

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
)
Petitioner,)
)
vs.) Case No. 08-5414
)
PITTSBURGH PETE'S,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On January 23, 2009, an administrative hearing in this case was held in Largo, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

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

For Respondent: Herbert H. Newman, pro se
10801 Starkey Road, No. 11
Largo, Florida 33777

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 August 25, 2004, the Department of Business and Professional Regulation, Division of Hotels and Restaurants (Petitioner), alleged that Pittsburgh Pete's (Respondent), a restaurant owned and operated by Herbert Newman, was determined after inspection to be in violation of specified food safety regulations. The Respondent apparently disputed the allegations and requested a formal administrative hearing, although the DOAH did not receive a copy of the request. The Petitioner forwarded the dispute to DOAH, which scheduled and conducted the formal hearing.

At the hearing, the Petitioner presented the testimony of one witness and had Exhibits lettered A through C admitted into evidence. Mr. Newman testified on behalf of the Respondent.

The Transcript of the hearing was filed on January 30, 2009. The Petitioner filed a Proposed Recommended Order on February 11, 2009.

FINDINGS OF FACT

1. The Petitioner is the state agency charged with regulation of hotels and restaurants pursuant to Chapter 509, Florida Statutes (2008).

2. At all times material to this case, the Respondent was a restaurant operating at 10801 Starkey Road, Largo, Florida, 33773, and holding food service license number 6215373.

3. On July 21, 2004, Jim Olsen, a trained sanitation and safety inspector employed by the Petitioner, performed a routine inspection of the Respondent.

4. Mr. Olsen identified various food safety regulation violations in a written report that was provided to Mr. Newman at the time of the inspection.

5. Violations that pose an immediate threat to public safety are deemed to be "critical" violations.

6. Mr. Olsen determined that the restaurant manager, Mr. Newman, was not a certified food manager, which is a critical violation of food safety regulations.

7. Mr. Olsen also determined that there was no documentation that the restaurant employees had completed the required food service training, another critical violation of food safety regulations.

8. The inspection report stated that the deadline for correction of the two critical violations was August 23, 2004.

9. On August 23, 2004, Mr. Olsen performed a "callback" inspection at which time he determined that the restaurant continued to lack a certified food manager and that there remained no documentation that the restaurant employees had completed the required food service training.

10. The violations were noted in the Administrative Complaint underlying this proceeding.

11. Other deficiencies identified in the July 21, 2004, inspection report were resolved on a timely basis and are immaterial to this proceeding.

12. At the hearing, Mr. Newman testified that he registered to take the food manager certification course at the earliest opportunity after the July 21, 2004, inspection, but acknowledged there was no certified food manager in the restaurant at the time of either inspection.

13. Mr. Newman also testified that some of the food service employees were trained, but acknowledged that he had no records at the time of either inspection to document that any of the employees had completed the training.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2008).

15. The Petitioner is the state agency charged with the regulation of food service establishments in the State of Florida. See Ch. 509, Fla. Stat. (2008). The Petitioner has adopted by incorporation the various provisions of the Food Code referenced herein. Fla. Admin. Code R. 61C-4.010(1).

16. The Administrative Complaint alleged that, at the time of the inspections identified herein, the Respondent lacked a certified food manager or documentation of food service employee

training. 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). The burden has been met.

17. Section 509.039, Florida Statutes (2004), provides as follows:

Food service manager certification.--It is the duty of the division to adopt, by rule, food safety protection standards for the training and certification of all food service managers who are responsible for the storage, preparation, display, or serving of foods to the public in establishments regulated under this chapter. The standards adopted by the division shall be consistent with the Standards for Accreditation of Food Protection Manager Certification Programs adopted by the Conference for Food Protection. These standards are to be adopted by the division to ensure that, upon successfully passing a test, approved by the Conference for Food Protection, a manager of a food service establishment shall have demonstrated a knowledge of basic food protection practices. The division may contract with an organization offering a training and certification program that complies with division standards and results in a certification recognized by the Conference for Food Protection to conduct an approved test and certify all test results to the division. Other organizations offering programs that meet the same requirements may also conduct approved tests and certify all test results to the division. The division may charge the organization it contracts with a fee of not

more than \$5 per certified test to cover the administrative costs of the division for the food service manager training and certification program. All managers employed by a food service establishment must have passed an approved test and received a certificate attesting thereto. Managers have a period of 90 days after employment to pass the required test. The ranking of food service establishments is also preempted to the state; provided, however, that any local ordinances establishing a ranking system in existence prior to October 1, 1988, may remain in effect. (Emphasis supplied)

18. Florida Administrative Code Rule 61C-4.023(1) (2004) provides, in relevant part, as follows:

All managers who are responsible for the storage, preparation, display, and serving of foods to the public shall have passed a certification test approved by the division demonstrating a basic knowledge of food protection practices as adopted in this chapter. Those managers who successfully pass an approved certification examination shall be issued a certificate by the certifying organization, which is valid for a period of five years from the date of issuance. Each licensed establishment shall have a minimum of one certified food protection manager responsible for all periods of operation. The operator shall designate in writing the certified food protection manager or managers for each location. A current list of certified food protection managers shall be available upon request in each establishment. When four or more employees, at one time, are engaged in the storage, preparation or serving of food in a licensed establishment, there shall be at least one certified food protection manager present at all times when said activities are taking place. The certified food protection manager or managers need not

be present in the establishment during those periods of operation when there are three or fewer employees engaged in the storage, preparation, or serving of foods. It shall be the responsibility of the certified food protection manager or managers to inform all employees under their supervision and control who engage in the storage, preparation, or serving of food, to do so in accordance with acceptable sanitary practices as described in this chapter.

19. The evidence establishes that, at the time of the inspections referenced herein, the Respondent failed to have a certified food manager on the premises.

20. Section 509.049, Florida Statutes (2004), provides in relevant part as follows:

Food service employee training.--

(1) The division shall adopt, by rule, minimum food safety protection standards for the training of all food service employees who are responsible for the storage, preparation, display, or serving of foods to the public in establishments regulated under this chapter. These standards shall not include an examination, but shall provide for a food safety training certificate program for food service employees to be administered by a private nonprofit provider chosen by the division.

* * *

(5) 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. (Emphasis supplied)

21. The evidence establishes that, at the time of the inspections referenced herein, the Respondent failed to provide documentation that any of the food service employees had received the required training.

22. Subsection 509.261(1), Florida Statutes (2004), provides that each offense is punishable by a fine not to exceed \$1,000 per offense. In addition, offenses may be disciplined by mandatory attendance at an educational program sponsored by the Hospitality Education Program, or by suspension, revocation, or refusal of a license.

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 a fine of \$500 against the Respondent and requiring that the Respondent complete an

appropriate educational program related to the violations identified herein.

DONE AND ENTERED this 3rd day of March, 2009, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of March, 2009.

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.