipment in their search for food and accordingly contaminate food preparation surfaces.

6. On December 19, 2007, food was being stored at Szechuan Panda directly on the floor. When the terminology "directly on the floor" is used, it includes any food that could be contaminated by ordinary mopping. That is, food stored in a container which is not impervious to water, such as a cardboard container, or a plastic container which does not have a top and the sides of which are so low that mopping might contaminate its contents.

7. On December 19, 2007, improper utensils were being used to scoop out food from food containers. According to Mr. Fulton, this is a critical violation because without the usage of a proper utensil with a handle, cross-contamination can occur when the food product touches an employee's hand.

8. On December 19, 2007, the carbon dioxide/helium tanks in Szechuan Panda were not adequately secured. According to Mr. Fulton, this is a violation because if the tanks become unsecured all of the pressure inside can cause the tanks to shoot off uncontrollably in an elliptical or variable pattern so as to damage anyone or anything with which they come in contact.

9. On December 19, 2007, grease was built-up on non-food contact surfaces. Mr. Fulton cited this as a violation because such debris is enticing for consumption by any present rodents and/or roaches. Rodents and roaches carry diseases that can lead to cross contamination.

10. On March 5, 2008, Mr. Fulton prepared a Complaint Inspection Report at Szechuan Panda in which some of the previously noted violations had not been corrected. From the time it was prepared until the date of hearing the report was not altered.

11. On March 5, 2008, Mr. Fulton again observed live roaches in Szechuan Panda, in both the food preparation and food service areas. He cited this as a critical violation for the reasons previously stated.

12. On March 5, 2008, dead roaches were observed throughout the business. Mr. Fulton cited this as a critical violation because live roaches will eat the carcasses of dead roaches, causing further cross-contamination, and because the

presence of dead roaches also shows a general lack of cleanliness and due care.

13. On March 5, 2008, cold foods were held at a temperature greater than 41 degrees Fahrenheit. According to Mr. Fulton, this is a critical violation because bacteria grows quicker, the closer food is held to 98 degrees Fahrenheit. Also on March 5, 2008, hot foods were held at a temperature less than 135 degrees Fahrenheit. Mr. Fulton classified this as a critical violation because any bacteria present on the food will grow, once the temperature drops below 135 degrees Fahrenheit.

14. On March 5, 2008, foods in both the dining area and food storage areas at Szechuan Panda were not properly covered. This was classified as a critical violation because cross-contamination can occur by way of any bacteria present being easily transferable to the exposed food.

15. On March 5, 2008, food also was being stored directly on the floor as previously described.

16. On March 5, 2008, improper utensils were again being used to scoop out food from food containers. Mr. Fulton considered this a critical violation for the reasons previously stated.

17. On March 5, 2008, food contact services were encrusted with grease, and soil deposits were present in food containers. Mr. Fulton listed this as a critical violation because an

unidentified slime growing within a food container poses a health risk that can possibly cross-contaminate other foods.

18. On March 5, 2008, in-use utensils for non-potentially hazardous foods were not being stored in a clean, protective place. Mr. Fulton considered this a violation because any harmful debris present on the unit being used for storage can become stuck on the utensil.

19. On March 5, 2008, the carbon dioxide helium tanks still were not adequately secured. This was listed as a violation for the reasons previously stated.

20. On March 5, 2008, grease was built up on non-food contact surfaces. This was listed as a violation for the reasons previously stated.

21. On March 5, 2008, a black substance was present on the wall around the dish-washing area. This was listed as a violation because the substance observed appeared mold-like, thus showing a lack of cleanliness.

22. On March 6, 2008, Inspector Fulton prepared a call-back inspection report at Szechuan Panda noting that some of the violations remained uncorrected. From the time it was prepared until the date of the hearing, the call-back report has not been altered.

23. On March 6, 2008, cold foods were held at a temperature greater than 41 degrees Fahrenheit. This was noted as a critical violation for the reasons previously stated.

