

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF HOTELS AND)	
RESTAURANTS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 10-0907
)	
JAZZY DOG CAFE,)	
)	
Respondent.)	
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RECOMMENDED ORDER

On April 28, 2010, an administrative hearing in this case was held by video teleconference in Orlando and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Vanya Y. Atanasova,
Qualified Representative
Charles F. Tunnichliff, Esquire
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Debbie Arent, pro se
Jazzy Dog Cafe
1311 Sligh Boulevard
Orlando, Florida 32806

STATEMENT OF THE ISSUES

The issues in the case are whether the allegations of the Administrative Complaint are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated October 21, 2009, the Department of Business and Professional Regulation, Division of Hotels and Restaurants (Petitioner), alleged that the Jazzy Dog Cafe (Respondent), a restaurant owned and operated by Debbie Arent, was determined, after inspection, to be in violation of specified food safety regulations. The Respondent disputed the allegations and requested a formal administrative hearing. On February 19, 2010, the Petitioner forwarded the dispute to the Division of Administrative Hearings, which scheduled and conducted the formal hearing.

At the hearing, the Petitioner presented the testimony of one witness and had Exhibits 1 through 4 admitted into evidence. Ms. Arent testified on behalf of the Respondent and presented the testimony of one additional witness.

The Transcript of the hearing was filed on June 10, 2010. The Petitioner filed a Proposed Recommended Order on June 22, 2010.

FINDINGS OF FACT

1. The Petitioner is the state agency charged with regulation of hotels and restaurants pursuant to Chapter 509, Florida Statutes (2009).

2. At all times material to this case, the Respondent was a restaurant operating at 1311 Sligh Boulevard, Orlando, Florida 32806, and holding food service license number 5811824.

3. On June 12, 2009, Andrea Piel, a trained sanitation safety specialist employed by the Petitioner, performed a routine inspection of the Respondent.

4. During the June 12, 2009, inspection, Ms. Piel observed two general types of food code violations that she deemed to be "critical": a failure to maintain proper food temperatures; and a failure to identify the dates upon which certain prepared or processed food products were presented for sale.

5. Critical food code violations are those that, if uncorrected, present an immediate threat to public safety.

6. During the June 12, 2009, inspection, Ms. Piel observed that a "maketable" reach-in cooler was unable to maintain proper temperature and that potentially hazardous cold foods were being held in the cooler at temperatures greater than 41 degrees.

7. The failure to maintain proper food temperatures can result in rapid bacterial contamination sufficient to cause serious illness in persons consuming improperly stored food.

8. During the June 12, 2009, inspection, Ms. Piel notified Debbie Arent of the problem with the cooler, and Ms. Arent transferred the food product held from the malfunctioning cooler to one that was maintaining proper temperature.

9. During the same inspection, Ms. Piel observed that food products being offered for sale lacked date markings important to determining the shelf life of the products.

10. Prepared and packaged foods have a shelf life of seven days when maintained at proper temperatures. Such foods must be date-marked to permit determination of the shelf life of the product.

11. The failure to identify the date upon which packaged or prepared food products are made available for sale can result in food being offered for sale beyond proper shelf life. Consumption of food beyond the shelf life, even if stored at proper temperatures, can increase the risk of food-borne illness in persons consuming the food.

12. During the June 12, 2009, inspection, Ms. Piel observed potentially hazardous ready-to-eat food products (specifically, potatoes) that had been prepared on site and that were not properly date-marked.

13. Ms. Piel also observed packaged processed foods including cheese, deli meats, and hot dogs, opened and presented for sale, that were not properly date-marked.

14. Ms. Piel performed a callback inspection on June 16, 2009, at which time she determined that the critical deficiencies observed on June 12, 2009, had been cured or that additional time was required for correction. At the time of the callback inspection, no food was present in the malfunctioning cooler, and Ms. Arent had scheduled a service call to address the problem.

15. On October 6, 2009, Ms. Piel performed a routine inspection, at which time she observed several critical food code violations that were the same as those cited in the June 12, 2009, inspection report.

16. During the October 6, 2009, inspection, Ms. Piel observed that once again, the "maketable" reach-in cooler was not maintaining proper temperature and that potentially hazardous cold foods were being held in the cooler at temperatures greater than 41 degrees.

17. At the hearing, Ms. Arent testified that the reason the foods held in the cooler were not at proper temperature on October 6, 2009, was because Ms. Piel opened the cooler doors and left them opened for upwards of ten minutes, which, Ms. Arent suggested, allowed the food in the cooler to warm.

18. Ms. Arent's testimony was not credible on this point and has been rejected. Ms. Arent offered no rationale as to why

Ms. Piel would want to raise the food temperature readings for the food products stored in the cooler.

