

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS)
AND RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 10-7767
)
DQ @ 39 AVE AND I-75,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A hearing was held pursuant to notice, on October 12, 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: Megan Demartini, Qualified Representative
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1015

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 (Division), 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 August 16, 2010. A formal hearing was set for October 12, 2010. The Notice of Hearing was mailed to the parties at their addresses of record.^{1/} The hearing took place as scheduled.

At the commencement of the hearing, the Division'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 Division's Motion to Accept Qualified Representative was granted.

At hearing, Petitioner presented testimony of one witness, Judy Hentges. Petitioner's Exhibits numbered 1 through 4 were admitted into evidence. Official Recognition was requested of Section 509.032(6) Florida Statutes, Florida Administrative Code Rules 61C-1.001(14), 61C-1.002(6)(c)1., and 61C-1.004(6), 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 November 3, 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 2008 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 1103079 as a public food establishment by the Division.

3. Critical violations are those violations that pose a significant threat to the public health, safety, and welfare and which is identified as a food-borne illness risk factor. Non-critical violations are violations that do not relate to a food-borne illness risk factor.

4. Judy Hentges has been employed by the Division for approximately 12 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 May 30, 2008, Ms. Hentges conducted a routine inspection of Respondent's premises. During the inspection, Ms. Hentges prepared, signed, and issued an inspection report while on the premises. Sonja Dobbins, Respondent's manager, was present and signed the inspection report.

6. Ms. Hentges informed the manager about the violations she found, noted the violations on the inspection report, placed the establishment on warning, and explained to the manager that the violations must be corrected by July 31, 2008.

7. On July 31, 2008, Ms. Hentges performed a callback inspection of Respondent. During that inspection, she prepared and signed a callback inspection report indicating that some of

the violations noted on the May 30, 2008, inspection report had not been corrected. Renee Sicard, Respondent's representative, signed for the callback inspection report.

8. On May 30, 2008, and again on July 31, 2008, the most serious violation observed by Ms. Hentges was the presence of flies in the kitchen. This is a critical violation because flies regurgitate when they land on food, then fly to another food item repeating that cycle. This can lead to food-borne illness.

9. On May 30, 2008, and again on July 31, 2008, the next most serious violation observed by Ms. Hentges was that the vacuum breaker was missing at the hose bibb. The vacuum breaker is a backflow preventer. This is a critical violation because without a vacuum breaker, contaminated water can back up into potable water used for washing dishes or for mixing food. This can introduce bacteria which can lead to food-borne illness.

10. On May 30, 2008, and again on July 31, 2008, Ms. Hentges observed that renovations were in progress while no plan review had been submitted to the Division. This is considered a violation because unauthorized movement of equipment could lead to more serious problems such as the blockage of a hand wash sink. This is a non-critical violation.

11. On May 30, 2008, and again on July 31, 2008, Ms. Hentges observed that non-food contact equipment was in poor repair. There was a leak inside the walk-in freezer causing a massive ice build-up. This is a violation because an employee could fall and get injured. This is a non-critical violation.

12. On May 30, 2008, and again on July 31, 2008, Ms. Hentges observed that the lights on the hood, in the hallway, and in the walk-in freezer were not functioning. This is a violation because without adequate light, employees are unable to observe soil buildup on equipment that needs to be cleaned. This is a non-critical violation.

CONCLUSIONS OF LAW

13. 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).

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

15. Pursuant to Section 509.261(1), Florida Statutes, 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.

16. Because the Department seeks the imposition of an administrative fine, the Department 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).

17. 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).

18. Through the Administrative Complaint, Respondent is alleged to have violated the following provisions of the Food Code, which read in pertinent part:

4-501.11 Good repair and adjustment

(A) Equipment shall be maintained in a state of repair and condition that meets the requirements specified in parts 4-1 and 4-2.

(B) Equipment components such as doors, seals, hinges, fasteners, and kick plates shall be kept intact, tight, and adjusted in accordance with manufacturers' specifications.

* * *

5-203.14 Backflow Prevention Device, when required.

