

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND)
CONSUMER SERVICES,)
)
Petitioner,)
)
vs.) Case Nos. 10-9186
) 10-10095
SUPER STOP SIXTH AVENUE, d/b/a)
SUPER STOP,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on December 22, 2010, by telephone conference call before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Steven Lamar Hall, Esquire
Department of Agriculture
and Consumer Services
407 South Calhoun Street, Suite 520
Tallahassee, Florida 32399

For Respondent: Hamid Lakhani
Super Stop Six Avenue, Inc.,
d/b/a Super Stop
15150 Northeast sixth Avenue
North Miami Beach, Florida 33162

STATEMENT OF THE ISSUES

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

PRELIMINARY STATEMENT

Respondent is convenience store with limited food service. Respondent sells mostly pre-packaged food products at retail, but it also provides ancillary food service.

Petitioner is an agency of the State of Florida responsible for permitting and regulating food establishments.

On June 22, 2010, a food safety inspector employed by Petitioner inspected Respondent's store and noted food safety violations that will be discussed below. On August 2, 2010, a follow-up inspection revealed violations that will discussed below. Based on those violations, Petitioner filed an administrative complaint against Respondent. Respondent timely requested a formal administrative hearing; the matter was referred to DOAH and assigned Case No. 10-9186.

On August 18, 2010, a food safety inspector employed by Petitioner inspected Respondent's store and noted food safety violations that will be discussed below. On September 9, 2010, a follow-up inspection revealed violations that will discussed below. Based on those violations, Petitioner filed an administrative complaint against Respondent. Respondent timely

requested a formal administrative hearing; the matter was referred to DOAH and assigned Case No. 10-10095.

On November 18, 2010, the undersigned granted the Petitioner's Motion to Consolidate, thereby consolidating DOAH Case Nos. 10-9186 and 10-10095.

At the formal hearing, Petitioner presented the testimony of Nelly Alvarez (a Sanitation and Safety Specialist employed by Petitioner), Jorge Ojeda (a Sanitation and Safety Specialist employed by Petitioner), and John Fruin, D.V.M. (Petitioner's Bureau Chief for the Bureau of Food and Meat Inspection). Petitioner offered 12 sequentially-numbered exhibits, each of which was admitted into evidence. Hamid Lakhani, Respondent's owner, testified, but offered no other testimony and no exhibits.

The Transcript, consisting of one volume, was filed January 13, 2011. 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. All statutory references are to Florida Statutes (2010).

FINDINGS OF FACT

1. Chapter 500, Florida Statutes, is the Florida Food Safety Act. Petitioner is the agency of the State of Florida

that is responsible for the administration and enforcement of Chapter 500.

2. Section 500.032(1) provides as follows:

(1) [Petitioner] is charged with the administration and enforcement of this chapter in order to prevent fraud, harm, adulteration, misbranding, or false advertising in the preparation, manufacture, or sale of articles of food. It is further charged to enforce the provisions of this chapter relating to the production, manufacture, transportation, and sale of food, as well as articles entering into, and intended for use as ingredients in the preparation of food.

3. Section 500.02(1) authorizes Petitioner to establish by rule conditions for the manufacturing, processing, packing, holding, or preparation of food and the selling of food at wholesale or retail. Pursuant to that authority, Petitioner has adopted by Florida Administrative Code Rule 5K-4.002(4), pertinent parts of the "2001 Food Code" and the "Supplement to the 2001 Food Code," published by the U.S. Public Health Service of the U.S. Department of Health and Human Services (the Food Code). The violations alleged by Petitioner in both administrative complaints, if proven, would constitute violations of the Food Code and, consequently, violations of chapter 500.

4. At the times relevant to this proceeding, Respondent operated a convenience store located in Miami, Florida, that

sold mostly pre-packaged food products at retail, but also provided ancillary food service (the facility). The facility had a retail sales area, a backroom storage area, a walk-in cooler, and an ice machine. The food service operation included a hot case unit that prepared pre-cooked ready-to-eat food products in individual portions for consumption and drinks such as milk, juice, sodas, and beer.

5. Violations of the Food Code can be categorized as "critical" or "non-critical". As compared to a non-critical violation, a critical violation typically involves unsanitary conditions that are more likely to cause physical harm to a consumer or someone handling a product.

June 22, 2010 Inspection

6. Jorge Ojeda, a sanitation and safety specialist employed by Petitioner, performed a routine inspection of the facility on June 22, 2010. Mr. Ojeda's inspection revealed numerous food safety violations, including violations that are deemed critical violations.

7. The following are the critical violations found by Mr. Ojeda on June 22, 2010:

- A. Rodent droppings were present in the walk-in cooler and retail area;
- B. Ice found in bags in the retail area had not been tested for safety.
- C. An ice bag in the retail area was missing a food label.

D. There was evidence of smoking in the retail and backroom areas.

E. There was no established employee health policy;

F. A food employee was observed washing utensils or equipment in a hand-wash sink.

G. Meat patties in the heat case were kept below the minimum approved temperature.

8. Other non-critical violations included general disrepair of the facility, holes in walls, standing water, mold on the ice machine, and failure to maintain equipment.

9. During the June 22, 2010, inspection, Mr. Ojeda issued a Stop Sale Order for the meat patties in the hot case unit until the product was reheated to the minimum temperature. After the temperature was raised to an approved level, Mr. Ojeda lifted the Stop Sale Order for the meat patties.

10. Mr. Ojeda also issued a Stop Sale Order for products in the walk-in cooler and in the ice machine until the walk-in cooler and the ice machine were cleaned and sanitized. As noted above, rodent droppings were found in the walk-in cooler. Mr. Ojeda testified that he found mold inside the ice machine.