24. On March 6, 2008, hot foods were held at a temperature less than 135 degrees Fahrenheit. This was noted as a critical violation for the reasons previously stated.

25. On March 6, 2008, foods in both the dining area and food storage area of Szechuan Panda were not properly covered, and this was listed as a critical violation for the reasons previously stated.

26. On March 6, 2008, a black substance was present on the wall around the dish-washing area. This was listed as a violation for the reasons previously stated.

27. On March 24, 2008, Mr. Fulton prepared a complaint inspection report at Szechuan Panda in which some of the violations still were not corrected. From the time it was prepared until the date of the hearing, the report has not been altered.

28. On March 24, 2008, dead roaches were observed throughout the business. This was listed as a critical violation for the reasons previously stated. Although some dead roaches may be evidence of attempts to exterminate all of a roach infestation as testified-to by Respondent, the presence of

dead roaches also shows a general lack of cleanliness and due care.

29. On March 24, 2008, cold foods were held at a temperature greater than 41 degrees Fahrenheit. This was listed as a critical violation for the reasons previously stated.

30. On March 24, 2008, hot foods were held at a temperature less than 135 degrees Fahrenheit. This was listed as a critical violation for the reasons previously stated.

31. On March 24, 2008, foods in both the dining area and food storage area of Szechuan Panda were not properly covered. This was listed as a critical violation for the reasons previously stated.

32. On March 24, 2008, food was still being stored directly on the floor.

33. On March 24, 2008, improper utensils were being used to scoop out food from food containers, This was listed as a critical violation for the reasons previously stated.

34. On March 24, 2008, food contact surfaces were encrusted with grease, and soil deposits were present in food containers. This was listed as a critical violation for the reasons previously stated.

35. On March 24, 2008, in-use utensils for non-potentially hazardous foods were not being stored in a clean, protective

place. This was listed as a violation for the reasons previously stated.

36. On March 30, 2008, Mr. Fulton prepared a call-back inspection report at Szechuan Panda in which some of the previous violations were not corrected. From the time it was prepared until the date of the hearing the call-back report has not been altered.

37. On March 30, 2008, cold foods were held at a temperature greater than 41 degrees Fahrenheit. This was listed as a critical violation for the reasons previously stated.

38. On March 30, 2008, hot foods were held at a temperature less than 135 degrees Fahrenheit. This was listed as a critical violation for the reasons previously stated.

39. On March 30, 2008, foods in both the dining area and food storage areas were not properly covered. This was listed as a critical violation for the reasons previously stated.

40. On March 30, 2008, food contact surfaces were encrusted with grease, and soil deposits were present in food containers. This was listed as a critical violation for the reasons previously stated.

41. As to most violations described by Mr. Fulton, Respondent Kang only protested that Chinese cooking was not conducive to meeting the regulations. He also apparently was not present when each of the foregoing inspections was made, so

his testimony as to why certain foods were above or below the permissible temperatures; were stored on the floor; or otherwise met standards is not persuasive.

42. Mr. Kang's testimony with regard to his quest for reputable and effective exterminators and his contracts with successive exterminators is credible. The area being largely clear of roaches after he hired a new exterminator is also noted. However, even giving Respondent all due credit for correcting certain inspection violations by call-back or subsequent inspection dates, his testimony as a whole does not evoke confidence in the cleanliness of the licensed establishment. Particularly, Mr. Kang's defenses that "live roaches came with purchased goods or were quickly killed" by the pest control company, and that dead roaches are swept out at the end of each day but there are more roaches when the restaurant opens the following morning, do not help his situation much. Most troubling is that Mr. Kang described a procedure whereby, although the restaurant is cleaned at the conclusion of each serving day, dead roaches are not swept out the following morning but are allowed to remain where they lie until the restaurant is cleaned entirely at the end of the second work day.

