STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-2136
	)	
WHISTLE STOP LOUNGE, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on August 14, 2009, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Victoria Coleman-Miller, Esquire
Department of Health
Palm Beach County Health Department
800 Clematis Street
West Palm Beach, Florida 33401

For Respondent: James S. Lewis, Esquire
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Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUES

The issues in this disciplinary proceeding arise from Petitioner's allegation that Respondent, which operates a bar and lounge, violated several statutes and rules governing food service establishments. If Petitioner proves one or more of the

alleged violations, then it will be necessary to consider whether penalties should be imposed on Respondent.

PRELIMINARY STATEMENT

On March 31, 2009, Petitioner Department of Health issued an Administrative Complaint against Respondent Whistle Stop, Inc., charging the licensee with various offenses relating to noncompliance with the statutes and rules governing food service establishments. Respondent timely requested a formal hearing to contest these allegations, and, on April 21, 2009, the matter was filed with the Division of Administrative Hearings.

The final hearing took place on August 14, 2009, as scheduled, with both parties present. Petitioner offered Petitioner's Exhibits 1 through 31, each of which was received in evidence without objection. In addition, Petitioner called as witnesses its employees Barbara Hoggard and Daniel Alterwein. Rose Sheffler, the owner and operator of the establishment in question, testified on behalf of Respondent. No Respondent's exhibits were offered.

The final hearing was recorded, but a transcript thereof has not been made. The parties were directed to file their respective proposed recommended orders no later than September 24, 2009. Petitioner timely submitted a proposed recommended order that has been carefully considered. Respondent did not file a post-hearing submission of any kind.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2008 Florida Statutes.

FINDINGS OF FACT

1. At all times relevant to this case, Respondent Whistle Stop Lounge, Inc. ("Whistle Stop") operated a duly licensed "bar and lounge" at a location in Boca Raton, Florida. Because the business activities of this enterprise also brought it within the statutory definition of a "food service establishment," Whistle Stop was required to be, and was, separately licensed as such.

2. As a licensed food service establishment, Whistle Stop is subject to the regulatory and disciplinary jurisdiction of Petitioner Department of Health ("Department").

3. The Department is charged with the duty of inspecting food service establishments for compliance with sanitation rules designed to protect the public against food-borne illnesses. Accordingly, agents of the Department have inspected Whistle Stop's premises on many occasions, as a routine matter. Whistle Stop, however, has had ongoing problems with compliance since at least 2004, with the result that the Department has inspected its establishment more frequently than otherwise might have been the case.

4. Indeed, from January 2008 though March 2009, the Department inspected Whistle Stop's premises 16 times——at least

once in each of 10 separate months——and determined that Whistle Stop's compliance was "unsatisfactory" during 14 of those visits.

5. During the referenced period, the Department twice concluded that Whistle Stop's establishment constituted an imminent danger to the public health. Consequently, the Department issued stop-sale orders on March 13, 2008, and November 7, 2008, each of which required Whistle Stop to close its doors. Although both stop-sale orders were lifted several weeks after their respective dates of issuance, the underlying problems subsisted, albeit in lesser degrees of severity.

6. The problems that most concerned the Department can be divided into three categories: (a) the persistent presence on the premises of roaches, rodents, and flies; (b) the persistent presence on the premises of "potentially hazardous food"; and (c) the persistent presence on the premises of improperly stored garbage.

7. The evidence clearly proves, and the undersigned finds, that Whistle Stop's establishment suffered from chronic infestations of roaches, flies, and rats, which persisted from January 2008 until at least December 11, 2008. During this period, Whistle Stop failed (or was unable) to take *effective* measures to protect against the entrance of such vermin.

8. The undersigned finds, based on clear and convincing evidence, that within Whistle Stop's premises were routinely kept a variety of "potentially hazardous food" in kinds and quantities that were inconsistent with the owner's explanation that such food was the employees' personal property being temporarily stored for their convenience. Although the Department's agents did not observe potentially hazardous food being served to, or consumed by, Whistle Stop's patrons, they did witness such food in a frozen state and being thawed.

9. For example, on November 7, 2008, chicken breast strips were seen to be decaying in a freezer on the premises. That same day, ground sausage was observed in a cooler, at a temperature that was above freezing and inadequate for long-term storage. On December 11, 2008, the Department's agents witnessed shrimp that was defrosting in the refrigerator, and butter that had been "out of temperature" for more than four hours and needed to be discarded. It is evident that on these occasions (and others), potentially hazardous food items at Whistle Stop's premises were subjected to activities that involved temperature changes, which is a form of "food preparation" according to the relevant regulatory definition of the term.

