STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF HOTELS AND RESTAURANTS,	)	
Petitioner,	)	
and	)	
FLORIDA RESTAURANT AND LODGING ASSOCIATION, INC.,	)	
Intervenor,	)	
vs.	)	Case No. 08-6209
ENFIN ENTERPRISES, INC., d/b/a CHEZ PIERRE,	)	
Respondent.	)	

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on March 2, 2009, in Tallahassee, Florida.

APPEARANCES

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

For Intervenor: Maureen M. Daughton, Esquire
Cathy M. Sellers, Esquire
Broad and Cassel
215 South Monroe Street, Suite 400
Tallahassee, Florida 32302-1804

For Respondent: E. Gary Early, Esquire
Albert T. Gimbel, Esquire
Messer, Caparello & Self, P.A.
2618 Centennial Place
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

The issue is whether Respondent violated Section 509.049, Florida Statutes,[1/] by using an unapproved food safety training program.

PRELIMINARY STATEMENT

The Department of Business and Professional Regulation, Division of Hotels and Restaurants (Division), alleged in an Administrative Complaint dated November 20, 2008, that Respondent violated Section 509.049, Florida Statutes, by using an unapproved food safety training program known as TrainSafe. On December 10, 2008, Respondent timely filed a petition disputing the allegations in the Administrative Complaint and requesting a formal hearing. On December 11, 2008, the Division referred this matter to the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge to conduct the hearing requested by Respondent.

On January 5, 2009, the Florida Restaurant and Lodging Association, Inc. (FRLA) filed an unopposed petition to intervene. The petition was granted in an Order entered on January 7, 2009. FRLA is aligned with the Division.

On January 23, 2009, the Division filed an unopposed motion to correct a scrivener's error in the Administrative Complaint. The motion was granted in an Order entered on January 26, 2009, and the case proceeded to final hearing on the Amended Administrative Complaint attached to the motion.

On February 23, 2009, the parties filed a Joint Prehearing Stipulation. The stipulations contained in that filing are incorporated in the Findings of Fact and Conclusions of Law set forth below.

On March 2, 2009, Respondent filed a motion seeking an award of attorney's fees against the Division pursuant to Section 57.105, Florida Statutes. Consideration of the motion was deferred pending final disposition of this case on the merits. See Order entered on March 3, 2009.

At the final hearing, the Division presented the testimony of Richard Akin and Robert Foster; FRLA presented the testimony of Carol Dover and the deposition testimony of Karen Cooley and Eric Favier; and Respondent presented the testimony of Mr. Akin, Mr. Favier, Kendall Burkett, Diann Worzalla, and Debra Williams. Joint Exhibits 1 through 26, Intervenor's Exhibits 6, 11, and

16, and Respondent's Exhibits 1 through 3, 7, and 8, were received into evidence. Official recognition was taken of the Articles of Organization of Florida Association Management Operation Services, LLC (FAMOS), as amended, on file with the Department of State as of January 26, 2009.

The Transcript of the final hearing was filed with DOAH on March 16, 2009. The parties were given 10 days from that date to file proposed recommended orders (PROs). The PROs were timely filed and have been given due consideration.

FINDINGS OF FACT

A. Parties

1. The Division is the state agency responsible for licensing and regulating food service establishments pursuant to Part I of Chapter 509, Florida Statutes.

2. Respondent is the owner and operator of a licensed food service establishment located in Tallahassee.

3. FRLA is a trade association that represents the interests of the hospitality and tourism industry in Florida.

B. FRLA's Interest in this Disciplinary Proceeding

4. One of FRLA's primary purposes is to educate its members and to promote their compliance with Florida laws.

5. FRLA was involved in the lobbying efforts that led to the passage of Section 509.049, Florida Statutes, which requires all food service employees to undergo food safety training.

6. FRLA owns and administers a food safety training program known as SafeStaff. The SafeStaff program is the food safety training program contracted by the Division pursuant to Section 509.049(2), Florida Statutes. The SafeStaff program has been the state-contracted program since October 2000.

7. As a result of its designation as the state-contracted food safety training program, the SafeStaff program is the only training program -- other than “grandfathered” programs approved under Section 509.049(3), Florida Statutes -- that can be used to train food service employees in Florida.

8. FRLA is authorized to charge a “per employee fee to cover the contracted price for the program.”

9. It was stipulated that the use of an unapproved program to train food service employees adversely impacts FRLA because those employees would likely have otherwise had to use the state-contracted SafeStaff program and pay the per-employee fee to FRLA.

