

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 09-6496
)
MAMA B.'S,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on, January 14, 2010, by video teleconference in Tallahassee and Orlando, Florida, before Susan B. Harrell, a designated 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

For Respondent: Chris Adamik, pro se
Mama B.'s
692 North Orange Avenue
Orlando, Florida 32801

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent has violated Food Code Rules 3-501.17(B), 3-501.16(A), 3-501.15, and 3-305.11, and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On July 31, 2009, Petitioner, Department of Business and Professional Regulation, Division of Hotels and Restaurants (Department), filed an Administrative Complaint against Respondent, Mama B.'s, alleging that Mama B.'s had violated Food Code Rules 3-501.17(B), 3-501.16(A), 3-501.15, and 3-305.11, which are incorporated by reference in Florida Administrative Code Rule 61C-1.001(14). Mama B.'s requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings on November 23, 2009.

At the final hearing, Andrea Piel testified on behalf of the Department. Petitioner's Exhibits 1 through 3 were admitted in evidence. Official recognition was taken of Subsection 509.032(6), Florida Statutes (2009)¹; Florida Administrative Code Rule 61C-1.001(14); and Food Code Rules 3-305.11, 3-501.15, 3-501.16(A), and 3-501.17(B).

At the final hearing, Chris Adamik, an owner of Mama B.'s, testified on behalf of Mama B.'s. Respondent's Composite Exhibit 1 was admitted in evidence.

The Transcript was filed on February 1, 2010. The parties agreed to submit their proposed recommended orders within ten days of the filing of the Transcript. Petitioner filed Petitioner's Proposed Recommended Order on February 11, 2010. As of the date of this Recommended Order, Respondent had not filed a proposed recommended order.

FINDINGS OF FACT

1. Mama B.'s is a restaurant located in Orlando, Florida. The Department is the state agency which is charged with the licensing and regulation of public food establishments in Florida pursuant to Section 20.165 and Chapter 509, Florida Statutes.

2. On July 13, 2005, Andrea Piel, an inspector for the Department, went to Mama B.'s to perform a food service inspection. Ms. Piel found that the sandwich cooler located at Mama B.'s was not maintaining potentially hazardous food at 41 degrees Fahrenheit or below. Specifically, she found that the temperature of the ham, turkey, and seafood in the reach-in cooler was 47 degrees Fahrenheit. The temperature of the salami in the reach-in cooler was 50 degrees Fahrenheit, and the temperature of the pepperoni and pastrami stored in the reach-in cooler was 48 degrees Fahrenheit. The temperature of the cheese in the reach-in cooler was 42 degrees Fahrenheit.

3. On the same inspection, Ms. Piel also found that hot foods were not being held at a temperature of at least 135 degrees Fahrenheit. She found the following on the front line: cooked mushrooms at 115 degrees Fahrenheit, pastrami at 112 degrees Fahrenheit, and cooked onions at 130 degrees Fahrenheit.

4. On her inspection on July 13, 2009, Ms. Piel also observed that Mama B.'s was not using proper cooling methods to cool hot food from 135 to 41 degrees Fahrenheit within six hours. Steak was being cooled in deep containers with tight fitting lids. Ms. Piel saw tomatoes being stored less than six inches above the floor. There was ready-to-eat cheese, which had been rewrapped and undated, stored in a cooler.

5. On July 13, 2009, Mama B.'s was given a warning by Ms. Piel, and a call-back inspection was scheduled for July 14, 2009. Ms. Piel went back to Mama B.'s on July 15, 2009, for the call-back inspection. She again observed that tomatoes were being stored about an inch off the ground. There was food being stored in the sandwich cooler at temperatures above 41 degrees Fahrenheit. The cooler contained ham and salami at 48 degrees Fahrenheit; capicola and seafood at 50 degrees Fahrenheit; turkey, cheese, and egg salad at 46 degrees Fahrenheit; and gyro meat at 45 degrees Fahrenheit.

6. On July 15, 2009, Ms. Piel also saw steak and onions, which were being cooled in deep containers with tight fitting lids. She also saw hot pastrami being held at 125 degrees Fahrenheit. Ms. Piel testified that the pastrami being held was not for orders waiting to be filled. Ms. Piel did not explain how she knew that there were no other orders for pastrami sandwiches.