10. There is clear and convincing evidence that garbage was often stored within Whistle Stop's premises in uncovered

containers without first having been placed in plastic bags or wet-strength paper bags, and the undersigned so finds. The Department's agents observed such improper storage of garbage on November 7, 2008; November 13, 2008; and December 11, 2008.

Ultimate Factual Determinations

11. It is determined, as a matter of ultimate fact, that Whistle Stop is guilty of failing to comply with Florida Administrative Code Rule 64E-11.007(7), which requires food service establishments to take effective measures for controlling vermin on the premises.

12. It is determined, as a matter of ultimate fact, that Whistle Stop is guilty of causing or allowing potentially hazardous food to be prepared on its premises, in violation of Florida Administrative Code Rule 64E-11.002(4)(c), which prohibits such food preparation at a bar and lounge (unless the establishment, *unlike* Whistle Stop, is also licensed as a restaurant).

13. It is determined, as a matter of ultimate fact, that Whistle Stop is guilty of failing to comply with Florida Administrative Code Rule 64E-11.007(6), which prescribes the requirements for storing and disposing of garbage at a food service establishment.

Additional Findings Pertaining to Administrative Fines

14. Having found that Whistle Stop has operated in violation of applicable rules, and in view of the Department's stated intent to impose a fine in excess of $25,000, it is necessary to make some additional findings concerning facts that bear on the amount of fine to be imposed.

15. Each time the Department's agents inspected Whistle Stop's premises, a Food Service Inspection Report was prepared, using a form that the agency has developed for this purpose. The form contained the following notice:

> Items marked below violate the requirements of Chapter 64E-11 of the Florida Administrative Code and must be corrected. Continued operation of this facility without making these corrections is a violation of [applicable law]. Violations must be corrected by the date and time indicated in the Results section above or an administrative fine or other legal action will be initiated.

This language expressly warned the licensee of the consequences of failing timely to fix an identified violation; implicitly, it told the licensee that if a violation were corrected within what was, effectively, a "grace period" until the next inspection, then disciplinary action (e.g., administrative fine or other legal action) would not be taken with regard to that violation.

16. Some of the violations for which the Department wants to impose an administrative fine were timely corrected. One

such violation was Whistle Stop's preparation of potentially hazardous food on November 7, 2008, for which the Department would impose a $500 fine. This problem was corrected before the next inspection on November 13, 2008, at which time this particular violation was not noted.

17. Similarly, the Department cited Whistle Stop for preparing potentially hazardous food on December 11, 2009, and it wants to impose a fine of $500 for the violation, which was found herein to have occurred. Whistle Stop, however, had corrected the violation by January 9, 2009, when the Department next inspected its premises.

18. The Department seeks to impose a fine of $500 per day for Whistle Stop's failure to take effective measures for controlling vermin between December 11, 2008 and January 9, 2009. Whistle Stop was cited for this violation on December 11, 2008, but *not* on January 9, 2009, which means that Whistle Stop corrected the problem at some point before the Department's next inspection. (There is no evidence, moreover, as to *when* this violation was corrected; thus, even if it were appropriate to impose a fine for a violation that the licensee corrected during the apparent grace period, which is contrary to the undersigned's view, the undersigned could not ascertain for how long the violation actually continued after December 11, 2008.)

19. The Department intends to impose fines of $125 apiece for Whistle Stop's failures properly to store garbage on the dates of November 13, 2008, and December 11, 2008. Each of these violations had been corrected, however, before the next inspections, which took place, respectively, on November 19, 2008, and January 9, 2009.

20. In contrast to the foregoing, there are other violations for which the Department would impose a fine that Whistle Stop did *not* timely correct. Whistle Stop was cited for improper storage of garbage on November 7, 2008, and that problem was not fixed by the next inspection on November 13, 2008. The Department intends to impose of fine of $125 for this violation.

21. Finally, the Department wants to fine Whistle Stop $500 per day (which amounts to $9,500) for the period from November 7, 2008, to November 26, 2008, for the licensee's continuing failure to control vermin on the premises. This violation did, in fact, continue throughout the subject period and was not timely corrected.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2009).

23. Section 381.0072, Florida Statutes, defines, as follows, the Department's jurisdiction in regard to food service protection:

> It shall be the duty of the Department of Health to adopt and enforce sanitation rules consistent with law to ensure the protection of the public from food-borne illness. These rules shall provide the standards and requirements for the storage, preparation, serving, or display of food in food service establishments as defined in this section and which are not permitted or licensed under chapter 500 or chapter 509.

