

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case Nos. 10-2675
) 10-3295
TATU,)
)
Respondent.)
_____)

CORRECTED RECOMMENDED ORDER¹

Pursuant to notice, a hearing was conducted in these consolidated cases on July 27, 2010, via video teleconference from sites in Gainesville and Tallahassee, Florida, before Lawrence P. Stevenson, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Chang S. Bahn, pro se
Tatu
1702 West University Avenue, Suite J
Gainesville, Florida 32603

STATEMENT OF THE ISSUE

At issue in this proceeding is whether Respondent committed the violations alleged in the Administrative Complaints dated August 31, 2009, and April 19, 2010, and, if so, what penalty is warranted.

PRELIMINARY STATEMENT

The Department of Business and Professional Regulation, Division of Hotels and Restaurants (the "Division"), alleged in an Administrative Complaint dated August 31, 2009, that Respondent violated the standards governing public food service establishments. Specifically, the Administrative Complaint alleged that the Division's inspector observed "potentially hazardous food cold held at greater than 41°F reach-in^{2/} cooler" during inspections conducted on February 18, 2009,^{3/} and July 14, 2009, in violation of Food Code Rule 3-501.16(a)^{4/}; observed cold holding equipment incapable of maintaining potentially hazardous food at proper temperature (reach-in cooler)" during inspections conducted on February 18, 2009, July 8, 2009, and July 14, 2009, in violation of Food Code Rule 4-301.11; and observed "identity of food or food product misrepresented. Menu board stated crab delight although imitation [crab] was used" during inspections conducted on September 26, 2008, February 18, 2009, and July 14, 2009, in violation of Section 509.292(1), Florida Statutes.

Respondent disputed the allegations and requested an evidentiary hearing pursuant to Section 120.57(1), Florida Statutes, through an Election of Rights form.

On May 17, 2010, the case was referred to the Division of Administrative Hearings, given DOAH Case No. 10-2675, and assigned to the undersigned. The case was noticed for hearing on July 27, 2010.

In a second Administrative Complaint dated April 19, 2010, the Division alleged further violations of the standards governing public food establishments. This Administrative Complaint alleged that the Division's inspector observed "potentially hazardous food cold held at greater than 41°F -- bread mix 66°F and liquid eggs 77°F, on cookline; sushi roll seafood 70°F, on front counter; and seafood 68°F, in reach-in cooler," in violation of Food Code Rule 3-501.16(A); and observed "hand wash sink not accessible for employee use at all times. Waste bucket and wiping cloth bucket blocking hand wash sink," in violation of Food Code Rule 5-205.11(A). The Administrative Complaint alleged that these violations occurred on July 8, 2009, July 14, 2009, and April 5, 2009.

Respondent disputed the allegations of the second Administrative Complaint and requested an evidentiary hearing pursuant to Section 120.57(1), Florida Statutes, through an Election of Rights form.

The second Administrative Complaint was referred to the Division of Administrative Hearings on June 15, 2010, and given DOAH Case No. 10-3295. Also on June 15, 2010, the Division filed a motion to consolidate DOAH Case Nos. 10-2675 and 10-3295, which was granted by an order dated June 30, 2010. The consolidated cases remained scheduled for July 27, 2010, on which date the hearing was held.

At the hearing, the Division presented the testimony of Daniel Fulton, the senior inspector who conducted the inspections of Respondent's restaurant, and the rebuttal testimony of sanitary and safety supervisor Jeanie Porter. The Division's Exhibits 1 and 4 through 8 were admitted into evidence. Respondent presented the testimony of Chang Bahn, the owner and operator of Tatu. Respondent offered no exhibits into evidence.

A Transcript of the hearing was filed at the Division of Administrative Hearings on August 11, 2010. The Division timely filed a Proposed Recommended Order on August 23, 2010. Respondent did not file a proposed recommended order. On September 8, 2010, Respondent filed a letter accompanied by photographs of Tatu's kitchen and cooler areas with captions purporting to explain the alleged violations. Because this letter was a belated attempt to supplement the evidentiary

record of this proceeding, it has not been considered in the drafting of this Recommended Order.