7. Mr. Adamik, an owner of Mama B.'s who was present at the time of the July 15, 2009, inspection, testified that there were several orders for pastrami sandwiches, which were being filled at the time Ms. Piel observed the pastrami. According to Mr. Adamik, the rolls were already placed on the board awaiting the placement of the pastrami, but, because the preparation area was so small, it was impossible to completely prepare more than one pastrami sandwich at a time. Mr. Adamik's testimony is credited. The pastrami, which Ms. Piel observed, was being used for immediate service in response to consumer orders.

8. The cooler in which the food was being stored above 41 degrees Fahrenheit had been in operation at Mama B.'s since the late 1990's. The machine cools from beneath and does not also cool from the top as newer models do. After the violations were noted on July 15, 2009, the old cooler was replaced. Mama B.'s had contacted a repairman after the July 13, 2009,

inspection, but the cooler could not be repaired so as to make it cool foods at 41 degrees Fahrenheit or less.

9. Mr. Adamik knew that the location of the tomatoes was a violation, but he did not correct it by the July 15, 2009, because he was busy trying to get the cooler repaired.

Mr. Adamik had no explanation why the ready-to-eat food, which had been opened at Mama B.'s, did not have appropriate date marks.

10. Violations of Food Code Rules 3-305.11, 3-501.15, 3-501.16(A), and 3-501.17(B) are considered to be critical violations by the Department.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

12. Petitioner has the burden to establish the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996).

13. Subsection 509.032, Florida Statutes, provides that the Division of Hotels and Restaurants (Division) shall adopt such rules as are necessary to carry out the provisions of Chapter 509, Florida Statutes. The Division has adopted Florida Administrative Code Rule 61C-1.001(14), which provides:

(14) Food Code--This term as 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.*

14. The Department has alleged in the Administrative Complaint that Mama B.'s violated Food Code Rules 3-501.17(B), 3-501.16(A), 3-501.15, and 3-305.11. Food Code Rule 3-305.11 provides:

Food Storage. (A) Except as specified in paragraphs (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 6 inches above the floor. (B) Food in packages and working containers may be stored less than 6 inches above the floor on case lot handling equipment as specified under Section 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.

15. The Department has established by clear and convincing evidence that Mama B.'s violated Food Code Rule 3-301.11 by storing tomatoes less than six inches from the ground.

16. Food Code Rule 3-501.15 provides:

Cooling methods. (A) Cooling shall be accomplished with the time and temperature criteria specified under Section 3-501.14 by using one or more of the following methods based on the type of food being cooled:

(1) Placing the food in shallow pans;
(2) Separating the food into smaller or thinner portions; (3) Using rapid cooling equipment; (4) Stirring the food in a container placed in an ice water bath;
(5) Using containers that facilitate heat transfer; (6) Adding ice as an ingredient; or (7) Other effective methods. (B) When placed in cooling or cold holding equipment, food containers in which food is being cooled shall be: (1) Loosely covered, or uncovered if protected from overhead contamination as specified under subparagraphs 3-305.11(A)(2), during the cooling period to facilitate heat transfer from the surface of the food.

17. The Department has established by clear and convincing evidence that cooked steak and onions were being cooled in deep containers containing tight fitting lids, in violation of Food Code Rule 3-501.15, which provides that approved cooling methods may include placing the food in shallow containers, loosely covering the food, or leaving the food uncovered if the food was protected from contamination from above.

18. Food Code Rule 3-501.16(A) provides:

(A) Except during preparation, cooking, or cooling, or when time is used as the public health control as specified under Section 3-501.19, and except as specified in paragraph (B) of this section, potentially hazardous food shall be maintained: (1) At 135 degrees Fahrenheit or above, except that roasts cooked to a temperature and for a time specified in paragraph 3-401.11(B) or reheated as specified in paragraph 3-403.11(E) may be held at a temperature of 130 degrees Fahrenheit or above; or (2) At a temperature specified in the following:
(A) 41 degrees Fahrenheit or less.

19. The Department has established by clear and convincing evidence that Mama B.'s stored food in a cooler at temperatures above 41 degrees Fahrenheit. Mama B.'s argues that because the cooler was old that it fell within the exception in Food Code Rule 3-501.16(A)(2)(b), which provides that food may be maintained at between 41 and 45 degrees Fahrenheit or less if "the equipment is in place and in use in the Food Establishment" and "within 5 years of the regulatory authority's adoption of this Code, the equipment is upgraded or replaced to maintain food at a temperature of . . . 41°F."