24. The term "food service establishment" is defined to mean:

> any facility, as described in this paragraph, where food is prepared and intended for individual portion service, and includes the site at which individual portions are provided. The term includes any such facility regardless of whether consumption is on or off the premises and regardless of whether there is a charge for the food. The term includes detention facilities, child care facilities, schools, institutions, civic or fraternal organizations, bars and lounges and facilities used at temporary food events, mobile food units, and vending machines at any facility regulated under this section. The term does not include private homes where food is prepared or served for individual family consumption; nor does the term include churches, synagogues, or other not-for-profit religious organizations as long as these organizations serve only their members and guests and do not advertise food or drink for public consumption, or any facility or establishment permitted or licensed under chapter 500 or chapter 509; nor does the term include any theater, if

> the primary use is as a theater and if patron service is limited to food items customarily served to the admittees of theaters; nor does the term include a research and development test kitchen limited to the use of employees and which is not open to the general public.

§ 381.0072(1)(b), Fla. Stat. (emphasis added).

25. The term "bars and lounges" is defined in Florida Administrative Code Rule 64E-11.002(4), which provides as follows:

> A ["bar and lounge" is a]facility which possesses a consumption on premises alcoholic beverage license from the Division of Alcoholic Beverages & Tobacco; where food service is limited to:
> (a) The preparation of drinks; or
> (b) The service of non-potentially hazardous snack foods (such as, chips, popcorn and pretzels); or
> (c) The service of potentially hazardous foods and no preparation of potentially hazardous food occurs.

26. Other relevant definitions are provided in Rule 64E-11.002, namely:

> (16) "Food" – Any raw, cooked or processed edible substance, ice, beverage or ingredient used or intended for use in whole, or in part, for human consumption.
>
> * * *
>
> (18) "Food preparation" – The manipulation of foods intended for human consumption by such means as washing, slicing, peeling, chipping, shucking, scooping, and/or portioning. The term also includes those activities involving temperature changes, combining ingredients, opening ready-to-eat

food packages, or any other activity causing physical or chemical alterations in the food.

* * *

(36) "Potentially hazardous food" – Any perishable food which consists in whole or in part of milk or milk products, eggs, meat, poultry, fish, shellfish, edible crustacea, or other ingredients, including synthetic ingredients, in a form:
(a) Capable of supporting rapid and progressive growth of infectious or toxigenic microorganisms; or
(b) Capable of supporting the slower growth of Clostridium botulinum.
(c) The term "potentially hazardous food" does not include foods which have a pH level of 4.6 or below or a water activity (Aw) value of 0.85 or less, or air-cooled hard-boiled eggs with the shell intact.

27. The standards and requirements for the storage, preparation, serving, or display of food in food service establishments are prescribed in Florida Administrative Code Rule 64E-11.007, which includes the following:

(6) Garbage and rubbish disposal
(a) All garbage and rubbish containing food wastes shall, prior to disposal, be kept in leakproof, nonabsorbent containers which shall be kept covered with tight fitting lids; provided that such containers need not be covered when stored in a special vermin proofed room or in a closed food waste refrigerator. Containers which do not have tight fitting vermin proof lids may be used only if garbage is first placed in plastic bags or wet-strength paper bags which are securely tied closed. All other rubbish shall be stored in an approved manner. The rooms, enclosures, areas and containers used shall be adequate for the

storage of all food wastes and rubbish which accumulates between periods of removal.

(b) Garbage and refuse containers, compactors and dumpsters located outside shall be stored on or above a smooth surface of nonabsorbent material such as concrete that is kept clean and maintained in good repair. If a compactor system is used for the storage of garbage, and the garbage is not stored in a self-contained and leak proof system, the compactor shall be placed on a concrete pad which is graded to drain into a sanitary sewer system.

(c) Adequate cleaning facilities shall be provided and each container, room or area shall be thoroughly cleaned after the emptying or removal of garbage and rubbish. Waste water from such cleaning operations shall be disposed of as sewage. Food waste grinders, if used, shall be suitably constructed and shall be installed in accordance with provisions of the applicable plumbing authority. All garbage and rubbish shall be removed from the food establishment premises with sufficient frequency to prevent nuisance conditions and shall be disposed of in accordance with provisions of Chapter 62-701, F.A.C.

(7) Vermin control – Effective control measures shall be taken to protect against the entrance into the food 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. All openings to the outside air, including windows, doors, skylights, transoms, intake and exhaust ducts shall be effectively protected against the entrance of flies and other flying insects by self-closing doors which open outward, closed windows, screening, controlled air currents or other effective means. Screening material shall not be less than 16 mesh to the inch or equivalent and screens for windows, doors, skylights, transoms and other openings to

> the outside air shall be tight fitting and free of breaks. Insecticides or rodenticides, when used, shall be used in full compliance with Chapter 5E-14, F.A.C.

