

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 09-0618
)
CHINA NO. 1,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case on April 14, 2009, by video teleconference at sites in Tallahassee and Orlando, Florida, before Carolyn S. Holifield, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: LeChea Parson, Esquire
Charles Tunnicliff, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-2202

For Respondent: Frank Liu, pro se
China No. 1
2595 South Hiawasse Road
Orlando, Florida 34744

STATEMENT OF THE ISSUES

The issues are whether Respondent committed the acts alleged in the Administrative Complaint dated October 20, 2008, and, if so, what penalty should be imposed against Respondent's license.

PRELIMINARY STATEMENT

On or about October 20, 2008, Petitioner, the Department of Business and Professional Regulation, Division of Hotels and Restaurants ("Division"), filed an Administrative Complaint alleging that in July and September 2008, Respondent, China No. 1 ("Respondent"), violated standards governing public food service establishments. Specifically, the Administrative Complaint charged Respondent with violating Food Code Rules 4-302.12, 3-302.11(A)(2), 4-601.11(C) and 6.202.14; Florida Administrative Code Rule 61C-1.004(2)(a) and (b); and Subsection 509.292(1), Florida Statutes (2008).¹ Respondent disputed the allegations and timely requested an evidentiary hearing.

The matter was referred to the Division of Administrative Hearings on February 4, 2009, for assignment of an Administrative Law Judge to conduct the hearing.

At hearing, the Division presented the testimony of Norma Gordon, a sanitation and safety specialist with the Division. The Division's Exhibits 1 through 4 were admitted into evidence.

Respondent presented the testimony of Frank Liu. Respondent offered no exhibits into evidence.

Prior to the evidentiary part of the hearing, the Division advised Respondent and the undersigned that it was deleting Count 6 of the Administrative Complaint, which charged Respondent with violating Subsection 509.292(1), Florida Statutes, because that violation had been corrected. Also, at the request of the Division, the undersigned took official recognition of the above-referenced provisions, rules, and statutory provisions.

The Transcript of the hearing was filed with the Division of Administrative Hearings on April 29, 2009. The Division timely filed its Proposed Recommended Order on May 11, 2009. Respondent did not file a proposed recommended order.

FINDINGS OF FACT

1. At all times material hereto, Respondent was a public food establishment, licensed and regulated by the Division. Respondent's license number is 5810388.

2. Respondent's address is 2595 South Hiawasse Road, Orlando, Florida 32835.

3. Norma Gordon is employed by the Division as a sanitation and safety specialist and has worked in that position for four years. Ms. Gordon's job responsibilities include inspecting public food establishments that are regulated by the

Division. To effectively carry out job responsibilities, Ms. Gordon had been trained in the areas of Food and Drug standardization, as well as the laws and rules related to the Food Code. Moreover, Ms. Gordon has successfully completed certified manager training. As part of her job, Ms. Gordon participates in monthly continuing education. During her employment with the Division, Ms. Gordon conducts about 1,000 inspections annually.

4. On July 22, 2008, Ms. Gordon conducted a routine inspection of the premises of China No. 1. During the inspection, Ms. Gordon observed about 15 violations, eight of which were deemed to be critical violations.

5. Ms. Gordon set forth her findings and listed all the violations on a Food Service Inspection Report on the day of the inspection. That same day, Ms. Gordon provided a copy of the report to Frank Liu, food manager for Respondent. The Food Service Inspection Report notified Mr. Liu that a call back inspection would be conducted on September 22, 2008, to determine if the violations had been corrected. Mr. Liu signed the Food Service Inspection Report on July 22, 2008, acknowledging that he received a copy of the Inspection Report.

6. On September 23, 2008, Ms. Gordon conducted a call back inspection of China No. 1. During that call back inspection, Ms. Gordon observed several violations that were reported on the

Food Service Inspection Report issued on July 22, 2008, but that had not yet been corrected.

7. Ms. Gordon recorded the uncorrected violations that she observed and verified during the September 23, 2008, callback inspection on a Call Back Inspection Report form. That Call Back Inspection Report was completed on September 23, 2008, and signed by Mr. Liu.

8. The uncorrected violations observed and verified on September 23, 2008, are set forth below in paragraphs 9 through 13.

9. The first uncorrected violation was that raw animal foods were not properly separated from each other in the holding unit. Ms. Gordon observed raw chicken stored above the raw beef and vegetables in the upright reach-in freezer. This was a critical violation because food must be protected from cross-contamination. For example, the raw chicken has salmonella, which requires that it be cooked at a certain temperature. Cross-contamination may occur when raw meat products are not separated from each other and/or are stored next to vegetables, because the meats and vegetables have different cooking temperatures.