C. Respondent’s Approved Food Service Training Program

(1) Submittal, Approval, and Subsequent Non-Use

10. On June 30, 2000, Respondent submitted to the Division for approval a food safety training program that was provided to it by the Florida Restaurant Association (FRA), which is the predecessor to FRLA.[2/]

11. Respondent submitted the FRA-provided program pursuant to Section 509.049, Florida Statutes (2000), which stated in pertinent part:

> Any food service training program established and administered prior to July 1, 2000 shall be submitted by the operator to the division for its review and approval. If the food safety training program is approved by the division, nothing in this section shall preclude any other operator of a food service establishment from also utilizing the approved program or require the employees of any operator to receive training or pay a fee to the division's contracted provider.

12. The program submitted by Respondent was called SafeStaff, just like FRLA's current program. The program consisted of the ServSafe program prepared by the National Restaurant Association Educational Foundation along with sections on food-borne illnesses and vermin control that were required by Florida law but were not addressed in the ServSafe program.

13. The program submitted by Respondent was established prior to July 1, 2000, and was administered to Respondent's food service employees on June 29 and 30, 2000.

14. The Division approved the program submitted by Respondent in a letter dated December 1, 2000. The letter stated in pertinent part:

> The Division of Hotels and Restaurants has reviewed the food safety program submitted pursuant to Section 509.049, Florida Statutes, and has determined that it is in substantial compliance with the standards and criteria adopted by the Division for food safety training. **This program** is therefore approved for utilization by any public food service establishment for the required training of its food handler employees, subject to the following conditions:
>
> * * *
>
> 4. The food safety training **curriculum areas** may not be deleted or reduced, but must continue to meet or exceed the food safety training standards established by the Division, as amended from time to time.

(Emphasis supplied).

15. Thus, as of December 1, 2000, the program submitted by Respondent was considered an approved, or "grandfathered," program that could be used to train food service employees in lieu of the state-contracted program.

16. In 2004, the Legislature amended Section 509.049, Florida Statutes, to require providers of approved food safety training programs to submit certain information to the Division when the program is used to train employees of other food service establishments. This reporting requirement does not apply when the provider uses its approved program to train its own employees.

17. The 2004 amendments to Section 509.049, Florida Statutes, also established a deadline for submitting food service training programs for approval as a grandfathered program. Specifically, subsection (3) of the statute was amended to require the program to be "submitted by the operator or the third-party provider to the division for its review and approval on or before September 1, 2004."

18. The Division assigned a unique "Provider ID Number" to each approved food safety training program to be used by the provider when reporting the required training information to the Division.

19. Respondent's approved program –- the FRA-provided SafeStaff/ServSafe program submitted by Respondent on June 30, 2000, and approved by the Division on December 1, 2000 -- was assigned Provider ID Number 7148473.

20. Respondent never used its approved training program to train its own employees. Instead, it purchased the training programs from FRA and FRLA or it hired employees who had already undergone training at a culinary school.

21. Respondent never used its approved training program (or any other training program) to train employees of other food service establishments, as more fully discussed in Part C(4), below.

(2) Sale of the Program to FAMOS

22. In May or June 2008, Respondent was approached by Rick Wallace, the president of FAMOS, about purchasing Respondent's approved training program.

23. Respondent's owner, Eric Favier, did not know that Respondent even had an approved program when he was first approached by Mr. Wallace. Indeed, Mr. Favier credibly testified that after the program was approved, it was "put into a drawer" and forgotten about.

24. Mr. Favier relied upon Mr. Wallace's representations that Respondent had an approved program, and he agreed to sell the program to FAMOS because Respondent was not using, and had no use for, the program.

25. On July 1, 2008, Respondent and FAMOS executed a document titled "Sale Agreement for Licensure of Florida Approved Food Safety Program" (hereafter "the Sale Agreement") pursuant to which Respondent agreed to sell "the entire license rights and ownership of [its] Florida approved employee food safety training program" to FAMOS.

26. The Sale Agreement required Respondent to "release all ownership and licensing rights of [the] Program commencing at the signing of this agreement." The agreement further provided that "payment of 10% of the Gross Profit[3/] shall constitute she complete sale of the food safety training program."

27. The Sale Agreement included a confidentiality provision that precluded the parties from disclosing any of the terms of the agreement. The confidentiality provision was removed through an "Addendum to Sale Agreement" dated October 27, 2008.

