

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 09-4258
)
RAM'S ROTI PALACE,¹)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on October 12, 2009, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

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

For Respondent: Frankie B. Ramsok, Manager
Ram's Roti Palace
Post Office Box 491912
Fort Lauderdale, Florida 33349

STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Administrative Complaint and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On January 29, 2009, Petitioner issued an Administrative Complaint alleging that, on October 29, 2008, and January 7, 2009, Respondent was in violation of Section 3-305.11 of the Food Code (Count 1); Section 4-101.11 of the Food Code (Count 2); Section 4-601.11(A) of the Food Code (Count 3); Section 4-602.13 of the Food Code (Count 4); Section 6-301.12 of the Food Code (Count 5); Section 6-202.15 of the Food Code (Count 6); and Section 509.049, Florida Statutes (Count 7).

On or about February 8, 2009, Respondent requested "an evidentiary hearing pursuant to Section 120.57(1), Florida Statutes," on the allegations made in the Administrative Complaint. On August 11, 2009, the matter was referred to DOAH for the assignment of a DOAH administrative law judge to conduct the hearing Respondent had requested.

As noted above, the hearing was held on October 12, 2009. Four witnesses testified at the final hearing: Novelette Williams and Sean Grosvenor (on behalf of Petitioner); and Rhoolkumari Nandkishore and Frankie Ramsook (on behalf of Respondent). In addition to the testimony of these four

witnesses, three exhibits (Petitioner's Exhibits 1 through 3) were offered and received into evidence.

At the close of the taking of evidence, the undersigned established a deadline (10 days from the date of the filing with DOAH of the hearing transcript) for the filing of proposed recommended orders.

The Transcript of the hearing (consisting of one volume) was filed with DOAH on October 21, 2009.

Petitioner filed its Proposed Recommended Order on October 26, 2009. To date, Respondent has not filed any post-hearing submittal.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Ram's Roti Palace (Restaurant) is a 900-square foot eating establishment located in Lauderdale Lakes, Florida, that serves Caribbean food. Its specialty is roti, a sandwich-like, flour-based "wrap." The vast majority of its sales are from take-out orders, but it does have tables and chairs for seated dining. The Restaurant's sales have decreased 20-25 percent from pre-recession levels, but unlike many of its competitors it has managed to survive and stay in business.

2. Frankie Ramsook is now, and has been since September 15, 1999, the holder of a license issued by Petitioner

(present license number SEA1618855) authorizing him to operate the Restaurant as a public food service establishment.

3. On October 29, 2009, Novelette Williams, a Senior Sanitation and Safety Specialist with Petitioner, along with Sean Grosvenor, a Sanitation and Safety Supervisor with Petitioner, conducted a "routine" inspection of the premises of the Restaurant. The inspection revealed, among other things, the following (which hereinafter will be referred to, collectively, as the "Conditions"): an opened bag of flour was kept on the floor in the kitchen; food items used to prepare dishes served in the Restaurant were stored on shelves, and in an unlocked freezer, both of which were located in a customer-accessible hallway leading to the Restaurant's bathroom²; food contact surfaces in the freezer were not smooth and easily cleanable, but rather were covered with newspapers (which could "rip and tear and become part of the food" stored in the freezer); accumulated dirt and other residue build-up were on food contact surfaces (on the stove, in the oven, in the microwave, on shelves, and in storage containers), as well as on non-food contact surfaces (around the stove and the exterior of the freezer); the Restaurant's bathroom had a sink for handwashing, but it was not equipped with individual, paper towels or other hand drying device³; and the rear door to the Restaurant was not self-closing.⁴ Furthermore, Mr. Ramsook was

unable to produce proof of employee food service training when asked to do so by Ms. Williams and Mr. Grosvenor during the inspection.

4. Before leaving the establishment, Mr. Grosvenor advised Mr. Ramsook, who was present during the inspection, that there would be a "callback" inspection to determine whether these Conditions had been corrected.

