

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 08-2710
)
BRISAS DEL YUNQUE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On July 29, 2008, an administrative hearing in this case was held by video teleconference between Tallahassee and Orlando, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Tomas Lopez, pro se
Brisas del Yunque
29 South Semoran Boulevard
Orlando, Florida 32807

STATEMENT OF THE ISSUES

The issues in the case are whether the allegations of the Administrative Complaint are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated February 8, 2008, the Department of Business and Professional Regulation, Division of Hotels and Restaurants (Petitioner), alleges that Brisas Del Yunque (Respondent), a restaurant owned by Tomas Lopez, was found to be in violation of food safety regulations related to training of food service employees and to cleaning of microwave ovens.¹

Mr. Lopez disputed the allegations and requested a formal administrative hearing. The Petitioner forwarded the matter to the Division of Administrative Hearings, which scheduled and conducted the formal hearing.

At the hearing, the Petitioner presented the testimony of one witnesses and had Exhibits 1 through 3 admitted into evidence. Mr. Lopez testified on behalf of the Respondent.

The Transcript of the hearing was filed on August 14, 2008. The Petitioner filed a Proposed Recommended Order on August 20, 2008.

FINDINGS OF FACT

1. The Petitioner is the state agency charged with regulation of hotels and restaurants pursuant to Chapter 509, Florida Statutes (2007).

2. At all times material to this case, the Respondent was a restaurant holding Food Service license number 5803705 and operating at 29 South Semoran Boulevard, Orlando, Florida 32807.

3. On October 23, 2007, Alphonso Rullan, a sanitation safety specialist employed by the Petitioner, performed a routine inspection of the Respondent at which time there were employees engaged in food preparation.

4. At the time of the October 23 inspection, the Respondent was unable to provide any evidence that the employees had received training in food safety protection.

5. Mr. Rullan also observed during the October 23 inspection that the interior of the microwave oven was soiled with crusted food material indicating that the oven was not being routinely cleaned at least every 24 hours.

6. Mr. Rullan noted the deficiencies in an inspection report, a copy of which was provided to the manager, who was identified as "Victor Montenegro."

7. On January 11, 2008, Mr. Rullan returned to the Respondent to perform a call back inspection, during which the Respondent was still unable to provide evidence that employees

had received training in food safety protection. Mr. Rullan again observed that the microwave oven was soiled with crusted food material indicating that the oven was not being cleaned at least every 24 hours. The deficiencies were cited in an inspection report which was provided to Mr. Lopez at the time of the inspection.

8. On February 8, 2008, the Petitioner issued an Administrative Complaint against the Respondent for failure to correct the deficiencies cited herein.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 120.57, Fla. Stat. (2008).

10. The Petitioner is the state agency charged with the regulation of food service establishments in the State of Florida. See Ch. 509, Fla. Stat. (2007). The Petitioner has adopted by incorporation the various provisions of the Food Code referenced herein. Fla. Admin. Code R. 61C-4.010(1). The Petitioner has the burden of proving by clear and convincing evidence the allegations set forth in the Administrative Complaint against the Respondent. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). In this case, the burden has been met.

11. The Administrative Complaint charged the Respondent with a violation of Subsection 509.049(5), Florida Statutes (2007), which provides as follows:

It shall be the duty of each public food service establishment to provide training in accordance with the described rule to all food service employees of the public food service establishment. The public food service establishment may designate any certified food service manager to perform this function. Food service employees must receive certification within 60 days after employment. Certification pursuant to this section shall remain valid for 3 years. All public food service establishments must provide the division with proof of employee training upon request, including, but not limited to, at the time of any division inspection of the establishment. Proof of training for each food service employee shall include the name of the trained employee, the date of birth of the trained employee, the date the training occurred, and the approved food safety training program used.

12. The evidence establishes that at the time of both the initial and the call back inspections, the Respondent failed to provide evidence that food service employees had received the required food safety training.

13. The Administrative Complaint also charged the Respondent with a violation of Food Code Rule 4-602.12(b), which provides as follows:

The cavities and door seals of microwave ovens shall be cleaned at least every 24 hours by using the manufacturer's recommended cleaning procedure.

14. The evidence establishes that at the time of both the initial and the call back inspections, observation of the microwave oven indicated that the cavities and door seals were not being cleaned in compliance with the rule.

15. Subsection 509.261(1), Florida Statutes (2007), provides that each violation is treated as a separate offense and that each offense is punishable by a fine not to exceed \$1,000 per offense. In addition, offenses may be disciplined by required attendance at an educational program sponsored by the Hospitality Education Program, or by suspension, revocation, or refusal of a license.

16. The Petitioner's Proposed Recommended Order recommends imposition of a total fine of \$1,000 in this case. There is no evidence that the penalty sought by the Petitioner is inappropriate according to the range set forth in the statute.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Business and Professional Regulation enter a final order imposing a fine of \$1,000 against the Respondent and requiring the Respondent to complete an appropriate educational program related to the violations identified herein.

DONE AND ENTERED this 5th day of September, 2008, in
Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
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 5th day of September, 2008.

ENDNOTE

^{1/} Additionally, the Administrative Complaint included an allegation related to an "uncovered electrical box behind the cook's line," but the Petitioner withdrew the allegation at the commencement of the hearing and offered no evidence related thereto.

COPIES FURNISHED:

Ethan Chase Bender
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Tomas Lopez
Brisas del Yunque
29 South Semoran Boulevard
Orlando, Florida 32807

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

William L. Veach, Director
Division of Hotels and Restaurants
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

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.