28. Respondent has not yet received any money from FAMOS for the sale of the program. However, Mr. Favier testified that he expects to receive money in the future once FAMOS starts earning a profit from the sale of the program.

29. There is no statute, rule, or Division policy that precludes the owner of an approved program from selling the program. Nor is there any statute, rule, or Division policy precluding the purchaser of the program from using the program to train employees of any food service establishment.

30. Respondent was not involved in any way with the use of the program after it was sold to FAMOS. Indeed, on this point, Mr. Favier credibly testified "when I sold the program to Mr. Wallace, I sold it, so I have no idea what he did with it."

31. It was not until October 28, 2008 (the day after the confidentiality provision was removed from the sale agreement), that the Division was first informed that Respondent's approved program had been sold to FAMOS. And, it was not until December 12, 2008 (several weeks after the filing of the Administrative Complaint and several days after the filing of

Respondent's petition for hearing[4/]), that the Division was first provided a copy of the Sale Agreement.

32. The Division has not formally recognized the change of ownership of the program through, for example, an amended license or Provider ID Number issued to FAMOS, and no clear request for such agency action has been made by Respondent or FAMOS. Thus, even though as discussed below, the contact information for the Respondent's approved program is that of FAMOS, the Division still considers Respondent to be the licensee of record for the program.

(3) "Branding" of the Program as TrainSafe

33. On September 24, 2008, Mr. Wallace sent an e-mail to the Division stating:

> We are in the process of promoting Chez Pierre's approved food safety program which has been named TrainSafe. How can we add to the Chez Pierre approved list line the name of the program? (Emphasis supplied).

34. Mr. Wallace did not inform the Division that FAMOS had purchased Respondent's approved training program, nor did he request that Provider ID Number 7148743 be transferred from Respondent to FAMOS.

35. The Division staff advised Mr. Wallace that the request must come from Respondent on its letterhead because Respondent was the license holder for the program.

36. On or about October 13, 2008, the Division received a letter from Mr. Favier on Respondent's letterhead. The letter was handwritten by Mr. Favier, but the substance of the letter was provided to him by Mr. Wallace.

37. Mr. Favier's letter stated in pertinent part:

> Chez Pierre's proprietary approved food safety program has been branded as TrainSafe® and is being marketed to the restaurant industry in Florida. (Emphasis supplied).
>
> Please add the Trainsafe® name to Chez Pierre's name on the approved food safety list. Please replace Karen Cooley with Rick Wallace as the provider contact . . . .

38. Mr. Favier did not inform the Division that Respondent had sold its approved training program to FAMOS, nor did he request that Provider ID Number 7178743 be transferred from Respondent to FAMOS.

39. The record does not clearly establish why Mr. Wallace and/or Mr. Favier did not inform the Division of the sale of Respondent's approved program to FAMOS. However, the inclusion of the confidentiality provision in the Sale Agreement suggests a specific intent to keep the facts concerning the sale from third-parties, including the Division.

40. On October 16, 2008, the Division updated its list of approved food safety training programs to change the designation of Respondent's approved program from "Chez Pierre" to "Chez

Pierre/TrainSafe" and to change the contact information for the program to that of FAMOS.

41. The Division made this change without reviewing any documents associated with the TrainSafe program because it had no reason to believe at the time that the "branding" of Respondent's program as TrainSafe was anything more than a renaming of the program. Indeed, that is all that it was represented to be by Mr. Wallace and Mr. Favier in their communications with the Division.

42. On November 12, 2008, FRLA filed a petition challenging the addition of the TrainSafe name to the Division's list of approved food safety training programs. FAMOS was permitted to intervene in that case, DOAH Case No. 08-5839, based upon the allegation that it was the owner of Respondent's approved food safety training program.

43. On or about December 1, 2008, while the case was still pending at DOAH, the Division removed the TrainSafe name from the list of approved food safety training programs.

44. The Division did not change the contact information for the program on the list back to Respondent's address.[5/] The contact information remained that of FAMOS, and, as result, any communications from the Division relating to the program would have gone to FAMOS, not Respondent.

45. On December 11, 2008, the attorney for Respondent and FAMOS sent a letter to the Division formally withdrawing Mr. Favier's request that the TrainSafe name be added to Respondent's name on the Division's list of approved food safety training programs.