5. Ms. Williams and Mr. Grosvenor conducted a "callback" inspection of the premises of the Restaurant on January 7, 2009. The inspection revealed that each of the Conditions described in Finding of Fact 3 still existed, and, once again, Ms. Williams' and Mr. Grosvenor's request to see proof of employee food service training went unfulfilled.

CONCLUSIONS OF LAW

6. Petitioner has been statutorily delegated the authority to "carry out all of the provisions of [Chapter 509, Florida Statutes] and all other laws relating to the inspection or regulation of . . . public food service establishments for the purpose of safeguarding the public health, safety, and welfare." § 509.032, Fla. Stat.

7. A "public food service establishment," as that term is used in Chapter 509, Florida Statutes, is defined in Section 509.013(5)(a), Florida Statutes, as follows:

"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.

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

9. Disciplinary action may be taken against the holder of such license for "operating in violation of [Chapter 509, Florida Statutes] or the rules of [Petitioner]." Such disciplinary action may include one or more of the following penalties: license revocation, with the licensee unable to "apply for another license for that location prior to the date on which the revoked license would have expired"; license suspension (for a period not exceeding 12 months), with the licensee able to "apply for reinstatement or renewal of the license" following the suspension period; imposition of an administrative fine not to exceed \$1,000 for each separate offense⁵; and "[m]andatory attendance, at personal expense, at an educational program sponsored by the Hospitality Education Program." § 509.261, Fla. Stat.

10. The statutory and rule provisions, violation of which subject a licensee to disciplinary action pursuant to Section 509.261, Florida Statutes, include the following:

Section 509.049, Florida Statutes Food service employee training.--

(1) The [D]ivision [of Hotels and Restaurants of the Department of Business and Professional Regulation] 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. . . .

* * *

(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.

* * *

Florida Administrative Code Rule 61C-4.010
Sanitation and Safety Requirements.

(1) Food Supplies and Food Protection -
Except as specifically provided in this
rule, public food service establishments
shall be subject to the provisions of
Chapter 3, Food Code, as adopted by
reference in Rule 61C-1.001, F.A.C.[⁶]

* * *

(5) Food Equipment, Utensils and Linens -
Public food service establishments shall be
subject to the provisions of Chapter 4, Food
Code, as adopted by reference in Rule 61C-
1.001, F.A.C.

(6) Physical Facilities - Except as
specifically provided in these rules, the
physical facilities at public food service
establishments shall be subject to the
provisions of Chapter 6, Food Code, as
adopted by reference in Rule 61C-1.001,
F.A.C.

* * *

11. Section 3-305.11 of Chapter 3 of the Food Code (which
is incorporated by reference in Florida Administrative Code Rule
61C-4.010(1)) provides as follows:

Section 3-305.11 Food Storage

(A) Except as specified in ¶¶ (B) and (C)
of this section, food shall be protected
from contamination by storing the food:

- (1) In a clean, dry location;
- (2) Where it is not exposed to splash,
dust, or other contamination; and
- (3) At least 15 cm (6 inches) above the
floor.

(B) Food in packages and working containers may be stored less than 15 cm (6 inches) above the floor on case lot handling equipment as specified under § 4-204.122.

(C) Pressurized beverage containers, cased food in waterproof containers such as bottles or cans, and milk containers in plastic crates may be stored on a floor that is clean and not exposed to floor moisture.

12. Sections 4-101.11, 4-601.11(A), and 4.602.13 of Chapter 4 of the Food Code (which is incorporated by reference in Florida Administrative Code Rule 61C-4.010(5)) provide as follows:

Section 4-101.11 Characteristics

Materials that are used in the construction of utensils and food-contact surfaces of equipment may not allow the migration of deleterious substances or impart colors, odors, or tastes to food and under normal use conditions shall be:

(A) Safe;

(B) Durable, corrosion-resistant, and nonabsorbent; (C) Sufficient in weight and thickness to withstand repeated warewashing;

(D) Finished to have a smooth, easily cleanable surface; and

(E) Resistant to pitting, chipping, crazing, scratching, scoring, distortion, and decomposition.

