STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF HOTELS AND RESTAURANTS,	)	
Petitioner,	)	
vs.	)	Case No. 10-5922
C AND K SMOKE HOUSE BBQ,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on October 4, 2010, by video teleconference between sites in Tallahassee and Sarasota, before Elizabeth W. McArthur, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: John J. Truitt, Qualified Representative
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 60
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For Respondent: Carl Rhodes, Jr., *pro se*
C and K Smoke House BBQ
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent committed the violation alleged in the Administrative Complaint, and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

Petitioner, Department of Business and Professional Regulation, Division of Hotels and Restaurants (Petitioner or Division), filed a one-count Administrative Complaint against Respondent, C and K Smoke House BBQ (Respondent), a licensed restaurant co-owned by Carl Rhodes, Jr., and Kimberly V. Rhodes. The Administrative Complaint alleged that Respondent violated a rule that requires submission of plans to the Division for review and approval before a restaurant is constructed, remodeled, converted, or reopened. The factual allegations, based on inspection reports, were that "renovations" were "in progress" to add a "rotisserie smoker unit at [the] outside patio area" and that the "area is also not propely [sic] screened."

Respondent timely requested an administrative hearing involving disputed issues of material fact, and the matter was referred to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct the hearing requested by Respondent.

Petitioner presented the testimony of Victoria Bagley, a sanitation and safety supervisor, who inspected Respondent's establishment. Petitioner's Exhibits 1 through 4 were received into evidence. In addition, Petitioner's request was granted for official recognition of Subsection 509.32(6), Florida Statutes (2010),[1] and Florida Administrative Code Rules 61C-1.001(14), 61C-1.002(6)(C)(1)[sic],[2] and 61C-1.005.

Mr. Rhodes, as co-owner of Respondent, self-represented Respondent and testified on Respondent's behalf. Respondent's other co-owner, Kimberly Rhodes, was present, but did not testify. Respondent's Exhibits 1 through 4 were received into evidence.

A Transcript of the final hearing was filed on October 14, 2010. The Division timely filed its Proposed Recommended Order, which has been considered in the preparation of this Recommended Order. Respondent did not file a proposed recommended order.

FINDINGS OF FACT

1. Since November 9, 2004, Respondent has been licensed and regulated by the Division as a permanent food service establishment in Parrish, Florida. Respondent's license number is 5105120.

2. Before initial licensure, Respondent submitted plans for the restaurant to the Division with the required plan review application and plan review fee of $150.00. The 2004 plans

submitted for Division review and approval were not offered into evidence.

3. The Division periodically inspects licensed food service establishments, such as Respondent, to ensure compliance with applicable laws and regulations. For example, on October 7, 2009, the Division conducted a routine inspection of Respondent and determined that Respondent "met inspection standards during this visit."

4. Two days later, on October 9, 2009, the Division conducted another inspection of Respondent. The Division's witness, Ms. Bagley, who conducted the inspection, gave no explanation for conducting another inspection so close in time to the October 7, 2009, inspection in which inspection standards were found to be met.

5. Ms. Bagley's October 9, 2009, inspection report indicates several violations, and as a result, Ms. Bagley conducted a call-back inspection the next morning. Some of the items identified in the October 9, 2009, report were addressed to Ms. Bagley's satisfaction by the next morning. Ms. Bagley determined that additional time, through December 10, 2009, should be given to address two remaining items. One of those items, designated as a "non-critical" violation, was described as follows in both the October 9, 2009, inspection report and the October 10, 2009, call-back inspection report:

> 51-16-1: No plan review submitted to and approved by division of hotels and restaurants and renovations in progress. Added routissary [sic] smoker unit unto outside patio area. Area is\also not propely [sic] screened. Must comply.

6. Ms. Bagley conducted a call-back inspection on December 11, 2009. She found that one of the two items scheduled for call-back inspection was in compliance. She recommended issuance of an Administrative Complaint with regard to the other item described, as follows:

> Violation: 51-16-1
> No plan review submitted to and approved by division of hotels and restaurants and renovations in progress. Added routissary [sic] smoker unit unto outside patio area, area is\also not propely [sic] screened. Must comply.

7. On January 22, 2010, Petitioner issued an Administrative Complaint against Respondent, as recommended by Ms. Bagley. The Administrative Complaint quoted the rule allegedly violated, as follows:

> 1. 51-16-1 61C-1.002(6)(C)(1) FAC:
> (1) The operator of each public food service establishment to be newly constructed, remodeled, converted, or reopened shall submit properly prepared facility plans and specifications to the Division for review and approval in accordance with the provisions of Chapter 509 and Rule Chapters 61C-1 and 61C-4, FAC. Such plans must be approved by the Division prior to construction, remodeling, conversion, scheduling of an opening inspection and licensing.

The allegations of fact relied on to establish the claimed rule violation were as follows:

> No plan review submitted to and approved by Division of Hotels and Restaurants and renovations in progress, added rotisserie smoker unit at outside patio area; area is also not propely [sic] screened.

8. Ms. Bagley testified that she prepared the three inspection reports on October 9, 10, and December 11, 2009, using a hand-held computer while she was on site. Ms. Bagley did not describe what she observed at any of the three inspections or elaborate on the description of the charged violation as set forth and repeated in each of the three inspection reports. Ms. Bagley did not identify any changes of any nature at Respondent's establishment besides the placement of a new rotisserie smoker unit in an area she described as the outside patio area.

9. Mr. Rhodes acknowledged that a new rotisserie smoker unit was acquired as replacement equipment to replace another smoker that wore out. Mr. Rhodes did not construct, remodel, or renovate space to house the new rotisserie. Instead, the new unit was placed in the same general area as the replaced unit, two feet from where the previous unit stood. The new unit could not sit in the identical spot as the prior unit, because it was an upright grill instead of a flat one. Though it was not

identical equipment, it was "like" equipment. Mr. Rhodes' testimony was credible and unrebutted.

10. Respondent submitted pictures into evidence to show the cooking area where the new rotisserie grill stands, adjacent to a larger smoker that sits next to another large smoker. These pictures were taken approximately three weeks after Ms. Bagley's last inspection. Ms. Bagley did not identify anything new or different in the scenes shown in the pictures from what she observed at the December 11, 2009, inspection. These pictures confirm Mr. Rhodes' testimony that the new rotisserie unit was placed in the same general area that was, and still is, used for cooking.

11. Ms. Bagley's three inspection reports use the phrase "renovations in progress." However, Ms. Bagley was unable to define what she meant by that phrase:

> Mr. Rhodes: I would like to get [Ms. Bagley's] definition of "renovation in progress."
>
> Ms. Bagley: Well, actually I wouldn't have a definition of renovation in progress. I would end up referring you to the plan review person, as well as the website. I believe that the definition in Florida Administrative Code 61(c) lists multiple possibilities, and then the Division has guidelines and policies that help explain those further.

12. Ms. Bagley's reference to the list of "multiple possibilities" is to Florida Administrative Code Rule

61C-1.002(5)(c)1., which states that the "operator of a public food service establishment to be newly constructed, remodeled, converted, or reopened" must submit plans to the Division for review and approval. This rule does not use the term "renovation," but it does use the term "remodeled."

13. The sentence after the excerpt of Florida Administrative Rule 61C-1.002(5)(c)1., quoted in the Administrative Complaint, provides as follows: "For remodeling, plan review submittal shall not be required if the division can otherwise determine that the intended remodeling will not have an impact on the Florida Clean Indoor Air Act, fire safety, bathroom requirements, or any other sanitation and safety requirements provided in law or rule."

14. When Ms. Bagley was asked about this provision and, in particular, how the Division defined the term "remodeling" used in its rule, her response was as follows:

> Well, I could say that just adding the smoker onto the patio area would be a change in use of that patio area. It turned it into a cooking, a food prep area that was originally, the plan was not approved for.

As previously noted, however, no evidence was presented of the original plans or the extent to which areas were separately designated for specific uses. The pictures in evidence do not support Ms. Bagley's apparent view that the so-called "patio area" with the new rotisserie grill is physically separated from

the so-called "cooking area" with the large smokers. The two areas are adjacent. A large smoker in the so-called "cooking area" is immediately adjacent to the new rotisserie smoker in the so-called "patio area" with nothing separating them besides a foot or two of space. Both areas appear to have ceilings, partial walls, and screening. The only apparent differences in the two areas are cosmetic, such as different flooring and different finishes to the walls.

15. Although Ms. Bagley was unable to define "renovation" or "remodeling," she referred to the Division's "guidelines and policies that help explain [the terms listed in the rule] further." The Division maintains a website page that sets forth "Restaurant Plan Review FAQ [frequently asked questions]." Respondent consulted this website page, which includes the following:

> Q: When am I required to submit plans for review?
>
> A: Plans are required for any of the following situations:
>
> Construction of a new food service establishment. Remodeling of an existing establishment if the proposed changes affect the sanitation, safety, or restroom requirements or the Florida Clean Indoor Air Act. Reopening an establishment that has been closed over one (1) year. Conversion of an existing structure for use as a food establishment.

> Q: What changes do not require a plan review?
>
> A: Changes that are only cosmetic in nature do not require a plan review. Such changes involve painting, replacing dining room carpeting, or replacing like equipment (e.g., replacing an old refrigerator with new). If you are in doubt, call the Customer Contact Center at 850.487.1395 for further clarification.

Ms. Bagley did not specifically address this guidance or explain why Respondent would not have reasonably relied on the authorization for "replacing like equipment" without plan review.

16. Leaving aside the threshold question of whether there was any "remodeling," no evidence was presented that the placement of the replacement rotisserie grill two feet away from where the prior grill was located is a change that implicates any new or different safety or sanitation requirements. Although Ms. Bagley testified that placing the new rotisserie grill two feet from the site of the old grill changed the use of the new location, she did not identify any specific sanitation or safety requirements impacted by the changed location. Presumably, if any such regulatory requirements had been impacted by the placement of the new rotisserie grill, Ms. Bagley would have cited them in her inspection reports.

17. Finally, although the inspection reports and Administrative Complaint allege that the area where the new

rotisserie grill is located is improperly screened, no evidence was presented to prove this allegation. Ms. Bagley did not explain what she meant by improper screening, where or how there was improper screening, or what the requirements are for proper screening. Respondent's pictures show screening in the entire cooking area that houses the new rotisserie grill and the other two larger smokers, but no evidence was presented regarding whether the screening was in any way improper.[3]

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

19. Petitioner has the burden of pleading, with particularity, in the Administrative Complaint the facts and law on which it relies to take disciplinary action against Respondent. Willner v. Department of Professional Regulation, Board of Medicine, 563 So. 2d 805, 806 (Fla. 1st DCA 1990); Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); United Wisconsin Life Insurance Co. v. Office of Insurance Regulation, 849 So. 2d 417, 422 (Fla. 1st DCA 2003).

20. In addition, Petitioner has the burden to prove the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996). The

clear and convincing evidence standard was defined in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), as follows:

> [C]lear 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 explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such 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.

21. The Administrative Complaint in this case charges Respondent with a single violation of the following rule requirement:

> (1) The operator of each public food service establishment to be newly constructed, remodeled, converted, or reopened shall submit properly prepared facility plans and specifications to the Division for review and approval in accordance with the provisions of Chapter 509, F.S., and Rule Chapters 61C-1 and 61C-4, F.A.C. Such plans must be approved by the Division prior to construction, remodeling, conversion, scheduling of an opening inspection and licensing.

Fla. Admin. Code R. 61C-1.002(5)(c)1. (cited incorrectly in the Administrative Complaint as Rule 61C-1.002(6)(C)(1), but quoted accurately).

22. The only facts alleged in the Administrative Complaint as the basis for the charged rule violation were as follows:

> No plan review submitted to and approved by Division of Hotels and Restaurants and renovations in progress, added rotisserie smoker unit at outside patio area; area is also not propely [sic] screened.

23. Without question, Respondent did not engage in new construction, did not convert an existing non-restaurant building for use as a food service establishment, nor did Respondent reopen a restaurant that had been closed. Thus, the only possible trigger under the rule is "remodeling."

24. Petitioner failed to meet its burden to prove by clear and convincing evidence that Respondent remodeled its food service establishment so as to violate the rule requiring plan submission. The only evidence of a change of any kind was that Respondent replaced a grill with like equipment and put the new grill in the same general area as the old grill, two feet away from where the old grill sat.

25. Petitioner does not contend that Respondent did not have proper plans for the restaurant submitted and approved prior to initial licensure in 2004. Petitioner did not present evidence of the original plans it approved, nor did Petitioner present any other evidence of what specifically changed at Respondent's establishment, if anything, besides the acquisition of a replacement grill placed in the same general area and two feet away from where the old grill sat. No evidence was presented of any construction or alteration of any structure,

such as if Respondent had added a room to house the replacement equipment or rebuilt any existing structures, in whole or in part. Respondent's unrebutted testimony was that no such activity occurred.

26. Petitioner's own inspector was unable to define what she meant by "renovation in progress," despite the fact that that is the phrase she used in her inspection report to describe Respondent's alleged violation.

27. Petitioner's inspector also was unable to define "remodeling," as used in the rule allegedly violated by Respondent. The only categories triggering the plan review requirement are new construction, remodeling, conversion, and reopening of a food service establishment; and the only one of those categories suggested by Petitioner to have occurred here is "remodeling." But Petitioner's inspector never determined whether there was any "remodeling," as required by the plan review rule. Instead, the inspector jumped to the exception in the rule and treated the exception as if it created an additional category.

28. The exception in the rule provides as follows: "For remodeling, plan review submittal shall not be required if the division can otherwise determine that the intended remodeling will not have an impact on the Florida Clean Indoor Air Act, fire safety, bathroom requirements, or any other sanitation and

safety requirements provided in law or rule." Ms. Bagley ignored the "remodeling" requirement and, instead, rewrote the exception to provide a new category subject to the plan review requirement--any change in a restaurant establishment that has an impact on any sanitation and safety requirements. But the Division's rule, as written, plainly requires as a threshold trigger of the plan review requirement that there must be "remodeling." Consideration of the impact on sanitation and safety requirements only comes into play after there is a determination that a restaurant intends to remodel its establishment. Then, under the exception, if the remodeling will not impact sanitation and safety requirements in statutes and rules, the remodeling can go forward without plan review. The exception serves to narrow the scope of the regulation so that not all remodeling is subject to the plan review requirement.

29. Even if Petitioner's rule required plan submission and approval for any change in a restaurant that impacts sanitation and safety requirements or for any change in use, Petitioner would not have met its burden of proving, with clear and convincing evidence, that the two-foot relocation of the replacement equipment was such a change. As noted in the Findings of Fact, the inspection reports did not cite any violations of any safety and sanitation requirements caused by

locating the replacement grill two feet away from where the old grill sat. Moreover, Petitioner did not prove with clear and convincing evidence that the relocated equipment was a "change in use" of the patio area. Petitioner failed to offer into evidence the original approved plans, and, thus, there is no evidentiary basis for determining what uses were originally approved in what areas. But neither "change in use," nor "change impacting sanitation and safety requirements," are among the four categories listed in the Division's rule that triggers the plan review and approval requirement.

30. The Division is bound by its rule as written. Boca Raton Artificial Kidney Center v. Department of Health and Rehabilitative Services, 493 So. 2d 1055, 1057 (Fla. 1st DCA 1986). That is particularly true in this penal context where the rule prescribes conduct to which regulated persons are required to conform or be subject to penalties as the Division seeks to impose here.

31. In the absence of a statutory or rule definition of the term "remodeling," the common and ordinary meaning and usage should apply. See, e.g., Humana Hospital-Biscayne v. Department of Banking and Finance, 603 So. 2d 672, 673 (Fla. 1st DCA 1992). "Remodel" means "to alter the structure of." Webster's Ninth New Collegiate Dictionary at 996. Accord Merriam-Webster's Online Dictionary, www.merriam-webster.com (providing as an

example of common usage: "We remodeled the kitchen last year"). Using this common meaning and usage, Respondent did not remodel the restaurant by replacing equipment with like equipment, even if the replacement equipment was placed in a different location, two feet from where the old equipment sat. As the terms "remodeling" and "renovating" are commonly understood, no one would say that buying a replacement rotisserie oven for one's kitchen, even if located in a slightly different place, constitutes remodeling or renovating the kitchen.

32. Respondent reasonably assumed that replacement of worn out equipment with like equipment in the same general area, unaccompanied by construction or alteration to the establishment's structure, would not be considered remodeling subject to the plan review submission requirement. That reasonable assumption was supported by the Division's website FAQs, which explain that replacement of "like equipment" does not trigger the regulatory plan review requirement.

33. As to the allegation that an area was "not properly screened," Petitioner failed to charge a specific statute or rule allegedly violated. The only rule violation charged in the Administrative Complaint was the rule requiring submission of plans for review and approval before new construction, remodeling, conversion, or reopening and that rule plainly does not contain any requirements for proper screening. Moreover,

Petitioner failed to meet its burden of proving the factual allegation of improper screening.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by the Petitioner, Department of Business and Professional Regulation, Division of Hotels and Restaurants, dismissing the Administrative Complaint against Respondent, C and K Smoke House BBQ.

DONE AND ENTERED this 22nd day of November, 2010, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of November, 2010.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes are to the 2010 version.

[2] Both the Administrative Complaint and the rule excerpts prepared by the Division for its official recognition request cite Florida Administrative Code Rule 61C-1.002(6)(C)(1) as the provision addressing plan review requirements for restaurants. There is no such rule. However, the text quoted in the Administrative Complaint and in the Division's rule excerpt corresponds to Florida Administrative Code Rule 61C-1.002(5)(c)1. according to the Department of State's Florida Administrative Code rules available online at https://www.flrules.org/Default.asp. While the failure to charge a violation of the correct rule could be considered fatal to an Administrative Complaint, here the text of the rule relied on is quoted in full. Therefore, although the error is noted, it is not the basis for the recommendation herein.

[3] The October 9, 2009, inspection report lists several "Warnings," including items identifying repairs needed to the screening in both the patio area and the adjacent area where the two large smokers are located. These warning items use reference No. 35B, a violation category that addresses outer openings (such as screening) to protect from insects. In contrast, the plan review issue raised in the Administrative Complaint falls under reference No. 51, which is a general violation category covering other conditions affecting sanitary and safe operation. There is no charged rule violation in the Administrative Complaint to correspond with the screening issues raised in the inspection report.

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.