46. Thereafter, on December 17, 2008, the file in DOAH Case No. 08-5839 was closed as moot. The Order Closing File stated in pertinent part:

> The proposed agency action that [FRLA] sought to influence through its Petition for Administrative Hearing was [the Division]'s approval of Chez Pierre's request to add the TrainSafe name to its name on [the Division]'s approved food safety training provider list. The request that resulted in that proposed agency action has been withdrawn, which, as acknowledged by [FRLA] it its response to the motion, "has the effect of negating [the Division]'s proposed agency action granting Chez Pierre's request." There is no additional relief that can be granted to [FRLA] in this proceeding and, therefore, this case is moot.

(4) Use of the Program's Provider Number by FAMOS

47. The first instance of Provider ID Number 7148473 -- the number assigned to Respondent's approved food safety training program -- being used to train food service employees was on October 11, 2008, which is more than three months after the Sale Agreement was executed by Respondent, but prior to the

addition of the TrainSafe name to the Division's list of approved food safety training programs.

48. Provider ID Number 7148473 was reported to the Division as the "provider" of the training for a total of 166 food service employees at 26 different establishments between October 11, 2008, and January 29, 2009.

49. The name of the program reported for each of the 38 employees trained between October 11 and November 18, 2008, was "TrainSafe."

50. The names of the programs reported for the 26 employees trained between November 21 and 24, 2008, were "TrainSafe" (11 employees) and "Chez Pierre" (15 employees).

51. The name of the program reported for each of the 102 employees trained after November 24, 2008, was "Chez Pierre."

52. The training of these food service employees was provided by, or pursuant to training programs sold to the establishments by, FAMOS.

53. There is no credible evidence that Respondent was involved in any way in the training of these food service employees.

D. The TrainSafe Program as an "Approved Program"

54. The TrainSafe program purports to be "a revision of the approved food safety program listed as Chez Pierre on the

approval list with the state . . . . State Provider No. 7148473."

55. The TrainSafe program meets the minimum standards established in the Food Code.

56. There is no statute, rule, or Division policy that limits the revisions to the style, content or presentation of an approved program so long as the program continues to meet the minimum standards established in the Food Code.

57. Nevertheless, the Division staff determined that the TrainSafe program is not merely a revision of Respondent's approved food service training program, but rather an entirely different program than the program submitted by Respondent and approved by the Division in 2000. This determination was based primarily upon the differences in language, layout, and format between the two programs.

58. When asked to explain the dividing line between a permissible revision/update to an approved program and an impermissible conversion to a different program, Division witness Richard Akin[6/] logically testified:

> What I would typically look at as a revision is when the food code is updated.
>
> To give you an example, hot water was originally defined as 110 degrees, it has been subsequently redefined as 100 degrees, so that would be a revision to meet the food code. There's also -- at one point hot food was supposed to be held at 140 degrees, it's

> now held at 135, so that revision would need to be into any approved training program.
>
> THE COURT: What about the reformatting component? What -- where is the dividing line between permissible reformatting and impermissible, using my words, impermissible changing of programs?
>
> THE WITNESS: The Division doesn't really have a policy on that. We would just look at the statute, and there's nothing that's stated in there.

59. This testimony is consistent with the December 1, 2000, letter approving the FRA-provided program submitted by Respondent. The letter implicitly recognizes a distinction between the specific program –- "this program" – that was determined to meet the requirements for grandfathering and the program's "curriculum areas" that must be updated to reflect the periodic changes in the minimum standards in the Food Code.

60. Even a cursory review of the TrainSafe program (Joint Exhibit 12) and the program submitted by Respondent and approved by the Division in 2000 (Joint Exhibit 1) support the Division staff's determination. The only similarities between the programs are the subjects covered. The wording, layout, format, order of presentation, test questions, theme, pictures, and diagrams used in the programs are entirely different.

61. Every food safety training program must meet the minimum standards established by the current edition of the Food Code, so the fact that the TrainSafe program addresses the same

subjects as did Respondent's approved program is not determinative as to whether it is the same program.

62. The TrainSafe program, as such, was not in existence prior to July 1, 2000.

63. The TrainSafe program, as such, was not administered to food service employees prior to July 1, 2000, nor was it submitted to and approved by the Division prior to September 1, 2004, as required for grandfathering under Section 509.049(3), Florida Statutes.

64. The conversion of Respondent's grandfathered food safety training program into the TrainSafe program had the effect of transforming Respondent's approved program into an unapproved program because the program, in its current form (i.e., as TrainSafe), no longer meets the requirements of Section 509.049(3), Florida Statutes.

CONCLUSIONS OF LAW

65. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

66. The parties stipulated that as the provider of the state-contracted food service training program, FRLA has standing to participate in this proceeding.

