

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 08-4981
)
FOOD FOR YOUR MOOD,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on January 15, 2009, by video teleconference with connecting sites in Miami and Tallahassee, Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charles F. Tunnickliff, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-2202

For Respondent: Nicole Moxey, pro se
Food For Your Mood
16650 Northwest 27th Avenue
Miami, Florida 33054

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent committed the offense set forth in the Administrative Complaint and, if so, what action should be taken.

PRELIMINARY STATEMENT

The Department of Business and Professional Regulation, Division of Hotels and Restaurants, hereinafter Department, issued an Administrative Complaint against Food For Your Mood, dated August 22, 2008. The Department charged Food For Your Mood with violating Food Code Rule 6-501.111, Controlling Pests, in that 30-plus live roaches and 20-plus dead roaches were observed behind the reach-in cooler in the kitchen. Food For Your Mood disputed the material allegations of fact and requested a hearing. On October 8, 2008, this matter was referred to the Division of Administrative Hearings.

At hearing, the Department presented the testimony of two witnesses and entered two exhibits (Petitioner's Exhibits numbered 1-2) into evidence. Food For Your Mood presented the testimony of one witness, Nicole Moxley, who testified on her own behalf, and entered no exhibits into evidence. The undersigned took official recognition of Section 509.032(6), Florida Statutes (2007), and Food Code Rule 6-501.111.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was

set for ten days following the filing of the transcript. The Transcript, consisting of one volume, was filed on April 7, 2009. The parties timely filed their post-hearing submissions, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material hereto, Food For Your Mood was licensed as a public food service establishment in the State of Florida by the Department, having been issued license type 2010 and license number 2330809.

2. At all times material hereto, Food For Your Mood was located at 16650 Northwest 27th Avenue, Opa-Locka, Florida 33054.

3. A critical violation in food service is considered to be a violation that can immediately constitute a health threat or food-borne illness, or can contribute directly to a food-borne illness. A non-critical violation is considered to be a violation that does not immediately constitute a health threat or food-borne illness, but, if not corrected, can constitute or often lead to a health threat or food-borne illness.

4. On August 22, 2008, Kevon Pierre, a sanitation and safety specialist with the Department, conducted an inspection of Food For Your Mood. Accompanying Mr. Pierre was another inspector with the Department, Guillermo Alonso, a sanitation

and safety supervisor, who did not perform any of the inspection.

5. Food For Your Mood was situated between two restaurants, one of which was closed and abandoned.

6. During the inspection, Mr. Pierre found a violation, which he considered to be a critical violation. Further, during the inspection, Mr. Pierre prepared a food inspection report on his PDA (Personal Data Assistant), setting forth the alleged critical violation. Mr. Pierre made Ms. Moxley aware of the alleged critical violation and reviewed the inspection report with her. The inspection report was signed by Mr. Pierre, Ms. Moxley, and Mr. Alonso.

7. The inspection on August 22, 2008, involved a possible closure of Food For Your Mood. Even though Mr. Pierre conducted the inspection, Mr. Alonso, as a supervisor, was also required to sign the inspection report because the inspection involved a possible closure of Food For Your Mood, and because, at that time, Mr. Pierre was not a "standardized" inspector, meaning that he was on probationary status.

8. The alleged critical violation on August 22, 2008, was 35A-05-1:¹ "Observed roach activity as evidenced by live roaches found 30 PLUS LIVE ROACHES BEHIND REACH IN COOLER IN KITCHEN AREA." The reach-in cooler was on wheels, so Mr. Pierre was able to move it, observe the area behind it, and observe the

roaches. Mr. Pierre counted the roaches. Additionally, Mr. Alonso observed live roaches behind the reach-in cooler, but did not count them. Mr. Pierre and Mr. Alonso considered this alleged violation to be a critical violation because the roaches constituted an immediate health threat and/or cause a food-borne illness due to some of the diseases that they may carry. Their testimony on this subject is found to be credible and clear and convincing.

9. Ms. Moxley looked behind the reach-in cooler after Mr. Pierre and Mr. Alonso, but failed to observe any roaches. Her testimony is found to be credible; however, the testimony of Mr. Pierre and Mr. Alonso is found to be more credible.

10. Even though Mr. Pierre testified that it was standard procedure to inspect an adjoining restaurant in a shopping complex or a complex, no testimony was presented as to the findings of his inspection of the restaurant that was still operating.