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 Tatu was a restaurant located at 1702 West University Avenue, Suite J, Gainesville, Florida 32603, holding Permanent Food Service license number 1102115. Tatu consists of a sushi bar and a restaurant serving Asian food, on the second floor of the UF Plaza directly across the street from the University of Florida campus. It is owned and operated by Chang Bahn.

3. A critical violation is a violation that poses an immediate danger to the public.

4. A non-critical violation is a violation that does not pose an immediate danger to the public, but needs to be addressed because if left uncorrected, it can become a critical violation.

5. On July 8, 2009, Daniel Fulton, a senior inspector with the Division, performed a food service inspection of the Respondent. During the inspection, Mr. Fulton observed that cold foods were not being held at their proper temperature. This is a critical violation because foods held out of their

proper temperatures for any length of time can grow bacteria that could cause food borne illnesses in persons who eat the food.

6. Mr. Fulton also observed that Respondent's cold holding equipment was not capable of maintaining potentially hazardous foods at their proper temperature. This is a critical violation because refrigeration equipment must be capable of holding foods below 41 degrees Fahrenheit for the safety of the consuming public.

7. At the conclusion of his inspection, Mr. Fulton prepared and signed an inspection report setting forth the violations he encountered during the inspection. He notified Mr. Bahn's wife, Suy Bahn, of the nature of the violations and she signed the inspection report. (Mr. Bahn was not present in the restaurant during the July 8, 2009, inspection.) Mr. Fulton informed Ms. Bahn that all of the violations noted in the inspection report would have to be corrected by the following day, July 9, 2009.

8. Mr. Fulton performed a callback inspection at Tatu on July 14, 2009. Mr. Fulton's callback inspection report noted that the critical violations found on July 8, 2009, had not been corrected. Uncooked fish was found held at temperatures of 45 to 46 degrees Fahrenheit, and the cold holding equipment was still incapable of maintaining food at the proper temperature.

9. Mr. Fulton further observed that Respondent was misrepresenting a food product. In this case, imitation crab was being served in a dish labeled "Crab Delight," rather than under the name "krab" to indicate its ersatz nature. This is a critical violation, not just because of the misrepresentation involved, but because restaurant customers may have allergies to certain foods and therefore need to know exactly what they are eating.

10. Mr. Bahn signed the July 14, 2009, callback inspection report. After the July 14, 2009, callback inspection, Mr. Fulton recommended that an Administrative Complaint be issued because Respondent had not corrected the critical violations found in the July 8, 2009, inspection. This Administrative Complaint was the basis for DOAH Case No. 10-2675.

11. On April 5, 2010, Mr. Fulton performed a food service inspection at Tatu. During this inspection, Mr. Fulton found two critical violations. The first critical violation was that the restaurant was keeping potentially hazardous cold foods at temperatures greater than 41 degrees Fahrenheit. On the cooking line, Mr. Fulton found breading mix held at 66 degrees Fahrenheit and liquid eggs at 77 degrees Fahrenheit. At the front counter, seafood was held at 70 degrees Fahrenheit, and Mr. Fulton found seafood at 68 degrees Fahrenheit in the reach-

in cooler. Mr. Fulton had noted the same critical violation during his inspection of July 8, 2009, and during his callback inspection of July 14, 2009.

12. The second critical violation noted by Mr. Fulton during his April 5, 2010, inspection was that the hand sinks were not accessible for employees' use at all times. The hand-washing sink was blocked by a waste bucket and a wiping cloth bucket. This is a critical violation because employees are less likely to wash their hands if it is difficult for them to do so. The employees' failure to wash their hands can lead to contamination of the food and consequently food-borne illnesses in the restaurant's customers. Mr. Fulton had noted the same critical violation during his inspection of July 8, 2009.^{5/}

13. Mr. Fulton prepared an inspection report. He notified Mr. Bahn of the violations. Mr. Bahn signed the report. Mr. Fulton recommended that an Administrative Complaint be issued in this case because Respondent had not corrected a violation for which it had already been cited within a one-year period. This Administrative Complaint was the basis for DOAH Case No. 10-3295.