19. During the October 6, 2009, inspection, Ms. Piel observed cheeses and prepared cheese sauce, sausage, beans, deli meats, hot dogs, and potatoes that were available for sale and not properly date marked.

20. Ms. Arent testified that no prepared or packaged foods were generally retained for sale after the date upon which the products were prepared or opened.

21. Ms. Arent indicated that packaged processed foods were opened in quantities that would be sold on the date in question and that foods that remained from catering work were generally not offered for sale to customers of the restaurant.

22. Ms. Arent asserted that it would be "ridiculous" to label the packages with the open date.

23. Ms. Arent testified at the hearing that "99 percent" of prepared foods observed by Ms. Piel were made on the morning of the inspection. The apparent assertion that essentially no food is carried from one day to the next lacked credibility, given the types of processed foods (cheeses, deli meats, hot dogs) that were not date-marked.

24. Ms. Arent was present in the establishment during the inspections referenced herein. At the time of each inspection,

Ms. Piel produced a written report of her findings and provided a copy of the report to Ms. Arent.

CONCLUSIONS OF LAW

25. 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. (2009).

26. The Petitioner is the state agency charged with the regulation of food service establishments in the State of Florida. See Ch. 509, Fla. Stat. (2009). The Petitioner has adopted by incorporation the various provisions of the Food Code referenced herein. Fla. Admin. Code R. 61C-4.010(1).

27. The Administrative Complaint alleged violations of the food code provisions cited herein. The Petitioner has the burden of proving by clear and convincing evidence the allegations set forth in the Administrative Complaint against the Respondent. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The burden has been met.

28. The Administrative Complaint charged the Respondent with a violation of Food Code Rule 3-501.17(B), which provides as follows:

Except as specified in ¶¶ (D) - (F) of this section, refrigerated, ready-to-eat, potentially hazardous food (time/temperature

control for safety 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 (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 food safety.

29. The Administrative Complaint charged the Respondent with a violation of Food Code Rule 3-501.17(A), which provides as follows:

Except when packaging food using a reduced oxygen packaging method as specified under § 3-502.12, and except as specified in ¶¶ (D) and (E) of this section, refrigerated, ready-to-eat, potentially hazardous food (time/temperature control for safety food) prepared and held in a food establishment for more than 24 hours shall be clearly marked 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 below. The day of preparation shall be counted as Day 1.

(1) 5°C (41°F) or less for a maximum of 7 days; or

(2) 7°C (45°F) or between 5°C (41°F) and 7°C (45°F) for a maximum of 4 days in

existing refrigeration equipment that is not capable of maintaining the food at 5°C (41°F) or less if:

(a) The equipment is in place and in use in the food establishment, and

(b) 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 5°C (41°F) or less.

30. The evidence established that the Respondent failed to clearly mark food products as required by the aforementioned provisions of the Food Code. Ms. Arent's assertion that no food products were held for more than 24 hours lacked credibility and has been rejected.

31. The Administrative Complaint charged the Respondent with a violation of Food Code Rule 3-501.16(A), which provides in relevant part as follows:

(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 under ¶ (B) of this section, potentially hazardous food (time/temperature control for safety food) shall be maintained:

* * *

(2) At a temperature specified in the following:

(a) 5°C (41°F) or less

32. The evidence established that the Respondent failed to maintain storage of potentially hazardous foods at a temperature

of 41 degrees or less as required by the aforementioned provision of the Food Code.

33. The Administrative Complaint charged the Respondent with a violation of Food Code Rule 4-301.11, which provides as follows:

4-301.11 Cooling, Heating, and Holding Capacities.

EQUIPMENT for cooling and heating FOOD, and holding cold and hot FOOD, shall be sufficient in number and capacity to provide FOOD temperatures as specified under Chapter 3.

34. The evidence failed to establish that the Respondent did not have sufficient equipment in number and capacity to maintain the required food temperatures. The evidence established that, when Ms. Arent was advised that food temperatures were not being maintained, the affected food products were moved to other coolers.

35. Subsection 509.261(1), Florida Statutes (2009), provides that each offense is punishable by a fine not to exceed \$1,000 per offense. In addition, offenses may be disciplined by mandatory attendance at an educational program sponsored by the Hospitality Education Program, or by suspension, revocation, or refusal of a license.

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 imposing a fine of \$500 against the Jazzy Dog Cafe and requiring that Debbie Arent complete an appropriate educational program related to the violations identified herein.

DONE AND ENTERED this 12th day of July, 2010, in
Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of July, 2010.

COPIES FURNISHED:

Debbie Arent
Jazzy Dog Cafe
1311 Sligh Boulevard
Orlando, Florida 32806

Vanya Y. Atanasova
Charles F. Tunnichliff, Esquire
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-2202

Reginald Dixon, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

William L. Veach, Director
Division of Hotels and Restaurants
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

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.