

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 10-10495
)
OLIVE TREE RESTAURANT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A telephonic final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings (DOAH), on February 11, 2011.

APPEARANCES

For Petitioner: Megan Demartini, Qualified Representative
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Paul Parnos, pro se
Olive Tree Restaurant
963 North Suncoast Boulevard
Crystal River, Florida 34429

STATEMENT OF THE ISSUE

The issue is whether Respondent violated provisions of the Food Code and, if so, should be penalized for such violations.

For the reasons set forth below, Respondent has committed violations for which he should be penalized.

PRELIMINARY STATEMENT

Petitioner filed an Administrative Complaint against Respondent on January 26, 2010, alleging a violation of chapter 509, Florida Statutes, and related rules. Respondent timely disputed the allegations contained in the Administrative Complaint and requested a hearing before DOAH involving disputed issues of material fact.

At the hearing, Petitioner presented the testimony of Jill Craig and offered three exhibits, which were accepted into evidence. Official recognition was taken of section 509.032(6), Florida Statutes; Florida Administrative Code Rules 61C-1.001(14), 61C-1.005, and 61C-4.023(1); Food Code Rules 3-305.11, 4-601.11(A) and (C), 4-602.11(C) and (D), 4-903.11(C) and (D), and 6-201.13. Respondent testified on his own behalf and offered no exhibits.

A one-volume Transcript was filed on April 15, 2011. Respondent filed his Proposed Recommended Order on February 22, 2011, and after an unopposed motion to extend time, Petitioner filed its Proposed Recommended Order on April 28, 2011.

References to statutes are to Florida Statutes (2010) unless otherwise noted.

FINDINGS OF FACT

1. At all times material to this matter, Respondent was licensed as a public food establishment in the State of Florida by the Department of Business and Professional Regulation, Division of Hotels and Restaurants (Department).

2. Respondent's business address is 963 North Suncoast Boulevard, Crystal River, Florida.

3. Petitioner's witness, Jill Craig, is employed by the Department as a senior sanitation safety specialist at 1313 North Tampa Street, Tampa, Florida 33602. Inspector Craig has worked for the Department in her current capacity for five years. Prior to working for the Department, Inspector Craig worked as a food server, prep cook, managed a grocery store, and performed housing inspections for the Department of Health in Indiana. Upon coming to work at the Department, Inspector Craig was versed in the Food Code, trained on the laws and rules pertaining to public food and lodging establishments, trained in Hazardous Analysis and Critical Control Points (HACCP), and became a certified food manager. Inspector Craig continues to receive training on a monthly basis. She performs about 1,500 food service inspections a year.

4. "Critical violations" are those that are likely to result in food-borne illness or environmental degradation.

"Non-critical violations" are minor issues that are not classified as critical violations.

5. Inspection reports are electronically prepared on a personal data assistant by the inspector.

6. On October 26, 2009, Inspector Craig performed a routine food service inspection of Olive Tree Restaurant, Respondent's place of business. During the inspection, