

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 10-2431
)
NEW SAN TELMO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This case came before Administrative Law Judge Edward T. Bauer for final hearing by video teleconference on August 2, 2010, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Garnett W. Chisenhall, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

For Respondent: No appearance

STATEMENT OF THE ISSUES

The issues in this disciplinary proceeding arise from Petitioner's allegation that Respondent, a licensed restaurant, violated several rules and a statutory provision governing food service establishments. If Petitioner proves one or more of the

alleged violations, then it will be necessary to consider whether penalties should be imposed on Respondent.

PRELIMINARY STATEMENT

On May 19, 2008, Petitioner Department of Business and Professional Regulation, Division of Hotels and Restaurants ("the Division"), issued an Administrative Complaint against Respondent New San Telmo, charging the licensed restaurant with various offenses relating to noncompliance with the statutes and rules governing food service establishments. Respondent timely requested a formal hearing to contest these allegations, and, on September 5, 2008, the matter was referred to the Division of Administrative Hearings.

On November 6, 2008, the parties filed a Joint Motion to Relinquish Jurisdiction, which indicated that a settlement had been reached. On April 30, 2010, after Respondent failed to execute the settlement agreement, Petitioner filed a Motion to Re-open with the Division of Administrative Hearings.

Petitioner's Motion to Re-open was granted on May 5, 2010, and the matter was subsequently scheduled for a final hearing.

The parties were properly notified that the final hearing would occur at 9:00 a.m. on August 2, 2010. At the designated time and place, the undersigned and counsel for Petitioner appeared. Respondent's representative, however, did not appear. After waiting approximately 35 minutes and upon review of the

file, from which it was determined that Respondent had been given adequate notice of the final hearing, the undersigned commenced the proceeding.

At the outset of the final hearing, Petitioner announced that it was abandoning several of the allegations contained in the Administrative Complaint.¹ Petitioner presented the testimony of its inspector, Ricardo Unold, and introduced three exhibits, numbered one through three. Finally, the undersigned took official recognition of the applicable administrative rules.

The Transcript of the final hearing was filed on August 17, 2010. Petitioner timely submitted a Proposed Recommended Order that has been considered in the preparation of this Recommended Order. Respondent did not file a post-hearing submission of any kind.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2008 version of the Florida Statutes.

FINDINGS OF FACT

1. Petitioner is the State agency charged with regulation of hotels and restaurants pursuant to Chapter 509, Florida Statutes.

2. At all times material to this case, Respondent was a restaurant operating at 16850 Collins Avenue, Golden Beach, Florida, and holding food service license number 2326334.

3. On February 26, 2008, and April 29, 2008, Respondent was inspected by Ricardo Unold, a Senior Sanitation and Safety Specialist with the Division. During both visits, Mr. Unold noticed several items that were not in compliance with the laws which govern the facilities and operations of licensed restaurants.

4. Through the testimony of Mr. Unold and the exhibits introduced into evidence during the final hearing, Petitioner presented clear and convincing evidence that as of April 29, 2008, the following deficiencies subsisted at Respondent New San Telmo: (1) In-use utensils stored in standing water less than 135 degrees Fahrenheit, in violation of Food Code² Rule 3-304.12(F); (2) The public bathroom was not equipped with a tight-fitting, self-closing door, in violation of Food Code Rule 6-202.14 and Florida Administrative Code Rule 61C-1.004(2)(b); (3) An unlabeled spray bottle, in violation of Food Code Rule 7-102.11; and (4) No proof of required employee training, in violation of Section 509.049, Florida Statutes.

5. The deficiencies relating to the lack of proof of employee training, the unlabeled spray bottle, and the bathroom door are all considered critical violations by the Division. Critical food code violations are those that, if uncorrected, present an immediate threat to public safety.

6. The final deficiency (storing in-use utensils in water less than 135 degrees Fahrenheit), while not categorized as a critical violation, is serious nonetheless because it directly relates to food preparation.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

8. Section 509.261, Florida Statutes, sets forth the acts for which the Division may impose discipline. This statute 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.
- (2) For the purposes of this section, the division may regard as a separate offense each day or portion of a day on which an establishment is operated in violation of a "critical law or rule," as that term is defined by rule.

9. By rule, the Division has defined the term "Food Code" as follows:

(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.*

Fla. Admin. Code R. 61C-1.001(14)(emphasis in original).

10. Florida Administrative Code Rule 61C-1.004(2)(b) provides in relevant part as follows:

Public bathrooms shall be completely enclosed and shall have tight-fitting, self closing doors or, in public lodging establishments or bathrooms located outside a public food service establishment, have entrances and exits constructed in such a manner as to ensure privacy of occupants.