43. Likewise, Mr. Kang's testimony also indicates his lack of understanding of the Department's requirements for

maintaining "safe" food temperatures. Mr. Fulton explained that most buffets use time and temperature for public health control, but he further testified that, per the regulations he goes by, a restaurateur may keep foods "out of temperature" only up to four hours, and to legitimately do so, pursuant to the Food Code, the restaurateur must write a statement explaining the precautions he has taken, and further state therein that if his food "out of temperature" is not sold within a four-hour period, it will be discarded. Then, with the foregoing statement displayed, that restaurateur must maintain a record with his foregoing posted declaration, on which he keeps track of each time food is taken "off temperature," and each time food is put "on temperature." Respondent posts no such declaration or record.

44. Mr. Kang's assertion that some of his prior inspection troubles were caused by disgruntled former employees has been considered, as has been his living in another city far from the location of his restaurant, so as to care for his disabled wife. However, his wife's acute care situation occurred four or five years ago and none of his employee problems seem to be current. In any case, none of these concerns excuse a licensee from meeting the applicable statutory and rule requirements.

CONCLUSIONS OF LAW

45. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause,

pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2008).

46. Petitioner Agency has jurisdiction over the operation of public lodging establishments and public food services establishments pursuant to Section 20.165, Florida Statutes (2007). It is the Agency charged with licensure and inspection of public food establishments in the State of Florida.

47. Section 509.261(1), Florida Statutes (2007), provides that any public lodging establishment or public food establishment that is operated or operating in violation of Chapter 509, or the rules promulgated thereunder, is subject to fines not to exceed \$1,000.00 dollars per offense; mandatory attendance at an educational program sponsored by the Hospitality Education Program; and the suspension, revocation or refusal of a license.

48. Petitioner Agency has the burden of proving by clear and convincing evidence the allegations against Respondent. Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996). In addition, the disciplinary action may only be based on the offenses specifically alleged in the Administrative Complaint. See Sternberg v. Department of Professional Regulation, Board of Medical Examiners, 465 So. 2d 1324, 1325 (Fla. 1st DCA 1985); Kenny v. Department of State, 501 So. 2d

129, 133 (Fla. 5th DCA 1987); and Hunter v. Department of Professional Regulation, 458 So. 2d 842, 844 (Fla. 2nd DCA 1984).

49. Petitioner elected not to proceed on one violation charged in the Administrative Complaint, so that charge has not been considered and is not discussed herein.

50. Despite an unrelated amendment effective February 24, 2008, at all times material (that is, on the date of each inspection/violation), the date of the charges (the date of the Administrative Complaint), and on the date of hearing, Florida Administrative Code Rule 61C-1.004, provided, in pertinent part:

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:

* * *

(6) All building structural components, attachments and fixtures shall be kept in good repair, clean and free of obstructions.

* * *

(9) Fire safety equipment.
(d) Carbon dioxide and helium tanks shall be adequately secured so as to preclude any danger to supply.

51. Respondent was charged in the Administrative Complaint with the black wall slime or debris situation for December 19, 2007, and March 5, 2008. The clear and convincing evidence only

shows that the wall disfigurement was present in the dishwashing area on March 5, 2008, and on March 6, 2008. Accordingly, Respondent can only be found in violation of 61C-1.004(6), on the single date which was both alleged and proven: March 5, 2008, and it is found and concluded that Respondent was in violation of Rule 61C-1.004(6) on that single date.

52. Petitioner also proved by clear and convincing evidence that Respondent violated Rule 61C-1.004(9)(d), because of the state of the carbon dioxide/helium tanks on December 19, 2007, and March 5, 2008.

53. With regard to the remaining charges, brought under Rule 61C-1.001, and "the Food Code", care has been taken to determine whether or not the Agency is, via the present case, embroiled in the same conundrum as it faced in Bono's Barbeque Sports Bar, supra.^{1/}

54. At all times material to the present case, Rule 61C-1.001, which is charged in the instant Administrative Complaint, provided, in pertinent part, as follows:

61C-1.001 Definitions.

