

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 10-8548
)
KEY WEST BED AND BREAKFAST,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 19, 2010, by telephone conference call before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Patricia Ann Nelson, Esquire
Department of Business and
Professional Regulation
1940 N. Monroe Street, Suite 42
Tallahassee, Florida

For Respondent: Jody Carlson, pro se
415 William Street
Key West, Florida 33040

STATEMENT OF THE ISSUES

Whether Respondent committed the violations alleged in the subject Administrative Complaint, and, if so, the penalties that should be imposed.

PRELIMINARY STATEMENT

Petitioner is a duly licensed bed and breakfast operating in Key West, Florida. On July 1, 2010, Petitioner filed an Administrative Complaint against Respondent which alleged Respondent violated Section 509.032(2)(b), Florida Statutes (2010),¹ by refusing to allow an inspector entrance or access to the licensed premises for the purpose of conducting an unannounced inspection. Respondent timely disputed the allegations contained in the Administrative Complaint, the matter was referred to DOAH, and this proceeding followed.

At the formal hearing, Petitioner presented the testimony of Leonardo Hernandez, a Sanitation and Safety Specialist employed by Petitioner. As part of his job duties, Mr. Hernandez conducts inspections of licensed premises. Petitioner offered two exhibits, both of which were accepted into evidence. At the request of Petitioner, the undersigned took official recognition of Sections 509.032(2)(b) and 509.032(6), Florida Statutes, and Florida Administrative Code Rules 61C-1.004 and 61C-1.005.

Respondent presented the testimony of Jody Carlson, the owner of Key West Bed and Breakfast. Respondent offered no exhibits.

The Transcript, consisting of one volume, was filed November 1, 2010. On Petitioner's motion, to which Respondent had no objection, the deadline for submitting proposed recommended orders (PROs) was extended to November 19, 2010. Petitioner timely filed its Proposed Recommended Order, which has been duly considered by the undersigned in the preparation of this Recommended Order. Respondent did not file a proposed recommended order. Respondent filed a letter addressed to the undersigned on December 13, 2010. That letter was not timely filed and was not considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times relevant to this proceeding, Respondent has operated as a bed and breakfast and has been subject to Petitioner's regulation. That regulation required Petitioner to comply with all relevant provisions set forth in Florida Statutes, Florida Administrative Code, and the Food Code.

2. At all times relevant to this proceeding Respondent held license number 5402366. That license authorizes Respondent to operate a bed and breakfast at 415 William Street, Key West, Florida (the subject facility).

3. Section 509.032, Florida Statutes, requires Petitioner to inspect licensed premises to safeguard the public health, safety, and welfare. Section 509.032(2)(b), Florida Statutes, authorizes the Petitioner to inspect the subject facility at any reasonable time as follows:

(b) For purposes of performing required inspections and the enforcement of this chapter, the division has the right of entry and access to public lodging establishments and public food service establishments at any reasonable time.

4. Leonardo Hernandez is employed by Petitioner as a Sanitation and Safety Specialist. Mr. Hernandez is experienced and properly trained to conduct inspections of food service and public lodging establishments to ensure compliance with applicable regulations. Mr. Hernandez performs between 1,200 and 1,400 inspections per year.

5. On May 21, 2010, Mr. Hernandez appeared at the subject facility at 8:26 a.m. for the purpose of conducting an unannounced inspection. The time Mr. Hernandez appeared at the subject premises for the inspection was a reasonable time. Mr. Hernandez had the right to inspect the premises and the licensee was required to grant him entry for the purpose of conducting the inspection.

6. Ms. Carlson, the owner of the subject facility, was not on the premises when Mr. Hernandez first arrived. The person in

charge of the subject facility (the operator), who was not identified by name, was supervising the preparation of breakfast for the guests of the subject facility when Mr. Hernandez first arrived. Mr. Hernandez showed the operator his credentials and told him why he was at the subject facility. In response, the operator, using profane language, denied Mr. Hernandez access to the premises. Mr. Hernandez suggested that the operator call the owner. The operator called Ms. Carlson by telephone and informed her of Mr. Hernandez's presence.

