

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 08-2662
)
GREEN GARDEN CHINESE)
RESTAURANT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A hearing was held pursuant to notice, on September 11, 2008, by Barbara J. Staros, assigned Administrative Law Judge of the Division of Administrative Hearings, in Tavares, Florida.

APPEARANCES

For Petitioner: Charles F. Tunnickliff, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1015

For Respondent: Gui Rong Lui, pro se
Green Garden Chinese Restaurant
1796 East Highway 50
Clermont, Florida 34711

STATEMENT OF THE ISSUE

Whether Respondent committed the violations set forth in the Administrative Complaint and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

Petitioner, Department of Business and Professional Regulation, Division of Hotels and Restaurants, filed an Administrative Complaint alleging that Respondent had violated the laws regulating the operation of public food establishments. The Administrative Complaint charged Respondent with 12 counts alleging violations of the provisions of Chapter 509, Florida Statutes, or the applicable rules governing the operation of public food establishments. At hearing, Petitioner withdrew counts 9, 10, and 11 of the Administrative Complaint. Consequently, the nine remaining charges were the subject of the hearing.

Respondent disputed the allegations in the Administrative Complaint and petitioned for a formal administrative hearing. The case was referred to the Division of Administrative Hearings on or about June 5, 2008. A formal hearing was set for September 11, 2008. The hearing took place as scheduled.

At hearing, Petitioner presented testimony of two witnesses, Henry Cristwell and Alex Chiu. Petitioner's Exhibits numbered one through three were admitted into evidence. Official recognition was requested of Section 509.032(6), Florida Statutes, Florida Administrative Code Rule 61C-1.004(6), and pertinent portions of the United States Food and Drug Administration's Food Code (Food Code). The request was granted.

Respondent offered the testimony of Gui Liu, owner of Respondent. Respondent did not offer any exhibits into evidence.

A Transcript consisting of one volume was filed on October 31, 2008. Petitioner timely filed a Proposed Recommended Order, and Respondent timely filed a post-hearing submission, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner, the Department of Business and Professional Regulation, Division of Hotels and Restaurants (Division), is a state agency charged with the duty and responsibility of regulating the operation of hotel and restaurant establishments pursuant to Section 20.165 and Chapter 509, Florida Statutes.

2. Respondent is an eating establishment located in Clermont, Florida. At all times material to the allegations of the Administrative Complaint, Respondent held license number 4502023 issued by the Division.

3. Critical violations are those violations that, if not corrected, are most likely to contribute to food-bourne illness, cross-contamination, and other environmental hazards.

4. Non-critical violations are those that are not directly related to food-bourne illness, but if they remain in non-compliance, are likely to lead to the development of a critical violation.

5. Henry Cristwell is a sanitation and safety specialist employed by the Division. Mr. Cristwell has a bachelor's degree in biology with minors in chemistry, mathematics, and physics. He has been employed by the Division for approximately eight years. He also has received training in laws and rules regarding public food service and lodging. Mr. Cristwell performs approximately 960 inspections annually.

6. On September 4, 2007, Mr. Cristwell conducted an inspection of Respondent's premises and issued an inspection report while on the premises. Gui Rong Lui, owner of the restaurant, signed for the inspection report.

7. During the September 4, 2007 inspection, Mr. Cristwell observed 14 violations and issued a warning that the violations must be corrected by November 4, 2007.

8. Alex Chiu is a senior Sanitation and Safety Specialist employed by the Division. Prior to working with the Division, Mr. Chiu was a food manager and owned his own business in Palm Beach County, Florida. He is a certified food manager and has received training in the Food and Drug Administration Food Safety Program. He also receives continuing education training on a monthly basis. Mr. Chiu performs approximately 900 inspections annually.

9. Mr. Chiu conducted a call-back inspection on December 5, 2007, during which he observed that several of the violations noted by Mr. Cristwell on September 4, 2007, had not been

corrected. During the re-inspection, Mr. Chiu prepared a call-back inspection report setting forth his findings from the inspection, and provided it to an employee of the restaurant.

10. The call-back inspection report contained the following regarding a violation he considered not corrected, " A bulk container of flour was not labeled." He considers this a critical violation because restaurants may have different kinds of cleaning products and food products. There is a danger that someone would use a product without knowing what it is, and mistakenly use the wrong product for the task he or she is performing.

11. Mr. Chiu also observed that there were no hand washing signs provided at the hand sinks used by food employees. This is a critical violation because hand washing is the most important way to prevent food-bourne illness.