14. The Division presented evidence of prior disciplinary action against Respondent. Administrative complaints were filed against Respondent based on inspections conducted on September 26, 2008 and on February 18, 2009. Each of these

cases was resolved by a Stipulation and Consent Order in which Respondent neither admitted nor denied the facts alleged in the respective administrative complaint. See Endnote 2, supra.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.^{6/}

16. Petitioner has jurisdiction over the operation of public lodging establishments and public food service establishments, pursuant to Section 20.165 and Chapter 509, Florida Statutes.

17. The Division is authorized to take disciplinary action against the holder of such a license for operating in violation of Chapter 509, Florida Statutes, or the rules implementing that chapter. Such disciplinary action may include suspension or revocation of the license, imposition of an administrative fine not to exceed \$1,000.00 for each separate offense, and mandatory attendance, at personal expense, at an educational program sponsored by the Hospitality Education Program. § 509.261, Fla. Stat.

18. Here, the Division seeks to discipline Respondent's license and/or to impose an administrative fine. Accordingly, the Division has the burden of proving the allegations charged

in the Administrative Complaint against the Respondent by clear and convincing evidence. Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

19. A licensee is charged with knowing the practice act that governs his license. Wallen v. Florida department of Professional Regulation, Division of Real Estate, 568 So. 2d 975 (Fla. 3d DCA 1990).

20. The Administrative Complaint in DOAH Case 10-2675 alleged that on September 26, 2008, February 18, 2009, and July 14, 2009, Respondent was in violation of Food Code Rules 3-501.16(A) and 4-301.11, and of Section 509.292(1), Florida Statutes.

21. Food Code Rule 3-501.16(A) provides, in pertinent part:

Potentially Hazardous Food, Hot and Cold Holding.

(A) Except during preparation, cooking, or cooling, or when time is used as the public health control as specified under § 3-501.19, and except as specified in ¶ (B) of this section, potentially hazardous food shall be maintained:

(1) At 57°C (135°F) or above, except that roasts cooked to a temperature and for a time specified in ¶ 3-401.11(B) or reheated as specified in ¶ 3-403.11(E) may be held at a temperature of 54°C (130°F) or above; or

(2) At a temperature specified in the following:

(a) 5°C (41°F) or less....

22. The Division proved by clear and convincing evidence that Respondent cold held potentially hazardous food at greater than 41 degrees Fahrenheit, and therefore that Respondent violated Food Code Rule 3-501.16(A).

23. Food Code Rule 4-301.11 provides:

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.

24. The Division proved by clear and convincing evidence that Respondent's equipment for holding cold food was not sufficient in capacity to maintain food at temperatures specified under Chapter 3 of the Food Code.

25. Section 509.292(1), Florida Statutes, provides:

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.

26. The Division proved by clear and convincing evidence that Respondent served imitation crab under the name "Crab Delight," and therefore that Respondent violated Section 509.292(1), Florida Statutes.

27. The Administrative Complaint in DOAH Case 10-3295 alleged that on July 8, 2009, July 14, 2009, and April 5, 2009, Respondent was in violation of Food Code Rules 3-501.16(A) and 5-205.11(A).

28. The Division proved by clear and convincing evidence that Respondent cold held breading mix at 66 degrees Fahrenheit and liquid eggs at 77 degrees Fahrenheit on the cooking line, seafood at 70 degrees Fahrenheit on the front counter, and seafood at 68 degrees Fahrenheit in the reach-in cooler. Therefore, the Division proved by clear and convincing evidence that Respondent was in violation of Food Code Rule 3-501.16(A), the text of which is set forth at Conclusion of Law 21, supra.

29. Food Code Rule 5-205.11(A) provides:

Using a Handwashing Facility.

(A) A handwashing facility shall be maintained so that it is accessible at all times for employee use.

30. The Division proved by clear and convincing evidence that Respondent's hand-washing sink was blocked by a waste bucket and a wiping cloth bucket, and therefore that Respondent violated Food Code Rule 5-205.11(A).