67. The Division has the burden to prove the allegations in the Amended Administrative Complaint by clear and convincing

evidence. See Dept. of Banking & Finance v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

68. The essence of the Amended Administrative Complaint is contained in paragraph 17, which alleges that "Respondent has violated Section 509.049(3), (4), and (5), Florida, by using the unapproved food worker training program known as 'Trainsafe®.'"

69. Thus, in order to prove its case, the Division must establish, first, that Respondent used the TrainSafe program to train food service employees, and, second, that the TrainSafe program was an unapproved training program.

70. The Division failed to meet its burden of proof as to the first issue; the evidence does not clearly and convincingly establish that Respondent used the TrainSafe program to train any food service employees.

71. To the contrary, the more persuasive evidence establishes that Respondent uses the state-contracted FRLA program to train its employees (at least those that were not already trained at a culinary school); that Respondent did not use the TrainSafe program or any other training program, including its grandfathered program to train employees of other food service establishments; that the first use of the provider number associated with Respondent's grandfathered program, occurred more than three months after Respondent sold the program to FAMOS; and that it was FAMOS, not Respondent, that

used the TrainSafe program to train employees of other food service establishments between October 11, 2008, and January 29, 2009.

72. In light of this conclusion, it is not necessary to reach the second issue as to whether the TrainSafe program is an approved program. Nevertheless, this issue will be addressed in the event that the Division or an appellate court concludes that Respondent should be held responsible for the use of its Provider ID Number by FAMOS to train food service employees with the TrainSafe program since it is still the licensee of record for the program.

73. Section 509.049(1), Florida Statutes, provides:

> The division shall adopt, by rule, minimum safety protection standards for the training of all 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 provide for a food safety training certificate program for food service employees to be administered by a private nonprofit provider chosen by the division.

74. Each public food service establishment is required to provide training for its employees using a training program approved by the Division. See § 509.049(1) and (5), Fla. Stat.

75. Section 509.049, Florida Statutes, provides for two types of approved training programs: the state-contracted

program selected pursuant subsection (2) and approved, grandfathered programs under subsection (3).

76. Section 509.049(3), Florida Statutes, provides:

> Any food safety training program established and administered to food service employees utilized at a licensed public food service establishment prior to July 1, 2000, shall be submitted by the operator or the third-party provider to the division for its review and approval on or before September 1, 2004. If the food safety training program is found to be in substantial compliance with the division's required criteria and is approved by the division, nothing in this section shall preclude any other operator of a food service establishment from also utilizing the approved program or require the employees of any operator to receive training from or pay a fee to the division's contracted provider. Review and approval by the division of a program or programs under this section shall include, but need not be limited to, verification that the licensed public food service establishment utilized the program prior to July 1, 2000, and the minimum food safety standards adopted by the division in accordance with this section.

77. Section 509.049(4), Florida Statutes, authorizes the Division to "revoke a program's approval if it finds a program is not in compliance with this section or the rules adopted under this section." (Emphasis supplied).

78. The reference in Section 509.049(4), Florida Statutes, to "this section" encompasses all of the provisions of Section 509.049, Florida Statutes, not just the requirement in

subsection (4) that the program continue to meet the minimum standards in the Food Code.

79. The requirements for the approval of a program under Section 509.049(3), Florida Statutes, are that the program was "utilized at a licensed public food service establishment prior to July 1, 2000"; that it was "submitted . . . to the division for its review and approval on or before September 1, 2004"; and that the program "utilized . . . the minimum food safety standards adopted by the division."

80. A program that no longer meets these requirements does not comply with Section 509.049, Florida Statutes, and its approval is subject to revocation by the Division.

81. The evidence clearly and convincingly establishes that the TrainSafe program does not comply with Section 509.049, Florida Statutes, because even though it meets the minimum standards in the Food Code, it was not the training program utilized by Respondent (or any other food service establishment) prior to July 1, 2000, nor was it the program submitted by Respondent to the Division for its review and approval prior to September 1, 2004.

