

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF HOTELS AND)	
RESTAURANTS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 09-5335
)	
RESTAURANT EL HONDURENO II,)	
)	
Respondent.)	
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RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on November 20, 2009, by video teleconference with connecting sites in Miami and Tallahassee, Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charles F. Tunnickliff, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

For Respondent: Eva Alvarado, pro se
Restaurant El Hondureno II
2298 Northwest 36th Street
Miami, Florida 33142

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent committed the offense set forth in the Administrative Complaint and, if so, what action should be taken.

PRELIMINARY STATEMENT

The Department of Business and Professional Regulation, Division of Hotels and Restaurants, hereinafter Department, issued an Administrative Complaint against Restaurant El Hondureno II (Restaurant), dated March 17, 2009. The Department charged the Restaurant with violating Food Code Rule 6-501.111, Controlling Pests, in that rodent activity was observed as evidenced by 70-plus fresh rodent droppings in the kitchen behind the chest-type freezer. The Restaurant disputed the material allegations of fact and requested a hearing. On September 30, 2009, this matter was referred to the Division of Administrative Hearings.

At hearing, the Department presented the testimony of two witnesses and entered four exhibits (Petitioner's Exhibits numbered 1 through 4) into evidence. The Restaurant presented the testimony of one witness, Eva Alvarado, who testified on her own behalf, and entered one composite exhibit (Respondent's Composite Exhibit numbered 1)¹ into evidence. The undersigned took official recognition of Section 509.032(6), Florida

Statutes (2008), Florida Administrative Code Rule 61C-1.001(14), and Food Code Rule 6-501.111.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for ten days following the filing of the transcript. The Transcript, consisting of one volume, was filed on December 10, 2009. The Department timely filed its post-hearing submission. The Restaurant did not file a post-hearing submission. The Department's post-hearing submission has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material hereto, the Restaurant was licensed as a public food service establishment in the State of Florida by the Department, having been issued license type 2010 and license number 2331004.

2. At all times material hereto, the Restaurant was located at 2298 Northwest 36th Street, Miami, Florida 33142.

3. A critical violation in food service is considered to be a violation that is directly related to a food-borne illness risk and could cause the threat of health and sanitation issues; or any violation that, if left uncorrected, could lead to food being contaminated and may cause a food-borne illness or cause someone to become sick or harmed.

4. On March 17, 2009, Mohammad Khan, a senior sanitation safety specialist with the Department, conducted an inspection of the Restaurant. Another inspector with the Department, Maurice Chi, a sanitation safety supervisor, arrived at the Restaurant after Mr. Khan and accompanied Mr. Khan during the inspection.

5. During the inspection, among other things, Mr. Khan and Mr. Chi found a violation, which they considered to be a critical violation. Further, during the inspection, Mr. Khan prepared a food inspection report, setting forth the alleged critical violation. The inspection report was signed by Mr. Khan, Mr. Chi, and Eva Alvarado, the manager of the Restaurant. Mr. Khan made Ms. Alvarado aware of the alleged critical violation, in addition to other violations, and provided her with a copy of the inspection report.

6. The inspection on March 17, 2009, involved a possible immediate closure of the Restaurant due to the alleged critical violation.

7. The alleged critical violation on March 17, 2009, was 35A-04-1:² "Observed rodent activity as evidenced by rodent droppings found found [sic] 70 plus fresh rodent droppings in kitchen behind chext [sic] type freezer." Mr. Khan moved the freezer, observed the area behind it, and observed approximately 70 fresh rodent droppings. Mr. Chi also observed the fresh

rodent droppings. Mr. Khan and Mr. Chi considered this alleged violation to be a critical violation because the fresh rodent droppings are directly related to food-borne illness in that rodents carry a lot of germs and diseases and they could contaminate food and preparation areas, causing significant health issues for anyone eating in the Restaurant. Their testimony is found to be credible and clear and convincing.

8. The Restaurant was closed on March 17, 2009, as a result of the critical violation being found.

9. The next day, March 18, 2009, the Restaurant was re-inspected. The critical violation had been corrected, and the Restaurant was allowed to re-open.

10. Ms. Alvarado testified, among other things, that the Restaurant had fumigation performed every 15 days. Her testimony does not negate what was found during the inspection on March 17, 2009, and the critical violation found.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2009).

12. The Department has the burden of proof to show by clear and convincing evidence that the Restaurant committed the offense set forth in the Administrative Complaint. Department

of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

13. Section 509.032, Florida Statutes (2008), provides in pertinent part:

(1) GENERAL. --The division [Division of Hotels and Restaurants of the Department of Business and Professional Regulation] shall carry out all of the provisions of this chapter and all other applicable laws and rules relating to the inspection or regulation of public lodging establishments and public food service establishments for the purpose of safeguarding the public health, safety, and welfare. . . .