31. The Division proposed an administrative fine of \$1,000.00 for each critical violation found in these consolidated cases, for a total penalty of \$5,000.00. Florida Administrative Code Rule 61C-1.005 sets forth the Division's disciplinary guidelines, which provide in relevant part as follows:

(6) Standard penalties. This section specifies the penalties routinely imposed against licensees and applies to all violations of law subject to a penalty under Chapter 509, F.S. Any violation requiring an emergency suspension or closure, as authorized by Chapter 509, F.S., shall be assessed at the highest allowable fine amount.

(a) Non-critical violation.

1. 1st offense - Administrative fine of \$150 to \$300.

2. 2nd offense - Administrative fine of \$250 to \$500.

3. 3rd and any subsequent offense - Administrative fine of \$350 to \$1000, license suspension, or both.

(b) Critical violation. Fines may be imposed for each day or portion of a day that the violation exists, beginning on the date of the initial inspection and continuing until the violation is corrected.

1. 1st offense - Administrative fine of \$250 to \$500.
2. 2nd offense - Administrative fine of \$500 to \$1,000.
3. 3rd and any subsequent offense - Administrative fine of \$750 to \$1,000, license suspension, or both.^[77] (Emphasis added.)

32. The Division's proposed fine was based on the premise that Respondent is a third-time offender due to the filing of two disciplinary Final Orders within 24 months preceding the Administrative Complaints in this consolidated proceeding. However, the evidence established only that the Division and Respondent entered into two previous "Stipulation and Consent Orders," which are in the nature of settlement agreements. The Division did not prove the allegations of the underlying administrative complaints, and Respondent neither admitted nor denied those allegations. Thus, the Division did not establish that two previous "disciplinary Final Orders" were entered against Respondent.

33. Under all the facts and circumstances of these consolidated cases, a fine of \$500.00 for each of the five proven critical violations is appropriate.

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 an administrative fine of \$2,500.00, payable under terms and conditions deemed appropriate.

DONE AND ENTERED this 5th day of October, 2010, in Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of October, 2010.

ENDNOTES

^{1/} On October 4, 2010, Petitioner filed a Motion for Clarification accurately pointing out that the undersigned had neglected to set forth an explicit Conclusion of Law regarding the alleged violation of Food Code Rule 4-301.11. The

correction has been made at Conclusion of Law 24, and the subsequent paragraphs have been renumbered.

^{2/} The Administrative Complaint spelled this term as "reachin," but for ease of reading it has been changed to "reach-in" throughout this Recommended Order.

^{3/} For purposes of establishing repeat violations, the Division's Administrative Complaint referenced inspections conducted on September 26, 2008, and February 18, 2009, which resulted in administrative complaints dated October 14, 2008, and March 26, 2009. In each instance, a Stipulation and Consent Order was entered by the Division. In the first Stipulation and Consent Order, signed by Chang Bahn on November 10, 2008, and entered on December 2, 2008, Respondent agreed to pay a fine of \$500.00 and submitted to a post-settlement inspection, but did not admit nor deny the allegations of fact contained in the Administrative Complaint. In the second Stipulation and Consent Order, signed by Chang Bahn on April 14, 2009, and entered on April 23, 2009, Respondent agreed to pay a fine of \$2,000.00, submitted to a post-settlement inspection, and agreed to cooperate in a "hospitality education program workshop," but again did not admit or deny the allegations of fact contained in the Administrative Complaint. The specifics of the inspections that led to those earlier final orders were not at issue in the instant cases.

^{4/} The Division has adopted by reference the 2001 Food Code of the United States Public Health Service/Food and Drug Administration, as well as its August 29, 2003, Supplement. Fla. Admin. Code R. 61C-1.001(14).

^{5/} The violation had apparently been corrected before the July 14, 2009, callback inspection, which would explain why it was not included as a major violation in the first Administrative Complaint.

Mr. Fulton had conducted the earlier inspections of September 26, 2008, and February 18, 2009, and had noted this violation in each of those inspections. The record did not establish whether this violation was included in the administrative complaints that ensued from those inspections.

^{6/} Unless otherwise indicated, all references are to the 2009 Florida Statutes.

7/ Florida Administrative Code Rule 61C-1.005(5)(e) defines "third and any subsequent offense" to mean "a violation of any law subject to penalty under Chapter 509, F.S., after two or more 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, even if the current violation is not the same as the previous 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.