* * *

Section 4-601.11 Equipment, Food-Contact Surfaces, Nonfood-Contact Surfaces, and Utensils.

(A) Equipment food-contact surfaces and utensils shall be clean to sight and touch.

* * *

Section 4-602.13 Nonfood-Contact Surfaces

Nonfood-contact surfaces of equipment shall be cleaned at a frequency necessary to preclude accumulation of soil residues.

* * *

13. Sections 6-202.15 and 6-301.12 of Chapter 6 of the Food Code (which is incorporated by reference in Florida Administrative Code Rule 61C-4.010(6)) provide as follows:

Section 6-202.15 Outer Openings, Protected

(A) Except as specified in ¶¶ (B), (C), and (E) and under ¶ (D) of this section, outer openings of a food establishment shall be protected against the entry of insects and rodents by:

- (1) Filling or closing holes and other gaps along floors, walls, and ceilings;
- (2) Closed, tight-fitting windows; and
- (3) Solid, self-closing, tight-fitting doors.

(B) Paragraph (A) of this section does not apply if a food establishment opens into a larger structure, such as a mall, airport, or office building, or into an attached structure, such as a porch, and the outer openings from the larger or attached structure are protected against the entry of insects and rodents.

(C) Exterior doors used as exits need not be self-closing if they are:

- (1) Solid and tight-fitting;
 - (2) Designated for use only when an emergency exists, by the fire protection authority that has jurisdiction over the food establishment; and
 - (3) Limited-use so they are not used for entrance or exit from the building for purposes other than the designated emergency exit use.
- (D) Except as specified in ¶¶ (B) and (E) of this section, if the windows or doors of a food establishment, or of a larger structure within which a food establishment is located, are kept open for ventilation or other purposes or a temporary food establishment is not provided with windows and doors as specified under ¶ (A) of this section, the openings shall be protected against the entry of insects and rodents by:
- (1) 16 mesh to 25.4 mm (16 mesh to 1 inch) screens;
 - (2) Properly designed and installed air curtains to control flying insects; or
 - (3) Other effective means.
- (E) Paragraph (D) of this section does not apply if flying insects and other pests are absent due to the location of the establishment, the weather, or other limiting condition.

* * *

Section 6-301.12 Hand Drying Provision

Each handwashing lavatory or group of adjacent lavatories shall be provided with:

- (A) Individual, disposable towels;

(B) A continuous towel system that supplies the user with a clean towel; or

(C) A heated-air hand drying device.

14. "No revocation [or] suspension . . . of any [public food service establishment] license is lawful unless, prior to the entry of a final order, [Petitioner] has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57." § 120.60(5), Fla. Stat.

15. The licensee must be afforded an evidentiary hearing if, upon receiving such written notice, the licensee disputes the alleged facts set forth in the administrative complaint. §§ 120.569(1) and 120.57, Fla. Stat.

16. At the hearing, Petitioner bears the burden of proving that the licensee engaged in the conduct, and thereby committed the violations, alleged in the administrative complaint. Proof greater than a mere preponderance of the evidence must be presented. Clear and convincing evidence of the licensee's guilt is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Pic N' Save of Central Florida v. Department of Business Regulation, 601 So. 2d

245, 249 (Fla. 1st DCA 1992); and § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute").

17. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). It is an "intermediate standard." Id. For proof to be considered "'clear and convincing' . . . 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 in 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." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

18. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific factual allegation(s) made in the charging instrument. Due process prohibits an agency from taking penal action against a licensee based on matters not

specifically alleged in the charging instrument, unless those matters have been tried by consent. See Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); and Luskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999).

19. The Administrative Complaint issued in the instant case alleges that, on October 29, 2008, and January 7, 2009, Respondent was in violation of Section 3-305.11 of the Food Code (Count 1); Section 4-101.11 of the Food Code (Count 2); Section 4-601.11(A) of the Food Code (Count 3); Section 4-602.13 of the Food Code (Count 4); Section 6-301.12 of the Food Code (Count 5); Section 6-202.15 of the Food Code (Count 6)⁷; and Section 509.049, Florida Statutes (Count 7).