11. Mr. Pierre did not enter and inspect the adjoining restaurant that was closed and abandoned because the Department did not have jurisdiction to enter and inspect a closed restaurant.

12. Food For Your Mood was closed as a result of the critical violation being found.

13. No evidence was presented regarding the alleged violation set forth in the Administrative Complaint regarding 20-plus dead roaches observed behind the reach-in cooler in the kitchen area.

CONCLUSIONS OF LAW

14. 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).

15. The Department has the burden of proof to show by clear and convincing evidence that Food For Your Mood committed the offense set forth in the Administrative Complaint.

Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

16. Section 509.032, Florida Statutes (2008), provides in pertinent part:

(1) GENERAL. --The division [Division of Hotels and Restaurants of the Department of Business and Professional Regulation] shall carry out all of the provisions of this chapter and all other applicable laws and rules relating to the inspection or regulation of public lodging establishments and public food service establishments for the purpose of safeguarding the public health, safety, and welfare. . . .

(2) INSPECTION OF PREMISES.

(a) The division has responsibility and jurisdiction for all inspections required by this chapter. The division has responsibility for quality assurance. . .

(b) For purposes of performing required inspections and the enforcement of this chapter, the division has the right of entry and access to public lodging establishments and public food service establishments at any reasonable time.

(c) Public food service establishment inspections shall be conducted to enforce provisions of this part and to educate, inform, and promote cooperation between the division and the establishment.

(d) The division shall adopt and enforce sanitation rules consistent with law to ensure the protection of the public from food-borne illness in those establishments licensed under this chapter. These rules shall provide the standards and requirements for obtaining, storing, preparing, processing, serving, or displaying food in public food service establishments . . . conducting necessary public food service establishment inspections for compliance with sanitation regulations . . . and initiating enforcement actions, and for other such responsibilities deemed necessary by the division. . . .

* * *

(3) SANITARY STANDARDS; EMERGENCIES; TEMPORARY FOOD SERVICE EVENTS. --The division shall:

(a) Prescribe sanitary standards which shall be enforced in public food service establishments.

* * *

(6) RULEMAKING AUTHORITY. --The division shall adopt such rules as are necessary to carry out the provisions of this chapter.

17. Florida Administrative Code Rule 61C-1.004, "General Sanitation and Safety Requirements," provides in pertinent part:

The following general requirements and standards shall be met by all public lodging and public food service establishments:

(3) Vermin control - Effective control measures shall be taken to protect against the entrance into the establishment, and the breeding or presence on the premises of rodents, flies, roaches and other vermin. All buildings shall be effectively rodent-proofed, free of rodents and maintained in a rodent-proof and rodent-free condition. . . .

18. As to alleged violation 35A-05-1, Food Code Rule 6-501.111, "Controlling Pests," provides in pertinent part:

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 §§ 7-202.12, 7-206.12, and 7-206.13; and

(D) Eliminating harborage conditions.

(emphasis in original)

19. The evidence is clear and convincing and demonstrates that Food For Your Mood violated Food Code Rule 6-501.111 in that 30-plus live roaches were found behind the reach-in cooler in the kitchen area. Furthermore, the evidence is clear and convincing and demonstrates that the violation was a critical violation.

20. Regarding the alleged violation of Food Code Rule 6-501.111 as to 20-plus dead roaches found behind the reach-in cooler in the kitchen area, this violation is considered abandoned by the Department since no evidence was presented.

21. As to penalty, Section 509.261, Florida Statutes (2008), provides in pertinent part:

(1) Any public lodging establishment or public food service establishment that has operated or is operating in violation of this chapter or the rules of the division, operating without a license, or operating with a suspended or revoked license may be subject by the division to:

(a) Fines not to exceed \$ 1,000 per offense;

(b) Mandatory attendance, at personal expense, at an educational program sponsored by the Hospitality Education Program; and

(c) The suspension, revocation, or refusal of a license issued pursuant to this chapter.

22. The Department suggests an administrative fine in the amount of \$2,000.00, which is contrary to the administrative

fine provision of Section 509.261(1)(a), Florida Statutes (2008).

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 imposing an administrative fine in the amount of \$1,000.00 against Food For Your Mood.

DONE AND ENTERED this 6th day of May, 2009, in Tallahassee, Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of May, 2009.

ENDNOTE

^{1/} This identification number is the corresponding identification number of the violation in the inspection report.

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.