Except when otherwise defined in this rule, the definitions provided in paragraph 1-201.10(B) Food Code, *Recommendations of the United States Public Health Service/Food and Drug Administration*, the *2001 Food Code Errata Sheet* (August 23, 2002), and *Supplement to the 2001 FDA Food Code* (August 29, 2003), herein adopted by reference, shall apply to Chapters 61C-1, 61C-3 and 61C-4, F.A.C. In addition, the following

definitions apply to Chapters 61C, 61C-3,
and 61C-4, F.A.C.:

* * *

(14) Food Code - Food Code, 2001
*Recommendations of the United States Public
Health Service/Food and Drug Administration
including Annex 3: Public Health
Reasons/Administrative Guidelines and Annex
5: HACCP Guidelines of the Food Code, the
2001 Food Code Errata Sheet (August 23,
2002), and Supplement to the 2001 FDA Food
Code (August 29, 2003). (Italics in the
original.)*^{2/}

55. The pertinent rules in the version of the Food Code referenced in, and applicable to, this Administrative Complaint, together with any applicable Annexes, Supplement, and Errata Sheet changes, are stated in Conclusion of Law 58, infra., except that any capitalization, spacing, or underlining patterns, peculiar to those documents, which make no substantive change or material difference, have not been used, and the symbols used in the original have been spelled-out.

56. The following rules are the only Food Code rules Petitioner Agency's Proposed Recommended Order has asserted were proven.

57. The dates alleged within the Administrative Complaint are also provided within Conclusion of Law 58, for each portion of the Food Code cited.^{3/}

58. The Food Code rules as described in Conclusions of Law 55-57 are:

Rule 6-501.111, Food Code, charged in the Administrative Complaint for December 19, 2007, and March 5, 2008, states in pertinent part:

Controlling pests. The presence of insects, rodents, and other pests shall be controlled to minimize their presence on the premises by: (A) Routinely inspecting incoming shipments of food and supplies; (B) Routinely inspecting the premises for evidence of pests; (C) Using methods, if pests are found, such as trapping devices or other means of pest control as specified under Sections 7-202.12, 7-206.12, and 7-206.13; and (D) Eliminating harborage conditions.

Rule 6-501.112, Food Code, charged in the Administrative Complaint for December 19, 2007, March 5, 2008, and March 24, 2008, states in pertinent part:

Removing dead or trapped birds, insects, rodents, and other pests. Dead or trapped birds, insects, rodents, and other pests shall be removed from control devices and the premises at a frequency that prevents their accumulation, decomposition, or the attraction of pests.

Rule 3-501.16(A), and (A)(1) Food Code, charged in the Administrative Complaint as "repeat violations," states in pertinent part, as amended by the August 29, 2003, Supplement:

(A) Except during preparation, cooking, or cooling, or when time is used as the public health control as specified in Section 3-501.19, and except as specified in Paragraph (B) of this section, potentially hazardous food shall be maintained: (1) At 57 degrees Centigrade (135 degrees Fahrenheit) or above, except that roasts cooked to a temperature and for a time specified in

Paragraph 3-401.11(B) or reheated as specified in Paragraph 3-403.11(E) may be held at a temperature of 54 degrees Centigrade (130 degrees Fahrenheit) or above; or (2) At a temperature specified in the following: (a) 5 degrees Centigrade (41 degrees Fahrenheit) or less; or (b) 7 degrees Centigrade (45 degrees Fahrenheit) or between 5 degrees Centigrade (41 degrees Fahrenheit) or less if: (i) The equipment is in place and in use in the food establishment, and (ii) within 5 years of the regulatory authority's adoption of the Code, the equipment is upgraded or replaced to maintain food at a temperature of 5 degrees Centigrade (41 degrees Fahrenheit) or less.