11. Food Code Rule 6-202.14 provides in pertinent part:

A toilet room located on the *premises* shall be completely enclosed and provided with a tight-fitting and self-closing door *except that this requirement does not apply to a toilet room that is located outside a food establishment and does not open directly into the food establishment such as a toilet room that is provided by the management of a shopping mall.*

(Emphasis in original).

12. Food Code Rule 3-304.12(F) provides:

During pauses in *food preparation or dispensing, food preparation and dispensing*

utensils shall be stored In a container of water if the water is maintained at a temperature of at least 57°C (135°F) and the container is cleaned at a frequency specified under Subparagraph 4-602.11(D)(7).

(Emphasis in original).

13. Food Code Rule 7-102.11 reads:

Working containers used for storing *poisonous or toxic materials* such as cleaners and *sanitizers* taken from bulk supplies shall be clearly and individually identified with the common name of the material.

(Emphasis in original).

14. Section 509.049, Florida Statutes, provides, in relevant part:

(1) The division shall adopt, by rule, minimum food safety protection standards for the training of all food service employees who are responsible for the storage, preparation, display, or serving of foods to the public in establishments regulated under this chapter. These standards shall not include an examination, but shall provide for a food safety training certificate program for food service employees to be administered by a private nonprofit provider chosen by the division.

* * *

(5) It shall be the duty of each public food service establishment to provide training in accordance with the described rule to all food service employees of the public food service establishment. The public food service establishment may designate any certified food service manager to perform this function. Food service

employees must receive certification within 60 days after employment. Certification pursuant to this section shall remain valid for 3 years. All public food service establishments must provide the division with proof of employee training upon request, including, but not limited to, at the time of any division inspection of the establishment. Proof of training for each food service employee shall include the name of the trained employee, the date of birth of the trained employee, the date the training occurred, and the approved food safety training program used.

(Emphasis added).

15. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a professional license is penal in nature. State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Division must prove the charges against Respondent by clear and convincing evidence. Department of Banking and Finance, Div. of Securities and Investor Protection v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987); Nair v. Department of Business & Professional Regulation, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

16. Clear and convincing evidence:

requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a

weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994)(quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

17. The undersigned has determined, as a matter of ultimate fact, that the Division established Respondent's guilt regarding noncompliance with the following provisions: Food Code Rule 3-304.12 (one violation); Food Code Rule 7-102.11 (one violation); Food Code Rule 6-202.14 and Florida Administrative Code Rule 61C-1.004(2)(b) (one violation)³; and Section 509.049, Florida Statutes (one violation). In making these determinations, the undersigned concludes that "the plain language of the applicable statute[] and rules, being clear and unambiguous, [can] be applied in a straightforward manner to the historical events at hand without simultaneously examining extrinsic evidence of legislative intent or resorting to principles of interpretation." Department of Business & Professional Regulation, Div. of Hotels & Restaurants v. Latin American Cafeteria, Inc., Case No. 05-2733 (DOAH November 2, 2005). It is therefore unnecessary to make additional legal conclusions concerning these violations. See id.

18. The Division has urged the undersigned to recommend that Respondent be fined \$1,800, which represents the maximum

total penalty authorized under the disciplinary guidelines for three critical violations and one non-critical violation.⁴ Under the circumstances, however, the undersigned concludes that the more appropriate penalty is to impose a middle of the guidelines fine for each violation (i.e, \$375 for each of the three critical violations, and \$225 for the non-critical violation), for a total fine of \$1400.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Division enter a final order: (a) finding Respondent guilty in accordance with the foregoing Recommended Order; and (b) ordering Respondent to pay an administrative penalty in the amount of \$1400, to be paid within 30 days after the filing of the final order with the agency clerk.

DONE AND ENTERED this 30th day of August, 2010, in Tallahassee, Leon County, Florida.



Edward T. Bauer
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of August, 2010.

ENDNOTES

¹ Specifically, Petitioner abandoned its allegations that Respondent did not provide a covered waste receptacle in the women's bathroom and failed to post a hand washing sign at a sink used by restaurant employees. Petitioner also dropped the charge relating to an unused opening in a panel box.

² The Food Code is a publication of the U.S. Food and Drug Administration, portions of which have been adopted by reference as rules of the Division. See Fla. Admin. Code R. 61C-1.001(14).

³ While Respondent's failure to equip its bathroom with a tight-fitting and self-closing door runs afoul of Food Code Rule 6-202.14 and Florida Administrative Code Rule 61C-1.004(2)(b), the misconduct has been treated as a single violation.

⁴ As the instant case involves a first offense, Florida Administrative Code Rule 61C-1.005(6) provides for a fine of \$250 to \$500 for each critical violation and \$150 to \$300 for every non-critical violation.

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.