(2) INSPECTION OF PREMISES.

(a) The division has responsibility and jurisdiction for all inspections required by this chapter. The division has responsibility for quality assurance. . . .

(b) For purposes of performing required inspections and the enforcement of this chapter, the division has the right of entry and access to public lodging establishments and public food service establishments at any reasonable time.

(c) Public food service establishment inspections shall be conducted to enforce provisions of this part and to educate, inform, and promote cooperation between the division and the establishment.

(d) The division shall adopt and enforce sanitation rules consistent with law to ensure the protection of the public from food-borne illness in those establishments licensed under this chapter. These rules shall provide the standards and requirements

for obtaining, storing, preparing, processing, serving, or displaying food in public food service establishments . . . conducting necessary public food service establishment inspections for compliance with sanitation regulations . . . and initiating enforcement actions, and for other such responsibilities deemed necessary by the division. . . .

* * *

(3) SANITARY STANDARDS; EMERGENCIES; TEMPORARY FOOD SERVICE EVENTS. --The division shall:

(a) Prescribe sanitary standards which shall be enforced in public food service establishments.

* * *

(6) RULEMAKING AUTHORITY. --The division shall adopt such rules as are necessary to carry out the provisions of this chapter.

14. Florida Administrative Code Rule 61C-1.001 provides in pertinent part:

Except when otherwise defined in this rule, the definitions provided in paragraph 1-201.10(B), Food Code, 2001 Recommendations of the United States Public Health Service/Food and Drug Administration; the 2001 Food Code Errata Sheet (August 23, 2002); and Supplement to the 2001 FDA Food Code (August 29, 2003) shall apply to Chapters 61C-1, 61C-3 and 61C-4, F.A.C. In addition, the following definitions apply to Chapters 61C-1, 61C-3 and 61C-4, F.A.C.:

* * *

(14) Food Code - This term is 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. A copy of the Food Code, as adopted by the division, is available on the division's Internet website www.MyFloridaLicense.com/dbpr/hr. A copy of the entire Food Code is available on the U.S. Food and Drug Administration Internet website. Printed copies of the entire Food Code are available through the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

15. Florida Administrative Code Rule 61C-1.004, "General Sanitation and Safety Requirements," provides in pertinent part:

The following general requirements and standards shall be met by all public lodging and public food service establishments:

(3) Vermin control - Effective control measures shall be taken to protect against the entrance into the 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. . . .

16. Food Code Rule 6-501.111, "Controlling Pests," provides in pertinent part:

The presence of insects, rodents, and other pests shall be controlled to minimize their presence on the PREMISES by:

(A) Routinely inspecting incoming shipments of FOOD and supplies;

(B) Routinely inspecting the PREMISES for evidence of pests;

(C) Using methods, if pests are found, such as trapping devices or other means of pest control as specified under §§ 7-202.12, 7-206.12, and 7-206.13; and

(D) Eliminating harborage conditions.
(emphasis in original)

17. The evidence is clear and convincing and demonstrates that the Restaurant violated Food Code Rule 6-501.111 in that 70-plus fresh rodent droppings were found in the kitchen behind the chest-type freezer. Furthermore, the evidence is clear and convincing and demonstrates that the violation was a critical violation.

18. As to penalty, Section 509.261, Florida Statutes (2008), provides in pertinent part:

(1) Any public lodging establishment or public food service establishment that has operated or is operating in violation of this chapter or the rules of the division, operating without a license, or operating with a suspended or revoked license may be subject by the division to:

(a) Fines not to exceed \$ 1,000 per offense;

(b) Mandatory attendance, at personal expense, at an educational program sponsored by the Hospitality Education Program; and

(c) The suspension, revocation, or refusal of a license issued pursuant to this chapter.

19. The Department suggests an administrative fine in the amount of \$1,000.00, which is consistent with the administrative fine provision of Section 509.261(1)(a), Florida Statutes (2008).

RECOMMENDATION

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

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

1. Finding that Restaurant El Hondureno II violated Food Code Rule 6-501.111.

2. Imposing an administrative fine in the amount of \$1,000.00 against Restaurant El Hondureno II.

DONE AND ENTERED this 31st day of December, 2009, in
Tallahassee, Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of December, 2009.

ENDNOTES

^{1/} Eva Alvarado agreed to provide this Administrative Law Judge and Petitioner with a copy of Respondent's Composite Exhibit No. 2, which consisted of fumigation reports/receipts from December 2008 through March 2009. However, Ms. Alvarado failed to provide a copy of Respondent's Composite Exhibit No. 2, and it, therefore, cannot be considered.

^{2/} This identification number is the corresponding identification number of the violation in the inspection report.

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.