7. Ms. Carlson arrived at the subject premises within ten minutes of that telephone call. In the interim, Mr. Hernandez remained outside of the premises.

8. Upon her arrival, Mr. Hernandez informed Ms. Carlson of the reason of his visit and showed her his credentials. Ms. Carlson asked why he had not scheduled the inspection. Mr. Hernandez explained that rules governing public food service and public lodging inspections allow the right of entry to licensed premises for the purpose of unannounced inspections. Mr. Hernandez further explained that he would not force his way into the establishment.

9. Mr. Hernandez did not inspect the subject facility on May 21, 2010.

10. Mr. Hernandez generated the inspection by computer, while he was at the subject facility, the inspection report that

was admitted as Petitioner's Exhibit 2. Mr. Hernandez closed the inspection report with the recommendation that an administrative complaint be filed against Respondent because he was refused entry to the premises. The inspection report reflects the time Mr. Hernandez arrived at the subject facility, but it does not reflect the time Mr. Hernandez closed the inspection report.

11. Mr. Hernandez asserted that he closed his inspection report after Ms. Carlson did not respond to his statement that he would not force his way into the subject facility.

12. There is no dispute that Mr. Hernandez explained to Ms. Carlson that he had the right to inspect the premises. There is also no dispute that Ms. Carlson offered to walk him through the premises while he conducted his inspection after that explanation.² Ms. Carlson's offer came after Mr. Hernandez closed his inspection report that contained the violation at issue in this proceeding, but before Mr. Hernandez left the premises.

13. Mr. Hernandez told Ms. Carlson that that he had been abused by her staff and that he would not go into the facility. That statement was made after he closed his inspection report.

CONCLUSIONS OF LAW

14. DOAH has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

15. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondent. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So.2d 112 (Fla. 1st DCA 1989); and Inquiry Concerning a Judge, 645 So.2d 398 (Fla. 1994). The following statement has been repeatedly cited in discussions of the clear and convincing evidence standard:

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 evidence 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 the firm belief of (sic) conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

16. Petitioner proved by clear and convincing evidence that Respondent's operator denied Mr. Hernandez access to the subject facility for the purpose of conducting an inspection. In response to that denial, Mr. Hernandez suggested to the operator that he contact the owner of the premises, thereby

agreeing to deal with the owner, not the operator, of the subject facility.

17. After the owner appeared at the premises, Mr. Hernandez showed his credentials and asserted his authority to inspect the premises. It is not clear why he closed out his inspection report when he did. It is clear, however, that the owner gave Mr. Hernandez permission to inspect the premises by offering to walk him through the facilities while he conducted his inspection on the morning of May 21, 2010, before Mr. Hernandez left the premises. The fact that Mr. Hernandez closed his inspection report before Ms. Carlson made her offer does not make her offer untimely. Mr. Hernandez could have amended his inspection report and he could have completed the inspection on the morning of May 21, but he chose not to do so. Instead, Mr. Hernandez told Ms. Carlson that he had been abused by her staff and that he would not go into the facility. He thereafter left the premises.

18. Because Mr. Hernandez agreed to deal with the owner of the premises and because the owner clearly offered Mr. Hernandez entry to inspect the premises before he left the premises, it is concluded that Petitioner has failed to meet its burden in this proceeding.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding Respondent not guilty of the violation alleged in the subject Administrative Complaint.

DONE AND ENTERED this 20th day of December, 2010, in Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
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 20th day of December, 2010.

ENDNOTES

- 1/ All statutory references are to Florida Statutes (2010).
- 2/ Ms. Carlson testified, credibly, that she wanted to accompany Mr. Hernandez because the subject facility was fully booked with guests, breakfast was being served, and she did not want her guests to be disturbed.

COPIES FURNISHED:

William V. Leach, Director
Division of Hotels and Restaurants
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399

Reginald Dixon, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Jody Carlson
Key West Bed and Breakfast
415 William Street
Key West, Florida 33040

Patricia Ann Nelson, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399

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.