

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 10-6048
)
GALINDO CAFE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This case came before Administrative Law Judge Edward T. Bauer for final hearing by video teleconference on December 10, 2010, at sites in Tallahassee and Miami, Florida.

APPEARANCES

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

For Respondent: Maria Magdalena Galindo, pro se
30530 South Dixie Highway
Homestead, Florida 33030

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 September 15, 2009, Petitioner Department of Business and Professional Regulation, Division of Hotels and Restaurants ("the Division"), issued a six-count Administrative Complaint against Respondent Galindo Cafe, charging the licensed restaurant with various offenses relating to noncompliance with the rules governing food service establishments. Respondent timely requested a formal hearing to contest the allegations, and, on July 22, 2010, the matter was referred to the Division of Administrative Hearings.

Although a final hearing was originally scheduled for October 18, 2010, the hearing was continued to December 10, 2010, to afford Respondent the opportunity to arrange for an interpreter. During the final hearing, the Division presented the testimony of Michael Brown, who is employed as an inspector with the Division, and Carlos Lezcano,¹ a Deputy District Manager with the Division. The Division also introduced three exhibits, numbered one through three. The owner of the licensed restaurant, Maria Magdalena Galindo, testified on behalf of Respondent.

The Transcript of the final hearing was filed on December 30, 2010. The Division 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 2009 version of the Florida Statutes.

FINDINGS OF FACT

1. The Division 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 30530 South Dixie Highway, Homestead, Florida, and holding food service license number 2330285.

3. On July 6, 2009, and November 3, 2009, Respondent was inspected by sanitation and safety specialists employed by the Division. During both visits, inspectors noticed multiple items that were not in compliance with the laws which govern the facilities and operations of licensed restaurants.

4. Through the testimony of Mr. Brown and the exhibits introduced into evidence during the final hearing, the Division presented clear and convincing evidence that as of November 3, 2009, the following deficiencies subsisted at Respondent Galindo Cafe: (1) ready-to-eat, potentially hazardous food was held for

more than 24 hours with no date marking, in violation of Food Code Rule 3-501.17(B); (2) food was stored on the floor, raw food was stored over cooked food, and uncovered food was present in a holding unit, in violation of Food Code Rules 3-305.11(A) (3), 3-302.11(A) (1) (b), and 3-302.11(A) (4), respectively²; (3) a cutting board that was grooved, pitted, and no longer cleanable was observed, in violation of Food Code Rule 4-501.12; (4) unclean, wet wiping clothes were observed, in violation of Food Code Rule 3-304.14(B) (2); (5) a buildup of soiled material on racks in the walk-in cooler was present, in violation of Food Code Rule 4-601.11(A); and (6) a wall soiled with accumulated grease was observed, in violation of Florida Administrative Code Rule 61C-1.004(6).

5. The deficiencies relating to the improper storage of food, the build-up of soiled material, and the lack of proper food labeling 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 three remaining deficiencies (a grooved and pitted cutting board, unclean wiping clothes, and the accumulation of grease on a wall), while not categorized as a critical violations, are serious nonetheless because they can lead to the contamination of food.

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).

10. Food Code Rule 3-501.17(B) provides:

Except as provided in paragraphs (D) and (E) of this section, refrigerated, ready-to-eat, potentially hazardous food prepared and packaged by a food processing plant shall be clearly marked, at the time the original container is opened in a food establishment and if the food is held for more than 24 hours, to indicate the date or day by which the food shall be consumed on the premises, sold, or discarded, based on the temperature and time combinations specified in paragraph (A) of this section; and (1) The day the original container is opened in the food establishment shall be counted as day 1; and (2) The day or due date marked by the food establishment may not exceed a manufacturer's use-by date if the manufacturer determined the use-by date based on food safety.

11. Food Code Rule 3-302.11(A) (4) requires that food shall be protected from cross contamination by "[s]toring the food in packages, covered containers or wrappings."