28. The Department is charged with the duty of inspecting "each food service establishment as often as necessary to ensure compliance with applicable laws and rules." § 381.0072(2)(c), Fla. Stat.

29. Section 381.0072(5), Florida Statutes, sets forth the acts for which the Department may impose discipline. This statute provides as follows:

> (a) The department may impose fines against the establishment or operator regulated under this section for violations of sanitary standards, in accordance with s. 381.0061. All amounts collected shall be deposited to the credit of the County Health Department Trust Fund administered by the department.
>
> (b) The department may suspend or revoke the license of any food service establishment licensed under this section that has operated or is operating in violation of any of the provisions of this section or the rules adopted under this section. Such food service establishment shall remain closed when its license is suspended or revoked.
>
> (c) The department may suspend or revoke the license of any food service establishment licensed under this section when such establishment has been deemed by the department to be an imminent danger to the public's health for failure to meet sanitation standards or other applicable regulatory standards.

> (d) No license shall be suspended under this section for a period of more than 12 months. At the end of such period of suspension, the establishment may apply for reinstatement or renewal of the license. A food service establishment which has had its license revoked may not apply for another license for that location prior to the date on which the revoked license would have expired.

30. Section 381.0061, Florida Statutes, which prescribes the Department's authority to impose administrative fines, provides as follows:

> (1) In addition to any administrative action authorized by chapter 120 or by other law, the department may impose a fine, which shall not exceed $500 for each violation, for a violation of s.381.006(16), s. 381.0065, s. 381.0066, s. 381.0072, or part III of chapter 489, for a violation of any rule adopted under this chapter, or for a violation of any of the provisions of chapter 386. Notice of intent to impose such fine shall be given by the department to the alleged violator. Each day that a violation continues may constitute a separate violation.
>
> (2) In determining the amount of fine to be imposed, if any, for a violation, the following factors shall be considered:
>
> (a) The gravity of the violation, including the probability that death or serious physical or emotional harm to any person will result or has resulted, the severity of the actual or potential harm, and the extent to which the provisions of the applicable statutes or rules were violated.
>
> (b) Actions taken by the owner or operator to correct violations.
>
> (c) Any previous violations.

> (3) All amounts collected under this section shall be deposited into an appropriate trust fund of the department.

31. Being penal in nature, the foregoing statutes and rule provisions "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Department of Professional Regulation, Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992).

32. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a license is penal in nature. State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Department must prove the charges against Whistle Stop by clear and convincing evidence. Department of Banking & Fin., Div. of Sec. & Investor Protection v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996)(citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Department of Business & Professional Regulation, Bd. of Medicine, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

33. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

> clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

34. The undersigned has determined, as a matter of ultimate fact, that the Department established Whistle Stop's guilt regarding noncompliance with the following laws: Florida Administrative Code Rule 64E-11.007(7); Florida Administrative Code Rule 64E-11.002(4)(c); and Florida Administrative Code Rule 64E-11.007(6). In making these determinations, the undersigned concluded that the plain language of the applicable statutes and rules, being clear and unambiguous, could be applied in a

straightforward manner to the historical events at hand without simultaneously examining extrinsic evidence of legislative intent or resorting to principles of interpretation. It is therefore unnecessary to make additional legal conclusions concerning these violations.

35. The Department has urged the undersigned to recommend that Whistle Stop be fined a total of $25,375. The undersigned concludes, however, that the imposition of fines for those violations which Whistle Stop timely corrected within the grace period specified in the respective Food Service Inspection Reports would be an unjust, if not abusive, exercise of discretion and therefore recommends that fines *not* be imposed for such violations.

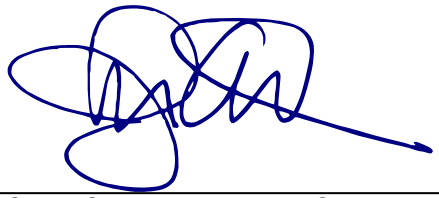
36. As for those violations which were not timely corrected, however, the Department's desired penalty of $9,625 is within the statutorily authorized guidelines. Having considered the factors set forth in Section 381.0061(2), Florida Statutes, the undersigned concludes that, under the circumstances, an administrative fine in this amount is reasonable and just.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order: (a) finding Whistle Stop guilty in accordance with the foregoing

Recommended Order; (b) ordering Whistle Stop to pay an administrative penalty in the amount of $9,625; and (c) revoking Whistle Stop's food service establishment license.

DONE AND ENTERED this 20th of October, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.