Rule 3-302.11(A)(4), Food Code, charged in the Administrative Complaint as a repeat violation, states in pertinent part:

(A) Food shall be protected from cross contamination by: (4) Except as specified in Paragraph (B) of this section, storing the food in packages, covered containers, or wrappings;

Rule 3-305.11, Food Code, charged in the Administrative Complaint for December 19, 2007, March 5, 2008, and March 24, 2008, states in pertinent part:

Food Storage. (A) Except as specified in Paragraphs (B) and (C) of this section, food shall be protected from contamination by storing the food: (1) In a clean, dry location; (2) Where it is not exposed to splash, dust, or other contamination; and (3) at least 15 cm (6 inches) above the floor. (B) Food in packages and working containers may be stored less than 6 inches above the floor on case lot handling equipment as specified under Section 4-204.122. (C) Pressurized beverage containers, cased food in waterproof containers such as bottles or cans, and milk

containers in plastic crates may be stored on a floor that is clean and not exposed to floor moisture.

Rule 3-301.11(B), Food Code, charged in the Administrative Complaint for December 19, 2007, March 5, 2008, and March 24, 2008, states in pertinent part:

(B) Except when washing fruits and vegetables as specified under Section 3-302.15 or when as specified in paragraph C of this section, food employees may not contact exposed, ready-to-eat food with their bare hands and shall use suitable utensils such as deli tissue, spatulas, tongs, single-use gloves, or dispensing equipment.

Rule 4-601.11(A), Food Code, charged in the Administrative Complaint for December 19, 2007, and March 5, 2008, states in pertinent part:

Equipment food-contact surfaces and utensils shall be clean to sight and touch.

Rule 3-304.12(E), Food Code, charged in the Administrative Complaint for December 19, 2007, March 5, 2008, and March 24, 2008, states in pertinent part:

In-use utensils, between-use storage. During pauses in food preparation or dispensing, food preparation and dispensing utensils shall be stored: (E) In a clean, protected location if the utensils, such as ice scoops, are used only with a food that is not potentially hazardous;

Rule 4-601.11(C), Food Code, charged in the Administrative Complaint for December 19, 2007, and March 5, 2008, states in pertinent part:

(C) Nonfood-contact surfaces of equipment shall be kept free of an accumulation of dust, dirt, food residue, and other debris.

59. Pleading in the Administrative Complaint of a violation of Food Code Rules 3-501.16(A) and 3-501.16(A)(1) was faulty because it referred only to "repeat violations." Proof of a violation of Food Code Rules 3-501.16(A) and 3-501.16(A)(1), also was faulty, mostly due to the hot temperatures permitted for hot foods having been changed by the 2003 Food Code Supplement, but also due to the absence of any specific allegation in the Administrative Complaint concerning a rule related to cold temperature requirements.

60. Otherwise, the foregoing Food Code rules, as quoted above and as charged in the Administrative Complaint, were proven clearly and convincingly as to violations of 3-305.11 (food on the floor, etc.) for December 19, 2007, March 5, 2008, and March 24, 2008; as to violation 3-301.11(B) (improper use of bowl and touching with hands) on December 19, 2007, March 5, 2008, and March 24, 2008; as to violation 3-304.12(E) (in-use utensil for non-potentially hazardous food not stored in clean, protected location) on March 5, 2008, and March 24, 2008; as to violation 4-601.11(A) (build-up of grease on food contact surfaces) on March 5, 2008; as to violation 4-601.11(C) (build-up of grease on non-food contact surfaces) for December 19, 2007, and March 5, 2008; as to violation 6-501.112 (dead pests-

roaches) on March 5, 2008, and March 24, 2008; as to violation 6-501.111 (live pests-roach activity) on December 19, 2007, and March 5, 2008. Also to reiterate, one violation of 61C-1.004(6) was clearly and convincingly proven for March 5, 2008 (see Conclusions of Law 50-51), and two violations of 61C-1.004(9)(d) were clearly and convincingly proven for December 19, 2007, and March 5, 2008 (see Conclusions of Law 50 and 52.) Furthermore, all the foregoing violations alleged as critical violations and concluded to be proven by clear and convincing evidence were also proven by clear and convincing evidence to be critical violations.

61. Petitioner did not prove some violations which were alleged in the Administrative Complaint and proved some violations which were not alleged in the Administrative Complaint. None of these violations may be held against Respondent.^{4/}

62. On the other hand, the prior Administrative Orders have been reviewed, solely for determination of penalty, and their having been considered, it is recommended that the penalty of license revocation requested by Petitioner Agency be imposed.

