

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF HOTELS AND )  
RESTAURANTS, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 10-2477  
 )  
NEW YORK DELI AND BAKERY, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

A hearing was held pursuant to notice, on July 28, 2010, in the Marion County Courthouse, Ocala, Florida, before W. David Watkins, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Garnett Chisenhall, 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, and 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 May 10, 2010. A formal hearing was set for July 28, 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 30 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.

Petitioner presented the testimony of one witness, Benjamin J. Bryant, Sanitation and Safety Specialist with the Division of Hotels and Restaurants. Petitioner offered four exhibits, all of which were received in evidence. Petitioner's Exhibit 4

(Certified Final Order) was conditionally admitted, for use only in the event one or more charges in the Administrative Complaint were proven on their own merit; and then only for purposes of mitigation or aggravation of penalty. At the request of Petitioner, official recognition was taken of Section 509.032(6), Florida Statutes (2008)<sup>1/</sup>, Florida Administrative Code Rules 61C-1.001(14), 61C-1.005, and 61C-4.023(1), and Rule 3-501.16(A), Food Code.

A Transcript consisting of one-volume was filed on August 5, 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 Ocala, 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 continue, are likely to lead to the development of a critical violation.

5. Benjamin J. Bryant is a Sanitation and Safety Specialist employed by the Division. He has been employed in that capacity by the Division for approximately 12 years, and has 26 years of experience as a restaurant manager. He also has received training in laws and rules regarding public food service and lodging. Mr. Bryant performs between 750 to 800 inspections annually.

6. On September 23, 2008, Mr. Bryant performed a routine food service inspection of New York Deli and Bakery. During the inspection, Mr. Bryant prepared and signed an inspection report setting forth several violations he observed during the inspection.

7. On September 23, 2008, Mr. Bryant notified Respondent about the violations and further advised that the violations must be corrected by the next inspection.

8. On May 8, 2009, Mr. Bryant performed another food service inspection of New York Deli and Bakery. During the

inspection, Mr. Bryant prepared and signed an inspection report setting forth violations he observed during the inspection.

9. On May 8, 2009, Mr. Bryant notified Respondent about the violations and recommended the issuance of an administrative complaint.

10. During the September 23, 2008, and May 8, 2009, inspections, the most serious violation observed was potentially hazardous foods held at temperatures greater than 41 degrees Fahrenheit. This included roast beef, ham, salami and cheese located in a display cooler at between 57-64 degrees Fahrenheit. This is a critical violation, because potentially hazardous food stored at improper temperatures can lead to food-borne illness.

11. The next most serious violation observed during those inspections was the absence of a food manager certification. This is a critical violation, because the State of Florida requires a certified food manager in the restaurant in order to instruct and observe employees and thereby avoid other violations from occurring.

12. On December 8, 2008, Petitioner and Respondent entered into a "Stipulation and Consent Order" relating to the alleged violations stemming from the September 23, 2008, inspection (and the follow-up inspection held the next day, September 24, 2008). (Petitioner's Exhibit 4) Among the "Stipulated Facts" was the

statement that "Respondent neither admits nor denies the allegations of fact contained in the Administrative Complaint. . .". Respondent agreed to pay a fine of \$250.00, submit to a post-settlement inspection, and attend a Hospitality Education Program workshop. Also included in the stipulation was the statement that "[E]xecution of this Stipulation will not preclude additional proceedings by the Department for acts or omissions not addressed in the Administrative Complaint attached as Exhibit "A" herein." (emphasis supplied)

13. The stipulated settlement was adopted by Final Order of the Division dated December 24, 2008, and constituted "appropriate settlement of this matter." There is no evidence in this record that Respondent did not comply with the terms of the settlement agreement.

#### CONCLUSIONS OF LAW

14. 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).

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

16. 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.

17. 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).

18. The Administrative Complaint at issue is grounded on violations observed during both the September 23, 2008, and May 8, 2009, inspections. However, as noted above, the violations allegedly observed during the September 23, 2008, inspection were the subject of the Stipulation and Consent Order, and Final Order, disposing of that Administrative Complaint. That matter was finally resolved without any admission or finding of violation by Respondent.

19. Paragraph 1-201.10(B) and Chapters 2 through 7 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).

20. Through the Administrative Complaint, Respondent is alleged to have violated Section 3-501.16(A), Food Code which states in pertinent part:

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. . .

21. Petitioner met its burden of proof that Respondent violated Section 3-501.16(A), Food Code, because potentially hazardous food was observed being held at temperatures greater than 41 degrees Fahrenheit during the inspection conducted on May 8, 2009.

22. Through the Administrative Complaint, Respondent is also alleged to have violated Rule 61C-4.023(1), Florida Administrative Code, which states in pertinent part:

All managers who are responsible for the storage, preparation, display, and serving of foods to the public shall have passed a certification test approved by the Division demonstrating a basic knowledge of food protection practices as adopted in this chapter. Those managers who successfully pass an approved certification examination



shall be issued a certificate by the certifying organization, which is valid for a period of five years from the date of issuance.

23. Petitioner met its burden of proof that Respondent violated Florida Administrative Code Rule 61C-4.023(1), because the manager lacked proof of Food Manager Certification during the inspection of May 8, 2009.

24. In its Proposed Recommended Order, the Division proposes the imposition of the maximum allowable fine of \$1,000.00 for each of the two violations proven. The Division asserts that the violations at issue constitute a "second offense" given the prior Final Order in which Respondent agreed to pay a fine of \$250.00 to resolve alleged violations brought by Petitioner. However, the alleged violations noted in the September 23, 2008, inspection were neither admitted nor proven, and therefore it would be inappropriate to categorize the violations stemming from the May 8, 2009, inspection as a second offense.

25. Moreover, since the prior Administrative Complaint was resolved through a settlement stipulation with no admission or determination of violation, that resolution must stand, consistent with the principles of administrative finality. Fla. Power Corp. v. Garcia, 780 So. 2d 34 (Fla. 2001). It is inappropriate at this juncture to revive the factual allegations

previously resolved through settlement and attempt to use those same (unproven) allegations as a basis to increase the fines imposed based upon the May 8, 2009, inspection.

26. The Division met its burden of proof regarding the allegations contained in the Administrative Complaint as they relate to the May 8, 2009, inspection. However, since the proven violations do not constitute a second offense, an administrative penalty in the amount of \$500.00 for each of the two violations is reasonable and appropriate.

27. Even were the violations arising from the May 8, 2009, inspection considered to be a second offense, a penalty of \$500.00 per violation is still appropriate given the absence of additional aggravating factors.

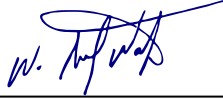
#### RECOMMENDATION

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 during the May 8, 2009, inspection, and impose 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. It is further recommended that Petitioner require Ramiro Escobar to complete an appropriate educational program related to the violations identified herein.

DONE AND ENTERED this 18th day of August, 2010, in  
Tallahassee, Leon County, Florida.



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W. DAVID WATKINS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 18th day of August, 2010.

ENDNOTE

<sup>1/</sup> All statutory references in this Recommended Order are to the 2009 version of the Florida Statutes with the exception of the jurisdictional reference contained in the Conclusions of Law.

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.