20. Petitioner met its burden of establishing by clear and convincing evidence that Respondent committed each of these violations on October 29, 2008, and January 7, 2009. Accordingly, disciplinary action may be taken against Respondent pursuant to Section 509.261, Florida Statutes.

21. In its Proposed Recommended Order, Petitioner proposes that the undersigned recommend that Respondent be required to pay an administrative fine totaling \$3,100.00 for having committed these violations.

22. This is a reasonable and appropriate penalty that is within Petitioner's statutory authority to impose.⁸

23. Petitioner should consider, upon Respondent's written request, allowing Respondent to pay this fine in installments according a payment schedule acceptable to Petitioner.

RECOMMENDATION

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

RECOMMENDED that Petitioner issue a final order finding that Respondent committed the violations alleged in the Administrative Complaint and disciplining Respondent therefor by imposing a fine in the total amount of \$3,100.00.

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



STUART M. LERNER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of November, 2009.

ENDNOTES

¹ According to the Department of Business and Professional Regulation's licensure records, Ram's Roti Palace is the "doing business as" name used by Frankie B. Ramsook.

² Proper "[f]lood storage is key to preventing food from being contaminated."

³ Handwashing and drying are "key in preventing the spread of disease and food borne illnesses."

⁴ Self-closing doors on a restaurant's "exterior openings" help prevent pests and vermin from entering the establishment and contaminating the food.

⁵ Section 509.261(2), Florida Statutes, provides that, "[f]or the purposes of this section, [Petitioner] may regard as a separate offense each day or portion of a day on which an establishment is operated in violation of a 'critical law or rule,' as that term is defined by rule." "Violations of critical laws or rules" are defined in Florida Administrative Code Rule 61C-1.0021(2), as "those violations determined by [Petitioner] to pose a significant threat to the public health, safety, or welfare."

⁶ The Food Code is adopted by reference in Subsection (14) of Florida Administrative Code Rule 61C-1.001, which provides, in pertinent part, as follows:

Food Code - This term [a]s used in Chapters 61C-1, 61C-3, and 61C-4, F.A.C., means paragraph 1-201.10(B), Chapter 2, Chapter 3, Chapter 4, Chapter 5, Chapter 6, and Chapter 7 of the Food Code, 2001 Recommendations of the United States Public Health Service/Food and Drug Administration including Annex 3: Public Health Reasons/Administrative Guidelines; Annex 5: HACCP Guidelines of the Food Code; the 2001 Food Code Errata Sheet (August 23, 2002); and Supplement to the 2001 FDA Food Code (August 29, 2003), herein adopted by reference.

⁷ In its Administrative Complaint, Petitioner alleged that Respondent violated Section 6-202.15 of the Food Code by not "not protecting with self-closing doors" both the rear exit of the Restaurant and the Restaurant's restroom. In its Proposed Recommended Order, however, Petitioner abandoned its claim that Respondent violated Section 6-202.15 by not having a self-closing restroom door (evidently recognizing that this section of the Food Code applies only to "outer openings of a food establishment").

⁸ A regulatory agency, such as Petitioner, when deciding what penalty to impose against a licensee for disciplinable misconduct, must apply any applicable agency-adopted "disciplinary guidelines" that were in effect at the time of the licensee's misconduct. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is bound by its own rules . . . creat[ing] guidelines for disciplinary penalties."); and Orasan v. Agency for Health Care Administration, Board of Medicine, 668 So. 2d 1062, 1063 (Fla. 1st DCA 1996)("[T]he case was properly decided under the disciplinary guidelines in effect at the time of the alleged violations."). Petitioner has adopted "disciplinary guidelines" (in Florida Administrative Code Rule 61C-1.005) to be used "for imposing penalties upon . . . public food service establishments under [its] jurisdiction." These guidelines, however, became effective June 28, 2009, after Respondent had committed the violations alleged in the Administrative Complaint. These "disciplinary guidelines" therefore do not govern the outcome of the instant case (but, even if they did, the undersigned's penalty recommendation would be the same).

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.