

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF HOTELS)	
AND RESTAURANTS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 10-0035
)	
DAI LOI,)	
)	
Respondent.)	
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RECOMMENDED ORDER

A hearing was held pursuant to notice, on March 10, 2010, by Barbara J. Staros, assigned Administrative Law Judge of the Division of Administrative Hearings, via video teleconferencing with sites in Jacksonville and Tallahassee, Florida.

APPEARANCES

For Petitioner: Charles F. Tunnickliff, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1015

For Respondent: No appearance

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

Petitioner, Department of Business and Professional Regulation, Division of Hotels and Restaurants, filed an Administrative Complaint alleging violations of the provisions of Chapter 509, Florida Statutes, or the applicable rules governing the operation of public food establishments.

Respondent disputed the allegations in the Administrative Complaint and petitioned for a formal administrative hearing. The case was referred to the Division of Administrative Hearings on or about January 4, 2010. A formal hearing was set for March 10, 2010. The hearing took place as scheduled.

At the commencement of the hearing, Petitioner's counsel entered his appearance, but no appearance was made on behalf of Respondent. The hearing was recessed for approximately 20 minutes to give a representative of Respondent an opportunity to appear, but no appearance was made on behalf of Respondent. The undersigned noted on the record that the Notice of Hearing was mailed to the address provided by Petitioner on its transmittal letter, which matched the address provided by Respondent on the Election of Rights.

At hearing, Petitioner presented testimony of one witness, Steven Rivera. Petitioner's Exhibits numbered 1 and 2 were admitted into evidence. Official recognition was requested of Section 509.032(2) and (6), Florida Statutes, Florida Administrative Code Rules 61C-1.001(14) and 61C-1.005, and

pertinent portions of the United States Food and Drug Administration's Food Code (Food Code). The request was granted.

A Transcript consisting of one volume was filed on March 24, 2010. Petitioner timely filed a Proposed Recommended Order, which has been considered in the preparation of this Recommended Order. Respondent did not file a post-hearing submission.

FINDINGS OF FACT

1. Petitioner, the Department of Business and Professional Regulation, Division of Hotels and Restaurants (Division), is a state agency charged with the duty and responsibility of regulating the operation of hotel and restaurant establishments pursuant to Section 20.165 and Chapter 509, Florida Statutes.

2. Respondent is an eating establishment located in Jacksonville, Florida. Respondent was issued a license as a public food establishment by the Division.

3. Critical violations are those violations that, if not corrected, are most likely to contribute to food-borne illness, cross-contamination, and other environmental hazards.

4. Non-critical violations are those that are not directly related to food-borne illness, but if they remain in non-compliance, are likely to lead to the development of a critical violation.

5. Steven Rivera is a sanitation and safety specialist employed by the Division. He has been employed by the Division for approximately three years, and has 12 years experience as a restaurant manager. He also has received training in laws and rules regarding public food service and lodging. Mr. Rivera performs approximately 1,000 inspections annually.

6. On July 7, 2009, Mr. Rivera conducted an inspection of Respondent's premises and issued an inspection report while on the premises. Mr. Rivera signed the report on the premises. Nhon Nguyen, owner of the restaurant, was present but did not sign the inspection report.

7. During the July 7, 2009, inspection, Mr. Rivera observed approximately 20 live roaches in the kitchen of the establishment. He observed the roaches inside a prep table drawer where utensils are stored, underneath the hand sink near the prep table, underneath the prep table in the cook line, underneath the reach-in cooler in the kitchen coming out of the cooler wheels, and in a corner near the reach-in cooler and table where open packages of food were being stored.

8. The presence of roaches in the kitchen of a food establishment is a critical violation because live roaches are vermin that can walk over food and food contact surfaces, and present an immediate threat to the public health.

9. During the course of the inspection, the owner of the restaurant became angry at Mr. Rivera, and made verbal threats toward him. At one point, the owner attempted to grab a knife from the cook's line, at which time the owner's family held him back and took him outside. The owner came back into the establishment, whereupon Mr. Rivera exited the property and called law enforcement. Law enforcement arrived and stayed with Mr. Rivera until he completed the inspection.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569, 120.57(1), and 120.60(5), Fla. Stat. (2009).

11. The Division is the state agency charged with regulating public food service establishments pursuant to Section 20.165 and Chapter 509, Florida Statutes.

12. Pursuant to Section 509.261(1), Florida Statutes (2009), the Division may impose penalties for violations of Chapter 509, Florida Statutes, including an administrative fine of no more than \$1,000 for each separate offense, attendance at personal expense at an educational program sponsored by the Hospitality Education Program, and the suspension or revocation of Respondent's license.

13. Because the Division seeks the imposition of an administrative penalty, which is a penal sanction, the Division has the burden of proving by clear and convincing evidence the

specific allegations in the Administrative Complaint. See, e.g., Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

14. Paragraph 1-201.10(B) and Chapters 2, 3, 4, and 6 of the United States Food and Drug Administration's Food Code (Food Code) have been incorporated by reference into the rules governing public food establishments. Fla. Admin. Code R. 61C-1.001(14).

15. Through the Administrative Complaint, Respondent is alleged to have violated the following provisions of the Food Code, which read in pertinent part:

6-501.111 Controlling Pests. 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 sections 7-202.12, 7-206.12, and 7-206.13; and (D) Eliminating harborage conditions.

16. Through the Administrative Complaint, Respondent is alleged to have violated Section 509.032(2)(b), Florida Statutes (2009), which reads as follows:

Inspection of premises.-

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.

17. The Division met its burden of proof that Respondent violated section 6-501.111, Food Code, by failing to control pests, as approximately 20 live roaches were observed in the kitchen during the inspection.

18. The Division met its burden of proof that Respondent violated Section 509.032(2)(b), Florida Statutes, because an agent of Respondent verbally and physically threatened Inspector Rivera on July 7, 2009, forcing him to exit the premises while performing his inspection duties.

19. In its Proposed Recommended Order, the Division proposes the imposition of a \$1,000.00 administrative penalty. The Division met its burden of proof regarding the allegations contained in the Administrative Complaint. Accordingly, the proposed administrative penalty in the amount of \$1,000.00 is reasonable and appropriate.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That the Division enter a final order which confirms the violations found, and imposes an administrative penalty in the amount of \$1,000.00, to be paid within 30 days of the issuance of the Agency's Final Order.

DONE AND ENTERED this 19th day of April, 2010, in
Tallahassee, Leon County, Florida.



Barbara J. Staros
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of April, 2010.

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.