12. Food Code Rule 3-305.11(A) (3) reads:

Food Storage. (A) Except as specified in paragraphs (B) and (C) of this section, food shall be protected from contamination by storing the food: . . . (3) At least 6 inches above the floor.

13. Food Code Rule 3-302.11(A) (1) (b) provides:

(A) Food shall be protected from cross contamination by: (1) Separating raw animal foods during storage, preparation, holding, and display from: . . . (B) Cooked ready-to-eat food.

14. Food Code Rule 4-501.12 reads, in pertinent part:

Cutting Surfaces. Surfaces such as cutting blocks and boards that are subject to scratching and scoring shall be resurfaced in they can no longer be effectively cleaned and sanitized, or discarded if they are not capable of being resurfaced.

15. Food Code Rule 3-304.14(B) (2) provides:

Cloths used for wiping food spills shall be: (2) Wet and cleaned as specified under paragraph 4-802.11(D), stored in a chemical sanitizer at a concentration specified in Section 4-501.114, and used for wiping spills from food-contact and nonfood-contact surfaces of equipment.

16. Food Code Rule 4-601.11(A) requires that

"[f]ood-contact surfaces and utensils shall be clean to the sight and touch."

17. Florida Administrative Code Rule 61C-1.004(6) provides that "[a]ll building structural components, attachments, and fixtures shall be kept in good repair, clean and free of obstructions."

18. 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. Fla. Real Estate Comm'n, 281

So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Division must prove the charges against Respondent by clear and convincing evidence. Dep't of Banking and Fin., Div. of Secs. & Investor Prot. 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. Dep't of Bus. & Prof'l Reg., 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

19. 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)).

20. 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 3-501.17(B) (one critical violation, as charged in Count One of the Administrative Complaint); Food Code Rules 3-302.11(A) (4), 3-305.11(A) (3), and 3-302.11(A) (1) (b) (one critical violation, as charged in Count Two); Food Code Rule 4-501.12 (one non-critical violation, as charged in Count Three);

Food Code Rule 3-304.14(B) (2) (one non-critical violation, as charged in Count Four); Food Code Rule 4-601.11(A) (one critical violation, as charged in Count Five); and Florida Administrative Code Rule 61C-1.004(6) (one violation, as charged in Count Six). In making these determinations, the undersigned concludes that "the plain language of the applicable . . . 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." Dep't of Bus. & Prof'l Reg., Div. of Hotels & Rests. v. Latin Am. Cafeteria, Inc., Case No. 05-2733 (Fla. DOAH Nov. 2, 2005). It is therefore unnecessary to make additional legal conclusions concerning these violations. Id.

21. As the instant case involves a first offense, Florida Administrative Code Rule 61C-1.005(6) provides for a fine ranging from \$250 to \$500 for each critical violation and \$150 to \$300 for every non-critical violation. The Division suggests in its Proposed Recommended Order that Respondent be fined a total of \$1,800, which represents a middle of the guidelines fine for each violation (i.e, \$375 for each of the three critical violations, and \$225 for each of the three non-critical violations). The undersigned agrees that the penalty sought by the Division is appropriate under the circumstances.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Division of Hotels and Restaurants 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 \$1800, to be paid within 30 days after the filing of the final order with the agency clerk.

DONE AND ENTERED this 25th day of January, 2011, 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 25th day of January, 2011.

ENDNOTES

¹ Mr. Lezcano's name is misspelled as "Loscano" in the final hearing transcript.

² These three allegations, all of which pertain to the storage of food, were enumerated in Count Two of the Administrative Complaint. However, Count Two did not contain the correct Food Code rules for two of the three violations. At the outset of the final hearing, the Division sought leave to orally amend the Administrative Complaint to accurately reflect the appropriate rules, which the undersigned granted. This did not result in prejudice, as the undersigned ruled that only one punishment could be imposed if Respondent was found to have violated Count Two.

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.