12. During the call-back inspection, Mr. Chiu also observed knives being stored in the crevice between equipment at the back kitchen prep table of the restaurant. This is not a critical violation, but the space between equipment may contain a lot of bacteria as a result of food reside. Thus, when a clean knife or other utensil is placed there, cross-contamination may occur.

13. During the call-back inspection, Mr. Chiu observed a ladle stored in standing water at room temperature. This is not a critical violation. However, when utensils are used in food, they often have food residue on them that may enable bacteria to

develop or multiply rapidly if they are not kept in water at temperatures below 41 or above 135 degrees. Temperatures between 41 and 135 degrees are referred to as the "danger zone."

14. During the call-back inspection, Mr. Chiu observed a cutting board that was "grooved, pitted, and no longer cleanable." While not a critical violation, the grooved and pitted areas of a cutting board trap bacteria and food residue which cannot be cleaned properly.

15. During the call-back inspection, Mr. Chiu observed that the light in the walk-in cooler was missing the proper shield or cover. While not a critical violation, there is a danger that if an unshielded bulb were to break, fragments of the broken bulb could fall into food items stored in the walk-in cooler.

16. During the call-back inspection, Mr. Chiu observed that the hood and hood filters were heavily soiled with accumulated grease. While not a critical violation, grease build-up on a hood above cooking equipment could fall into open food items below during the cooking process.

17. During the call-back inspection, Mr. Chiu observed that the hood filters were in disrepair. While not a critical violation, hood filters in disrepair are no longer able to trap grease during cooking. This creates gaps or openings for the grease to escape into the atmosphere.

18. During the call-back inspection, Mr. Chiu observed aluminum foil and cardboard being used as liners on equipment.

While not a critical violation, aluminum foil and cardboard are not approved equipment as they cannot be easily cleaned and do not stay intact.

19. During the call-back inspection, Mr. Chiu observed that there was no Heimlich Maneuver sign posted. While not a critical violation, employees of a restaurant need to be able to know how to perform the Heimlich Maneuver in the event there is a choking victim in the restaurant.

20. The above described violations observed by Mr. Chiu were initially observed by Mr. Cristwell at the September 4, 2007, inspection. Thus, these violations had not been corrected at the time of the call-back inspection.

21. Gui Rong Liu owns the restaurant that is the Respondent in this case. She maintains that Mr. Chiu did not spend enough time at her restaurant during the call-back inspection to make these determinations. She bases this assertion on reports from her employees, who did not testify, that Mr. Chiu spent less than 20 minutes in her restaurant. Mr. Chiu maintains that he spent about 30 minutes on the call-back inspection.

22. Regardless of whether Mr. Chiu spent 20 or 30 minutes on the re-inspection, he is an experienced inspector who had the information from the initial inspection and, therefore, was specifically looking to see if the violations had been corrected. His testimony regarding his observations of items still in non-compliance is deemed credible and accepted.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569, 120.57(1), and 120.60(5), Fla. Stat.

24. The Division is the state agency charged with regulating public food service establishments pursuant to Section 20.165 and Chapter 509, Florida Statutes.

25. Pursuant to Section 509.261(1), Florida Statutes, the Division may impose penalties for violations of Chapter 509, Florida Statutes, including an administrative fine of no more than \$1,000 for each separate offense, attendance at personal expense at an educational program sponsored by the Hospitality Education Program, and the suspension or revocation of Respondent's license.

26. Because the Division seeks the imposition of an administrative penalty, which is a penal sanction, the Division has the burden of proving by clear and convincing evidence the specific allegations in the Administrative Complaint. See, e.g., Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

27. Chapters 3, 4, and 6 of the United States Food and Drug Administration's Food Code (Food Code) have been incorporated by reference into the rules governing public food establishments. Fla. Admin. Code R. 61C-4.010.

28. Through the Administrative Complaint, Respondent is alleged to have violated the following provisions of the Food Code, which read in pertinent part:

3-302.12 Food Storage Containers Identified With Common Name of Food. Working containers holding food or food ingredients that are removed from their original packages for use in the food establishment, such as cooking oils, flour, herbs, potato flakes, salt, spices, and sugar shall be identified with the common name of the food except that containers holding food that can be readily and unmistakably recognized such as dry pasta need not be identified.

3-304.12 In-Use Utensils, Between-Use Storage. During pauses in food preparation or dispensing, food preparation and dispensing utensils shall be stored:
(F) In a container of water if the water is maintained at a temperature of at least 60 [degrees] C (140 [degrees] F) and the container is cleaned at a [specified frequency].