20. The version of Florida Administrative Code Rule 61C-1.001, which is at issue in this proceeding, was first adopted and became effective on February 27, 2005. Thus, Mama B.'s had until February 27, 2010, to replace any cooling equipment which could not maintain food at 41 degrees

Fahrenheit. However, Mama B.'s was still required to maintain the temperature of the cool foods between 41 degrees and 45 degrees Fahrenheit prior to February 27, 2010. The cooling equipment that is at issue meets the exception contained in Food Code Rule 3-501.16.

21. Food Code Rule 4-203.12 provides that measuring devices of ambient air and water must be accurate within ± 3 degrees Fahrenheit of the use range. Thus, Mama B.'s argues that as long as the cold food is within 3 degrees Fahrenheit of 45 degrees Fahrenheit that the food is being maintained in accordance with the Food Code. This argument is misplaced because it was not the temperature of the air that was being measured but the temperature of the food that was being measured. Food Code Rule 4-203.11 requires that a measurement device which is used to measure food in Fahrenheit degrees must be accurate within ± 2 degrees. The temperatures of the ham, salami, capicola, and seafood were above 47 degrees Fahrenheit at the inspection on July 15, 2009, and the Department has established by clear and convincing evidence that Mama B.'s violated Food Code Rule 3-501.16(A)(2)(b).

22. Food Code Rule 3-403.10 provides: "Cooked and refrigerated food that is prepared for immediate service in response to an individual consumer order, such as a roast beef sandwich au jus, may be served at any temperature." The

pastrami had been heated in response to several orders which were being filled. Thus, the pastrami was not being held for future orders. Mama B.'s was not in violation of Food Code Rule 3-501.16 as it relates to the hot pastrami.

23. Food Code Rule 3-501.17(B) provides:

Except as provided in paragraphs (D) and (E) of this section, refrigerated, ready-to-eat, potentially hazardous food prepared and packaged by a food processing plant shall be clearly marked, at the time the original container is opened in a food establishment and if the food is held for more than 24 hours, to indicate the date or day by which the food shall be consumed on the premises, sold, or discarded, based on the temperature and time combinations specified in paragraph (A) of this section; and (1) The day the original container is opened in the food establishment shall be counted as day 1; and (2) The day or date marked by the food establishment may not exceed a manufacturer's use-by date if the manufacturer determined the use-by date based on safety.

24. The Department has established by clear and convincing evidence that Mama B.'s violated Food Code Rule 3-501.17(B) by storing cheese, which had been opened and rewrapped, without properly marking the day or date by which the food must be consumed, sold or discarded.

25. Florida Administrative Code Rule 61C-1.005(5)(a) provides:

(a) "Critical violation" means a violation determined by the division to pose a significant threat to the public health,

safety, or welfare and which is identified as a food borne illness risk factor, a public health intervention, or critical in DBPR Form HR-5022-014 Lodging Inspection Report or DBPR Form HR-5022-015 Food Service Inspection Report, incorporated by reference in subsection 61C-1.002(8), F.A.C., and not otherwise identified in this rule.

26. The violations which the Department has established by clear and convincing evidence are critical violations. Florida Administrative Code Rule 61C-1.005(6)(b) provides that an administrative fine for a first offense critical violation ranges from \$250 to \$500 per day for which the violation remains uncorrected. No evidence was presented to show the exact date the violations were corrected.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Mama B.'s violated Food Code Rules 3-305.11, 3-501.15, 3-501.16(A), and 3-501.17(B); imposing a fine of \$250 for the violation of Food Code Rule 3-305.11; imposing a fine of \$300 for the violation of Food Code Rule 3-501.15; imposing a fine of \$500 for the violation of Food Code Rule 3-501.16(A); and imposing a fine of \$400 for a violation of Food Code Rule 3-501.17(B).

DONE AND ENTERED this 16th day of February, 2010, in
Tallahassee, Leon County, Florida.

Susan B. Harrell

SUSAN B. HARRELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 16th day of February, 2010.

ENDNOTE

^{1/} Unless otherwise indicated, all references to the Florida
Statutes are to the 2009 version.

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.