

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS)
AND RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 10-2672
)
HOT WOK,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A hearing was held pursuant to notice, on July 16, 2010, by Barbara J. Staros, assigned Administrative Law Judge of the Division of Administrative Hearings, via video teleconferencing with sites in Gainesville 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 is the appropriate disciplinary action that 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 May 17, 2010. A formal hearing was set for July 16, 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, Judy Hentges. Petitioner's Exhibits numbered 1, 2, 4 and 5 were admitted into evidence. Exhibits 4 and 5 were admitted only for consideration of mitigation or aggravation of penalty and proof

of prior violation. Official Recognition was requested of Sections 509.032(6) and 509.292(1) 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 July 30, 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. References to Florida Statutes are to the 2009 version, unless otherwise indicated.

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 Gainesville, Florida. Respondent was issued license number 1102902 as a public food establishment by the Division.

3. Critical violations are those violations that pose a significant threat to the health, safety, and welfare of the

public. Non-critical violations are any other violation that are not deemed critical.

4. Judy Hentges has been employed by the Division for approximately 12 and one-half years as a sanitation and safety specialist. She also has a food manager's certification. Ms. Hentges has received training in laws and rules regarding public food service and lodging, and continues to receive continuing education training on a monthly basis. Ms. Hentges performs approximately 800 to 1,000 inspections annually.

5. On August 11, 2009, Ms. Hentges conducted a routine inspection of Respondent's premises and issued an inspection report while on the premises. Kitty Lu, manager of the restaurant, was present and signed the inspection report, as did Ms. Hentges.

6. Ms. Hentges informed the manager about the violations she found, which were noted on the inspection report, and explained that the violations must be corrected by the following day.

7. During the August 11, 2009, inspection, Ms. Hentges observed food that was not held at 135 degrees Fahrenheit or above.

8. When food is held "out of temperature," bacteria rises at a rapid rate which can initiate a food-borne illness. This is a critical violation because temperature violations are one

of the leading causes of food-borne illnesses and present an immediate health threat to the public. Respondent had previously been cited for this particular violation during inspections that took place on February 11, 2009; February 12, 2009; and April 16, 2009.

9. During her inspection on August 11, 2009, Ms. Hentges also observed that imitation scallops were being used, whereas the menu did not indicate that the scallops were imitation. This constitutes misrepresentation of a food product. Respondent previously had been cited for this particular violation on October 20, 2008; October 21, 2008; February 11, 2009; February 12, 2009; and April 16, 2009.

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. (2010).

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 suspension of Respondent's license, 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, 5, 6 and 7 of the United States Food and Drug Administration's Food Code (Food Code) have been incorporated by reference into the Department's 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 provision of the Food Code, which reads in pertinent part:

3-501.16(A)(1) 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. . . .

16. Through the Administrative Complaint, Respondent is alleged to have violated Section 509.292(1), Florida Statutes (2009), which reads as follows:

Misrepresenting food or food product.-

(1) An operator may not knowingly and willfully misrepresent the identity of any food or food product to any of the patrons of such establishment. The identity of food or a food product is misrepresented if:

(a) The description of the food or food product is false or misleading in any particular;

(b) The food or food product is served, sold, or distributed under the name of another food or food product; or

(c) The food or food product purports to be or is represented as a food or food product that does not conform to a definition of identity and standard of quality if such definition of identity and standard of quality has been established by custom and usage.

17. The Division met its burden of proving that Respondent violated Section 3-501.16(A)(1), Food Code, by failing to maintain food at 135 degrees Fahrenheit or above, as observed by Ms. Hentges in the kitchen during the inspection of August 11, 2009.

18. The Division met its burden of proving that Respondent violated Section 509.292(1), Florida Statutes, because the identity of a food product, imitation scallops, was misrepresented during the inspection of August 11, 2009.

19. In its Proposed Recommended Order, the Division proposes the imposition of a four-day suspension. Florida Administrative Code Rule 61C-1.005(6) sets forth the penalty guidelines to be imposed against licensees for violations of the

applicable statutes and rules. Subsection (b) 3. provides that when a third or subsequent offense of a critical violation occurs, the appropriate penalty is an administrative fine of \$750 to \$1,000, license suspension, or both. Subsection (c) 3. of the rule sets forth a penalty range of an administrative fine of \$1,000, license suspension, or license revocation, or any combination thereof, for the third or subsequent offense of misrepresentation of a food or food product.

20. The Division met its burden of proof regarding the allegations contained in the Administrative Complaint. Further, the undersigned reviewed the Final Orders previously entered against Respondent regarding the same violations. Accordingly, the proposed license suspension of four days is reasonable and consistent with the above-referenced rule penalty guidelines.

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 suspends Respondent's hotel and restaurant license for four days, effective the first Monday after 40 days from the date the Final order is filed with the Agency Clerk of the Department of Business and Professional Regulation, Division of Hotels and Restaurants.

DONE AND ENTERED this 27th day of August, 2010, in
Tallahassee, Leon County, Florida.



Barbara J. Staros
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of August, 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.