A plumbing system shall be installed to preclude backflow of a solid, liquid, or gas containment into the water supply system at each point of use at the food establishment, including a hose bibb if a hose is attached or on a hose bibb if a hose is not attached and backflow prevention is required by law, by:

(A) Providing an air gap as specified under section 5-202.13; or

(B) Installing an approved backflow prevention device as specified under section 5-202.14.

* * *

6-501.111 Controlling Pests

The presence of insects, rodents, and other pests shall be controlled to minimize their presence on the premises by:

(A) Routinely inspecting incoming shipments of food and supplies;

(B) Routinely inspecting the premises for evidence of pests;

(C) Using methods, if pests are found, such as trapping devices or other means of pest control as specified under Sections 7-202.12, 7-206.12, and 7-2006.13; and

(D) Eliminating harborage conditions.

19. The Division proved by clear and convincing evidence that Respondent violated Rule 4-501.11(A) and (B) of the Food Code in that a leak in Respondent's walk-in freezer caused a massive build-up of ice on the floor.

20. The Division proved by clear and convincing evidence that Respondent violated Rule 5-203.14, Food Code, because the vacuum breaker was missing at the hose bibb.

21. The Division proved by clear and convincing evidence that Respondent violated Rule 6-501.111, Food Code, as live flies were in the kitchen.

22. Through the Administrative Complaint, Respondent is alleged to have violated Florida Administrative Code Rule 61C-1.004(6), which requires that all building structural components, attachments and fixtures be kept in good repair, clean, and free of obstructions.

23. The Division proved by clear and convincing evidence that Respondent violated Florida Administrative Code Rule 61C-1.004(6) in that lights were observed not functioning at the hood, in the hallway, and in the walk-in freezer.

24. Through the Administrative Complaint, Respondent is alleged to have violated Florida Administrative Code 61C-1.002(5)(c)1., which provides in pertinent part:^{2/}

Licensing and Inspection Requirements.-

(5)(c) 1. The operator of each public food 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. . . .

25. The Division met its burden of proving that Respondent violated Florida Administrative Code Rule 61C-1.002(5)(c)1., in that Respondent had not submitted an updated plan review and renovations were in progress.

26. In its Proposed Recommended Order, the Division proposes the imposition of \$2,500 fine. Florida Administrative Code Rule 61C-1.005 sets forth the penalty guidelines to be imposed against licensees for violations of the applicable statutes and rules. However, the Administrative Complaint was issued prior to the adoption of this rule. Therefore, Section 509.261(1), Florida Statutes, sets forth the appropriate penalty guidelines.

27. In light of the Division having proven two critical and three non-critical violations, the proposed fine is reasonable.

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 imposes an administrative fine in the amount of \$2,500 due and payable to the Division of Hotels and

Restaurants, 1940 North Monroe Street, Tallahassee, Florida
32399-1011, within 30 calendar days of the date the Final Order
is filed with the Agency Clerk.

DONE AND ENTERED this 9th day of December, 2010, in
Tallahassee, Leon County, Florida.



Barbara J. Staros
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of December, 2010.

1/ In its Proposed Recommended Order, the Division notes that after the hearing took place, a piece of undeliverable mail was returned by the Postal Service indicating a new address for James Hill, President of Respondent. Nothing mailed to Respondent by the Division of Administrative Hearings has been returned as undeliverable. The undersigned confirmed on the record that Respondent's copy of the Notice of Hearing was mailed to the address provided by the Division on its transmittal letter, which matched the address provided by Mr. Hill on the Election of Rights as his mailing address. In an abundance of caution, a copy of this Recommended Order will be mailed to Respondent's address of record and to the address provided by the Division in its Proposed Recommended Order.

2/ The Administrative Complaint incorrectly cites this as Florida Administrative Code 61C-1.002(6)(c)1. However, the content of the rule was quoted putting Respondent on notice of the provision alleged to have been violated.

COPIES FURNISHED:

Charles F. Tunnickliff, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32388-1015

DQ @ 39 Avenue and I-75
c/o James Hill
1035 South West 81st Drive
Gainesville, Florida 32607

DQ @ 39 Avenue and I-75
c/o James Hill
4434 South West 102nd Drive
Gainesville, Florida 32608-7143.

William L. Veach, Director
Division of Hotels and Restaurants
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Reginald Dixon, General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

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.