82. In reaching this conclusion, the undersigned did not overlook the testimony of the Division staff that there is no express prohibition against revising or making changes to a grandfathered program. However, consistent with Mr. Akin's

reasonable explanation that there is a difference between merely updating an approved program and converting it into an entirely different program, the overwhelming weight of the evidence in this case establishes that the "re-branding" of Respondent's approved program as TrainSafe was effectively the creation of an entirely new program rather than a mere update to the Respondent's grandfathered program.[7/]

83. On this point, the undersigned agrees with the argument of the Division and FRLA that the deadlines in Section 509.049(3), Florida Statutes, would be rendered meaningless if, as Respondent contends, a grandfathered program could be "re-branded" or otherwise changed into a completely different program as was done in this case. Surely that is not what the Legislature intended when it provided for grandfathering of existing training programs and allowed their continued use in lieu of the program selected for statewide use by the Division under Section 509.049(2), Florida Statutes.

84. Therefore, in the event that the Division concludes that Respondent should be held responsible for the use of its Provider ID Number by FAMOS to train food service workers using the TrainSafe program, the Division should revoke the approval of the program because it no longer meets the requirements of Section 509.049, Florida Statutes. See § 509.049(4), Fla. Stat.

85. No additional penalty (such as the $1,000 administrative fine sought by the Division[8/]) should be imposed on Respondent; the revocation of the program's approval is a sufficient penalty under the circumstances. Indeed, although Respondent is not entirely blameless in this matter, the evidence establishes that Mr. Favier was merely an unwitting accomplice (rather than a knowing co-conspirator) to Mr. Wallace's less-than-forthright effort to get the entirely new TrainSafe program approved by the Division in the guise of a revision to Respondent's grandfathered program.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Division issue a final order dismissing the Amended Administrative Complaint.

DONE AND ENTERED this 15th day of April, 2009, in Tallahassee, Leon County, Florida.

T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of April, 2009.

ENDNOTES

1/ All statutory references are to the 2008 version of the Florida Statutes unless otherwise indicated.

2/ FRLA proffered evidence as to why Respondent submitted the FRA-provided program to the Division for grandfathering and who was involved in the submittal on behalf of FRA. This information –- some of which made it into the record in Intervenor's Exhibits 6 and 16 -- adds a level of irony to this case, but it has no bearing on the issue framed by the Amended Administrative Complaint. Simply put, this case turns not upon what Respondent's program once was or how it came to be grandfathered, but rather on what the program has become and whether the sale of, or the changes to, the program cause it to lose its grandfathered status such that the program in its present form is effectively a new, unapproved program that has been used by Respondent to train food service employees.

3/ The Sale Agreement defines "gross profit" as "the gross amount of revenue generated by the program, minus the costs of printing, re-design development, distribution, database maintenance and marketing cost."

4/ It is noteworthy that the petition filed by Respondent in response to the Administrative Complaint makes no reference to the fact that Respondent sold its approved program to FAMOS.

5/ It is not entirely clear why the contact information was not changed back to that of Respondent. Indeed, although the Division was technically without authority to make any changes to the list while the matter was pending at DOAH, after the case was closed as moot, the list should have reverted back to the way it was prior to October 16, 2008, because the preliminary agency action that was challenged by FRLA became a nullity upon the withdrawal of the request that led to the preliminary agency action.

6/ Mr. Akin is the Deputy Bureau Chief of the Division's Bureau of Sanitation and Safety Inspections. He is the person within the Department of Business and Professional Regulation with the most knowledge regarding the administration and approval of food worker training programs.

7/ It is not necessary in this case to determine where the line should be drawn between a permissible revision to a grandfathered training program and an impermissible substitution of a new program for a grandfathered program. This is the first case in which the Division has confronted this issue, and the precise location of the line will be fleshed out through the adjudication of future cases. See generally McDonald v. Dept. of Banking & Finance, 346 So. 2d 569 (Fla. 1st DCA 1977).

8/ It is noteworthy that the Division did not request that the fine be based upon each use of the TrainSafe program even though Section 509.261(1)(a), Florida Statutes, authorizes the Division to impose "[f]ines not to exceed $1,000 per offense" (emphasis supplied).

COPIES FURNISHED:

Charles Tunnicliff, Esquire
Eric C. Hurst, Esquire
Department of Business &
Professional Regulation
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-2202

Maureen M. Daughton, Esquire
Cathy M. Sellers, Esquire
Broad and Cassel
215 South Monroe Street, Suite 400
Tallahassee, Florida 32302-1804

E. Gary Early, Esquire
Albert T. Gimbel, Esquire
Messer, Caparello & Self, P.A.
2618 Centennial Place
Tallahassee, Florida 32308

Ned Luczynski, General Counsel
Department of Business &
Professional Regulation
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-2202

William L. Veach, Director
Division of Hotels and Restaurants
Department of Business &
Professional Regulation
1940 North Monroe Street, Suite 60
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.