10. The second uncorrected violation was that Respondent did not have a thermometer available to measure the temperature of the food products. This is a critical violation because such

a device is necessary to ensure that foods are prepared and maintained at appropriate temperatures.

11. The third uncorrected violation was that the bathroom door in the establishment was being left open at times other than during the cleaning or maintenance of the facility. This is deemed to be a critical violation.

12. The fourth uncorrected violation was that the restroom was in disrepair. Respondent's establishment had only one toilet. That one toilet had no handle or mechanical device that could be used to flush the toilet. Instead, there was a string tied to the toilet and the handicap bar in the stall. Somehow this mechanism was "rigged" so that in order to flush the toilet, a person had to pull the string that was tied to the handicap bar in the stall.

13. The fifth uncorrected violation was based on the medium build-up of grease on the hood filters above the cooking area. This is a non-critical violation, but can become a critical violation if the equipment is not maintained and cleaned. If the equipment in the cooking area is not kept clean, dust, debris and other residue will accumulate and may fall in the cooking area and/or in the food being cooked.

14. Respondent presented no evidence to establish that the violations described above were corrected on September 23, 2008. Moreover, Mr. Liu did not dispute the evidence presented. His

testimony was that most of the violations were corrected in December 2008, which was after the call back inspection.

15. Critical violations are violations that can contribute to food contamination, illness, environmental degradation and/or environmental hazard.

16. Non-critical violations are those which, initially, do not pose an immediate threat. However, if such violations remain uncorrected, they may turn into critical violations.

17. On or about March 21, 2008, the Division issued an Administrative Complaint against Petitioner alleging violations of Chapter 509, Florida Statutes, and/or rules promulgated thereto. The charges set out in that Administrative Complaint were based on inspections conducted on September 27, 2007, and February 27, 2008. No hearing was held in the matter. Rather, the matter was resolved in April 2008, pursuant to a Stipulation and Consent Order executed by the Division and Respondent. Pursuant to that Stipulation, Respondent agreed to pay a \$2,300.00 fine and have its manager and employee attend the Hospitality Education Program.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes. See also Fla. Admin. Code R. 61C-1.0021(4).

19. The Division is the state agency responsible for licensing and inspecting public food service establishments. See §§ 509.032 and 509.241, Fla. Stat.

20. A "public food service establishment" is defined in Subsection 509.013(5)(a), Florida Statutes, as follows:

(5)(a) "Public food service establishment" means any building, vehicle, place, or structure, or any room or division in a building, vehicle, place, or structure where food is prepared, served, or sold for immediate consumption on or in the vicinity of the premises; called for or taken out by customers; or prepared prior to being delivered to another location for consumption.

21. Each "public food service establishment" must have a license from the Division prior to commencement of operation. § 509.241, Fla. Stat.

22. The Division is authorized to take disciplinary action against the holder of such license for operating in violation of Chapter 509, Florida Statutes, or the rules implementing that chapter. Such disciplinary action may include suspension or revocation of the license; imposition of an administrative fine not to exceed \$1,000.00 for each separate offense; and mandatory attendance, at personal expense, at an educational program sponsored by the Hospitality Education Program. § 509.261, Fla. Stat.

23. Here, the Division seeks to discipline Respondent's license and/or to impose an administrative fine. Accordingly, the Division has the burden to prove the allegations in the Administrative Complaint by clear and convincing evidence. See Dept. of Banking & Finance v. Osborne, Stern & Co., 670 So. 2d 932 (Fla. 1996).

24. Subsection 509.032(6), Florida Statutes, authorizes the Division to adopt such rules that are necessary to carry out the provision of that chapter.

25. Pursuant to its rulemaking authority, the Division has adopted rules governing public food service establishments contained in Florida Administrative Code Rule Chapters 61C-1 and 61C-4. The rules incorporate by reference portions of the Food Code adopted by the U.S. Food and Drug Administration, including those sections officially recognized at the final hearing. See, e.g., Fla. Admin. Code R. 61C-4.010(1), (5) and (6).

26. The Administrative Complaint alleges that on September 23, 2008, Respondent violated Food Code Rules 3-302.11(A)(2), 4-302.12, 4-601.11(C), and 6-202.14; and Florida Administrative Code Rule 61C-1.004(2)(a) and (b).

