

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 10-0902
)
CEDAR ONE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on April 9, 2010, by video teleconference with hearing sites located in Tallahassee and Panama City, Florida, before Suzanne F. Hood, Administrative Law Judge with 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: Frank Johnson
Qualified Representative
Cedar One
2709 East Avenue
Panama City, Florida 32301

STATEMENT OF THE ISSUES

The issues are whether Respondent has violated Chapter 509, Florida Statutes (2009), by not having its mobile food dispensing vehicle report to a commissary as required by Florida Administrative Code Rule 61C-4.0161(2)(c).

PRELIMINARY STATEMENT

On or about March 26, 2009, Petitioner Department of Business and Professional Regulation, Division of Hotels and Restaurants (Respondent), issued an Administrative Complaint against Respondent Cedar One. The complaint alleged that Respondent violated Chapter 509, Florida Statutes, and Florida Administrative Code Rule 61C-4.0161(2)(c) by failing to ensure that its mobile food dispensing unit reported to a commissary as specifically required by the rule.

Respondent subsequently requested an administrative hearing to contest the Administrative Complaint. Petitioner referred the case to the Division of Administrative Hearings on February 18, 2010. A Notice of Hearing by Video Teleconference dated February 24, 2010, scheduled the hearing for April 9, 2010.

During the hearing, Petitioner presented the testimony of one witness. Petitioner offered four exhibits that were accepted as evidence.

Respondent presented the testimony of one witness. Respondent did not offer any exhibits for admission as evidence.

The Transcript was filed on April 30, 2010. That same day, Petitioner filed a Motion for Extension of Time to file a proposed order. The undersigned granted the unopposed motion.

Petitioner timely filed its Proposed Recommended Order on May 10, 2010. As of the date that this Recommended Order was issued, Respondent had not filed proposed findings of fact and conclusions of law.

Except as otherwise noted, references hereinafter shall be to Florida Statutes (2009).

FINDINGS OF FACT

1. Petitioner is the agency charged with the responsibility of regulating the operation of public food services establishments pursuant to Section 20.165 and Chapter 509, Florida Statutes, and the rules promulgated there under.

2. At all times material hereto, Respondent was licensed as a mobile food dispensing vehicle. Respondent's business address is 2709 East Avenue, Panama City, Florida 32401.

3. Non-critical violations are violations that, if not corrected, can create threats to public health, safety, or welfare. Failure of a mobile food dispensing vehicle to report to a commissary as required by Florida Administrative Code Rule

61C-4.0161(2)(c) is a non-critical violation of Petitioner's rules.

4. On August 22, 2007, and October 26, 2007, Petitioner's inspector conducted inspections of Respondent's business. On both occasions, the inspector determined that Respondent's mobile food dispensing vehicle was not reporting to a commissary.

5. On December 12, 2007, Petitioner issued an Administrative Complaint against Respondent. The complaint alleged that Respondent's mobile food dispensing vehicle had not reported to a commissary on August 22, 2007, and October 26, 2007.

6. After an informal hearing, Petitioner issued a Final Order dated March 28, 2008. Pursuant to the Final Order Respondent violated five administrative rules, including Florida Administrative Code Rule 61C-4.0161(2)(c). The Final Order, which was filed with Petitioner's Agency Clerk on April 16, 2008, required Respondent to pay a \$250 administrative fine.

7. On May 21, 2008, Petitioner's inspector performed a call-back food service inspection of Respondent's business. During that inspection, the inspector determined, among other things, that Respondent's mobile dispensing vehicle was not reporting to a commissary.

8. On February 23, 2009, Petitioner's inspector conducted a routine food service inspection of Respondent's business. During the inspection, the inspector determined that Respondent's mobile food dispensing vehicle was not reporting to a commissary.

9. The record shows that Respondent has repeatedly violated Florida Administrative Code Rule 61C-4.0161(2)(c). During the hearing, Respondent presented no evidence to the contrary.

CONCLUSIONS OF LAW

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

11. Petitioner has the burden of proving the allegations contained in the Administrative Complaint by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996). Petitioner has met this burden.

12. Respondent's mobile food dispensing vehicle is a "public food service establishment," which is defined in Section 509.013(5)(a), Florida Statutes, as follows:

(5)(a) "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.

13. Petitioner has a duty to regulate public food service establishments in order to safeguard the public health, safety, and welfare. See § 509.032(1), Fla. Stat.