11. Mr. Ojeda assigned Respondent a "poor" rating and advised that he would return for a follow-up inspection.

August 2, 2010 Inspection

12. Mr. Ojeda conducted a follow-up inspection of the facility on August 2, 2010. The inspection revealed numerous food safety violations, some of which are repeat violations.

13. The following are the critical violations found by Mr. Ojeda on August 2, 2010:

- A. There was evidence of rodent droppings and live roaches in the facility;
- B. Ice found in bags in the retail area had not been tested for safety.
- C. An ice bag in the retail area was missing a food label.
- D. There was evidence of smoking in the retail and backroom areas.
- E. There was no established employee health policy;
- F. A food employee was observed washing utensils in a hand-wash sink.
- G. Meat patties in the heat case were kept below the minimum approved temperature.

14. Other violations included general disrepair of the facility, holes in walls, and failure to maintain equipment and fixtures.

Administrative Complaint for Case No. 10-9186

15. Following the August 2, 2010, inspection, Petitioner prepared an administrative complaint that underpins DOAH Case No. 10-9186. Petitioner seeks to impose an administrative fine against Respondent in the total amount of \$3,700.00 for the violations found during the inspections on June 22 and August 2.

August 18, 2010 Inspection

16. Mr. Ojeda conducted an inspection of the facility on August 18, 2010. During that inspection Mr. Ojeda found numerous food safety violations.

17. The following are the critical violations found by Mr. Ojeda on August 18, 2010:

A. There was evidence of the presence of insects and rodents in the store.

B. There was evidence of smoking in the retail and back room areas where food is processed or prepared, where clean equipment or utensils are stored, or where food is uncovered or exposed.

C. There was mold present on the ice machine.

D. Equipment and utensils were not properly sanitized.

E. Items for sale in the retail area were not marked for individual sale.

F. There was no established employee health policy.

G. Food label was missing or incomplete. Juice drinks were not labeled for individual sale.

18. Other violations included general disrepair of the facility, holes in walls, standing water, and failure to maintain equipment and fixtures.

19. Mr. Ojeda issued a Stop Sale Order for all food items in the store due to evidence of rodents and rodent droppings throughout the store.

20. Mr. Ojeda issued a Stop Use Order for the ice machine because he found mold inside the unit. Mr. Ojeda also issued a Stop Sale Order for the hot holding unit because the unit and associated utensils were not properly sanitized.

21. Mr. Ojeda assigned Respondent a "poor" rating and advised that he would return for a follow-up inspection.

September 9, 2010 Inspection

22. Mr. Ojeda conducted a follow-up inspection of the facility on September 9, 2010. During that inspection Mr. Ojeda found numerous food safety violations.

23. The following are the critical violations found by Mr. Ojeda on August 18, 2010:

A. There was evidence of the presence of insects and rodents throughout the store.

B. There was evidence of smoking in the retail and back room areas where food is processed or prepared, where clean equipment or utensils are stored, or where food is uncovered or exposed.

C. Grade A milk and milk products were being sold or used beyond the expiration date on the container.

D. Items for sale in the retail area were not marked for individual sale and were missing labels.

F. There was no established employee health policy.

24. Other violations included general disrepair of the facility, holes in walls, standing water, and failure to maintain equipment and fixtures.

25. Mr. Ojeda issued a Stop Sale Order for the expired milk offered for sale in the retail area. The product, which expired the day before the inspection, was released to be returned to the distributor.

26. Mr. Ojeda also issued a Stop Sale Order for all food items in the store due to evidence of rodents and rodent droppings throughout the store.

Administrative Complaint for Case No. 10-10095

27. Following the September 9, 2010, inspection, Petitioner prepared an administrative complaint that underpins DOAH Case No. 10-10095. Petitioner seeks to impose an administrative fine against Respondent in the total amount of \$1,550.00 for the violations found during the inspections on August 18 and September 9.

28. Petitioner proved by clear and convincing evidence that Respondent committed the violations alleged in Case No. 10-9186. The testimony of Dr. Fruin established that an administrative fine in the amount of \$3,700.00 is reasonable for those violations.

29. Petitioner proved by clear and convincing evidence that Respondent committed the violations alleged in Case No. 10-10095. The testimony of Dr. Fruin established that an administrative fine in the amount of \$1,500.00 is reasonable for those violations.

CONCLUSIONS OF LAW

30. 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.

31. 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. Dep't of Agric. & Consumer Servs., 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).

32. Petitioner proved the violations alleged in the two administrative complaints that underpin this proceeding by clear and convincing evidence.

33. Section 500.121, Florida Statutes, authorizes Petitioner to levy administrative fines up to \$5,000.00 for a violation of the Florida Food Safety Act.

34. Petitioner seeks an administrative fine against Respondent in the amount of \$3,700.00 for the violations alleged and proven as to Case No. 10-9186. Petitioner established that the amount of the fine is reasonable.

35. Petitioner seeks an administrative fine against Respondent in the amount of \$1,500.00 for the violations alleged

and proven as to Case No. 10-10095. Petitioner established that the amount of the fine is reasonable.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Agriculture and Consumer Services enter a final order that finds Respondent guilty of the violations alleged in Case No 10-9186 and imposes an administrative fine against Respondent in the amount of \$3,700.00 for those violations. It is further recommended that the final order find Respondent guilty of the violations alleged in Case No 10-10095 and impose an administrative fine against Respondent in the amount of \$1,500.00 for those violations.

DONE AND ENTERED this 17th day of February, 2011, in Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of February, 2011.

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.