27. Food Code Rule 3-302.11(A)(2) states in relevant part:

(A) Food shall be protected from cross contamination by:

* * *

(2) Except when combined as ingredients, separating types of raw animal foods from each other such as beef, fish, lamb, pork, and poultry during storage, preparation, holding, and display by:

(a) Using separate equipment for each type, or

(b) Arranging each type of food in equipment so that cross contamination of one type with another is prevented, and

28. Food Code Rule 4-302.12 states in pertinent part:

(A) Food temperature measuring device shall be provided and readily accessible for use in ensuring attainment and maintenance of food temperatures as specified under Chapter 3.

29. Food Code Rule 4-601.11(C) states in pertinent part:

(C) Nonfood-contact food surfaces of equipment shall be kept free of an accumulation of dust, dirt, food residue, and other debris.

30. Food Code Rule 6-202.14 and Florida Administrative Code Rule 61C-1.004(2)(b) provide the requirements for the doors of public bathrooms and public food service establishments, respectively.

31. Food Code Rule 6-202.14 states in pertinent part:

A toilet room located on the premises shall be completely enclosed and provided with a tight-fitting and self-closing door except that this requirement does not apply to a toilet room that is located outside a food establishment and does not open directly into the food establishment such as a toilet

room that is provided by the management of a shopping mall.

32. Florida Administrative Code Rule 61C-1.004(2)(b)

states:

(2) Public bathrooms.

* * *

(b) Public bathrooms shall be completely enclosed and shall have tight-fitting, self closing doors or, in public lodging establishments or bathrooms located outside a public food service establishment, have entrances and exits constructed in such a manner as to ensure privacy of occupants. Such doors shall not be left open except during cleaning or maintenance.

33. Florida Administrative Code Rule 61C-1.004(2)(a)

states:

(2) Public bathrooms.

(a) Each public lodging and food service establishment shall be provided with adequate and conveniently located bathroom facilities for its employees and guests in accordance with provisions of these rules and the plumbing authority having jurisdiction. Public access to toilet facilities shall not be permitted through food preparation, storage, or warewashing areas. Bathroom fixtures shall be of readily cleanable sanitary design. Bathroom facilities shall be kept clean, in good repair and free from objectionable odors. Bathrooms shall provide at least 20 foot candles of light. The walls, ceilings and floors of all bathroom shall be kept in good condition.

34. The Division met its burden of proof.

35. The clear and convincing evidence established that Respondent violated Food Code Rules 3-302.11(A)(2), 4-302.12, 4-601.11(C) and 6-202.14; and Florida Administrative Code Rule 61C-1.004(2)(a) and (b), as alleged in the Administrative Complaint.²

36. The Division proposed an administrative fine of \$1,000.00 for each of the five violations or a total administrative fine of \$5,000.00. Moreover, the Division proposed that Respondent's employees attend an educational program sponsored by the Hospitality Education Program. The proposed penalty is within the scope of those authorized by Subsections 509.261(1)(a) and (b), Florida Statutes.

RECOMMENDATION

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

RECOMMENDED that Petitioner, Department of Business and Professional Regulation, Division of Hotels and Restaurants, enter a final order:

1. Finding that Respondent, China No. 1, violated Food Code Rules 3-302.11(A)(2), 4-302.12, 4-601.11(C) and 6-202.14; and Florida Administrative Code Rule 61C-1.004(2)(a) and (b);

2. Imposing a total administrative fine of \$5,000.00 against Respondent. The total administrative fine shall be paid to the Division of Hotels and Restaurants, 1940 North Monroe

Street, Tallahassee, Florida 32399-1011, within 30 days of the agency entering its final order in this case; and

3. Requiring Respondent (through its employees, owners, and/or managers) to attend, at personal expense, an educational program sponsored by the Hospitality Education Program.

DONE AND ENTERED this 30th day of June, 2009, in Tallahassee, Leon County, Florida.

Carolyn S. Holifield

CAROLYN S. HOLIFIELD
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 30th day of June, 2009.

ENDNOTES

^{1/} All statutory references are to Florida Statutes (2008), unless otherwise noted.

^{2/} Both Food Code Rule 6-202.14 and Florida Administrative Code Rule 61C-1.004(2)(b) address the problem with the bathroom door on Respondent's premises (i.e. the door will not stay closed). Thus, the violation of the foregoing provisions is treated as only one violation.

COPIES FURNISHED:

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

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

Frank Liu
China No. 1
2595 South Hiawasse Road
Orlando, Florida 34744

Charles Tunnickliff, Esquire
LeChea Parson, Esquire
Department of Business and
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.