14. Pursuant to Section 509.032(6), Florida Statutes, Petitioner has authority to promulgate rules as necessary to carry out the provisions of Chapter 509, Florida Statutes.

15. Section 509.261(1), Florida Statutes, provides that any public food service establishment that has operated or is operating in violation of Chapter 509, Florida Statutes, or the rules promulgated thereunder, is subject to fines not to exceed \$1,000 per offense and the suspension, revocation, or refusal of a license.

16. Florida Administrative Code Rule 61C-4.0161(2)(c) states as follows:

(c) Mobile food dispensing vehicles shall operate from an approved commissary that meets all applicable requirements of this rule. The commissary must be provided with potable water and adequate facilities for disposal of liquid and solid waste. The mobile food unit must report to the commissary to store or replenish supplies,

clean utensils and equipment, or dispose of liquid and solid waste. Mobile food dispensing vehicles which are self-sufficient for equipment, storage, and utilities must report to the commissary as often as needed, but not less than once weekly, to replenish supplies, clean the interior of the unit, or dispose of liquid or solid wastes. For the purpose of this rule, a mobile food dispensing vehicle which is self-sufficient includes a three compartment sink for washing, rinsing, and sanitizing of equipment and utensils; a separate handwash sink; adequate refrigeration and storage capacity; full provision of power utilities including electrical, LP gas, or a portable power generation unit; a potable water holding tank; and a liquid waste disposal system in accordance with Subparts 5-3 and 5-4 of the Food Code, as adopted by reference in Rule 61C-1.001, F.A.C. Mobile food dispensing vehicles which are not self-sufficient must report to their commissary at least once daily. The exterior of the vehicle may be washed in any location, provided the waste water does not create a sanitary nuisance.

17. In this case, Respondent admitted that it did not report to a commissary to store or replenish supplies, clean utensils and equipment, or dispose of liquid and solid waste. Instead, Respondent argues that it does not do so because it performs these tasks at its place of operation. However, Respondent's place of operation is not an approved commissary.

18. Clear and convincing evidence indicates that Respondent violated Florida Administrative Code Rule 61C-4.0161(2)(c). The appropriate penalty for this violation is

controlled by the disciplinary guidelines set forth in Florida Administrative Code Rule 61C-1.005, as follows in relevant part:

(5) Definitions.

(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.

(b) "Non-critical violation" means a violation not meeting the definition of critical violation and not otherwise identified in this rule.

(c) "First offense" means a violation of any law subject to penalty under Chapter 509, F.S., when no disciplinary Final Orders involving the same licensee have been filed with the Agency Clerk within the 24 months preceding the date the current administrative complaint is issued.

(d) "Second offense," and "second and any subsequent offense" mean a violation of any law subject to penalty under Chapter 509, F.S., after one disciplinary Final Order involving the same licensee has been filed with the Agency Clerk within the 24 months preceding the date the current administrative complaint is issued, even if the current violation is not the same as the previous violation.

* * *

(6) Standard penalties. This section specifies the penalties routinely imposed against licensees and applies to all violation of law subject to a penalty under chapter 509, F.S.

(a) Non-critical violation.

1. 1st offense--Administrative fine of \$150 to \$300.
2. 2nd offense--Administrative fine of \$250 to \$500.

* * *

(7) Aggravating or mitigating factors. The division may deviate from the standard penalties . . . based upon the consideration of aggravating or mitigating factors present in a specific case. The division shall consider the following aggravating and mitigating factors in determining the appropriate disciplinary action to be imposed and in deviating from the standard penalties:

- (a) Aggravating factors.
 1. Possible danger to the public.
 2. Length of time since the violation occurred.

* * *

5. Disciplinary history of the licensee within the 60 months preceding the date the current administrative complaint was issued.

* * *

- (b) Mitigating factors.

* * *

3. Length of time the licensee has been in operation.

19. Respondent has committed a multiple offenses of a non-critical violation. After considering the aggravating and mitigating circumstances set forth above, the appropriate penalty is an administrative fine in the amount of \$1,000.

RECOMMENDATION

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

RECOMMENDED:

That the Department of Business and Professional Regulation enter a final order finding that Respondent has repeatedly violated Florida Administrative Code Rule 61C-4.0161(2)(c) and imposing an administrative fine in the amount of \$1,000.

DONE AND ENTERED this 13th day of May, 2010, in Tallahassee, Leon County, Florida.



SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of May, 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.