RECOMMENDATION

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

RECOMMENDED that a final order be entered revoking Respondent's Hotels and Restaurant license, effective the first Monday, after 30 days from the date the final order is filed with the Agency Clerk of the Department of Business and Professional Regulation, Division of Hotels and Restaurants.

DONE AND ENTERED this 19th day of November, 2008, in Tallahassee, Leon County, Florida.



ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of November, 2008.

ENDNOTES

1/ Bono's result, that the charges therein were not sustainable, devolved upon the failure of Florida Administrative Code Rule 61C-4.010, to state which version of the Food Code was incorporated by reference therein, and the failure of the Notice of Proposed Rule Amendment applicable to the February 27, 2005, version of Rule 61C-4.010, to specify where one could locate the version of the Food Code being incorporated in that proposed rule. In reaching the conclusion that the charges against Bono's were unsustainable because one could not determine which Food Code version had been incorporated by reference into the rule or where the correct adopted Food Code version could be found by the public, the Bono's ALJ also had to assess the

situation in terms of Section 120.54(1)(i)1., Florida Statutes, and Florida Administrative Code Rule 1S-1.005, for all times material to that particular case. Florida Administrative Code Rule 61C-4.010 is not involved in the present case.

2/ Florida Administrative Code Rule 61C-1.001, as quoted, existed from February 27, 2005, until August 12, 2008. In other words, it was in effect on each of the restaurant inspections herein of December 19, 2007, March 5, 2008, March 6, 2008, March 24, 2008, and March 30, 2008. It read the same on each of those inspection dates and until July 1, 2008, when 2008-104 and 2008-149, Laws of Florida, amended Section 120.54(1)(i), Florida Statutes, concerning rule amendment procedures, and it read the same on the August 5, 2008, date of hearing in the instant case.

Incidentally, despite the July 1, 2008, statutory modifications, Florida Administrative Code Rule 1S-1.005, has not been amended since Bono's.

Unlike the situation in Bono's, The Notice of Proposed Rule Amendment for the February 27, 2005, through August 12, 2008, version of Florida Administrative Code Rule 61C-1.001, which is the rule specifying which Food Code is to be used in the instant case, was published in 31 Florida Law Weekly 1 (January 7, 2005), and that Notice of Proposed Rule Amendment gave notice of where a copy of the Food Code referenced in the rule could be found. Therefore, the present case does not present in the same form as did Bono's.

It is also noted that, although the title on the cover of the material provided in hard copy by Petitioner herein ("the green book") does not reflect the dates of the Errata Sheet or Supplement to the Food Code, as recited in Rule 61C-1.001, (see Conclusion of Law 54), these materials are, in fact, included inside the cover of the hard copy provided by Petitioner.

3/ The Administrative Complaint herein attempts to incorporate by reference every observation made by Mr. Fulton and noted on the attached inspection reports, which may bear different dates, different/additional allegations, or other rule numbers, above and beyond those listed by date in the body of the Administrative Complaint itself. Likewise, for three charges, the Administrative Complaint simply states "repeated violation", giving no dates at all, unless one assumes "repeated violations" means every date cited anywhere in the Administrative Complaint. These two methods of pleading do not clearly apprise any reader of "incorporated" charges, against which Respondent must defend

on specific dates. Accordingly, these "incorporated" charges are not considered properly plead. (See Conclusions of Law 59 and 61.)

4/ See Findings of Fact 50-52, Conclusions of Law 57-60, and n.3.

COPIES FURNISHED:

Charles Tunnickliff, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Yu Zeng Kang
Szechuan Panda
3830 Southwest 13th Street
Gainesville, Florida 32608

Ned Luczynski, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

William L. Veach, Director
Department of Business and
Professional Regulation
Division of Hotels and Restaurants
1940 North Monroe Street
Tallahassee, Florida 32399-2202

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.