4-101.111 Non-food contact surfaces. Non-food contact surfaces of equipment that are exposed to splash, spillage, or other food soiling or that require frequent cleaning shall be constructed of a corrosion-resistant, nonabsorbent, and smooth material.

4-501.11 Good Repair and Proper Adjustment.
(A) Equipment shall be maintained in a state of repair and condition that meets the requirements specified under parts 4-1 and 4-2.
(B) Equipment components such as doors, seals, hinges, fasteners, and kick plates shall be kept intact, tight, and adjusted in accordance with manufacturer's specifications.

4-501.12 Cutting Surfaces. Surfaces such as cutting blocks and boards that are subject to scratching and scoring shall be resurfaced if they can no longer be effectively cleaned and

sanitized, or discarded if they are not capable of being resurfaced.

4-903.11 Equipment, Utensils, Linens, and Single-Service and Single-Use Articles.

(A) Except as specified in paragraph (D) of this section, cleaned equipment and utensils, laundered liners, and single-service and single-use articles shall be stored: (1) In a clean, dry location; (2) Where they are not exposed to splash, dust, or other contamination; and (3) At least 6 inches above the floor.

(B) Clean equipment and utensils shall be stored as specified under paragraph (A) of this section and shall be stored: (1) In a self-draining position that allows air drying; and (2) Covered or inverted.

6-202.11 Light bulbs, Protective Shielding.

(A) Except as specified in paragraph B of this section, light bulbs shall be shielded, coated, or otherwise shatter-resistant in areas where there is exposed food; clean equipment, utensils, and linens; or unwrapped single-service and single-use-articles. . . .

6-301.14 Hand Washing Signage.

A sign or poster that notifies food employees to wash their hands shall be posted at all hand washing lavatories used by food employees and shall be clearly visible to food employees.

29. Through the Administrative Complaint, Respondent is alleged to have violated Florida Administrative Code Rule 61C-1.004(6), which reads as follows:

General Sanitation and Safety Requirements.

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

30. Through the Administrative Complaint, Respondent is alleged to have violated Section 509.213(1), Florida Statutes,

which requires every food service establishment to post, in a conspicuous place accessible to employees, a sign which illustrates and describes the Heimlich Maneuver procedure.

31. The Division met its burden of proof that Respondent violated section 3-302.12, Food Code, by failing to properly label a bulk container of flour.

32. The Division did not meet its burden of proof that Respondent violated section 3-304.12(F), Food Code, by storing an in-use ladle in water at an improper temperature, as no evidence was presented that the temperature of the water was tested.

33. The Division met its burden of proof that Respondent violated section 4-101.111, Food Code, by using aluminum foil and cardboard as liners on equipment.

34. The Division met its burden of proof that Respondent violated section 4-501.11(A) and (B), Food Code, by having hood filters that were in disrepair.

35. The Division met its burden of proof that Respondent violated section 4-501.12, Food Code, by having a cutting board that was grooved and pitted.

36. The Division met its burden of proof that Respondent violated section 4-903.11 by storing knives in crevices prone to bacteria and other contaminants.

37. The Division met its burden of proof that Respondent violated section 6-202.11, Food Code, by failing to place a shield or cover over the light bulb in the walk-in cooler.

38. The Division met its burden of proof that Respondent violated section 6-301.14, Food Code, by failing to post hand-washing signs at the hand sinks used by food employees.

39. The Division met its burden of proof that Respondent violated Florida Administrative Code Rule 61C-1.004(6), by having hood and hood filters that were heavily soiled with accumulated grease.

40. The Division met its burden of proof that Respondent violated Section 509.213(1), Florida Statutes, by failing to post a Heimlich Maneuver sign in the Restaurant.

41. In its Proposed Recommended Order, the Division recommends the imposition of a \$2,500.00 administrative penalty and attendance at an educational program offered by the Hospitality Education Program. The Division met its burden of proof regarding two critical violations and nine non-critical violations. Accordingly, an administrative penalty in the amount of \$2,500.00 is reasonable and appropriate.

RECOMMENDATION

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

RECOMMENDED:

That the Division enter a final order which confirms the violations found, dismisses the violations not found, imposes an administrative penalty in the amount of \$2,500.00, to be paid within 30 days of the issuance of the Agency's Final Order, and

requiring that Respondent attend an educational program offered by the Hospitality Education Program.

DONE AND ENTERED this 12th day of December, 2008, in Tallahassee, Leon County, Florida.



Barbara J. Staros
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of December, 2008.

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.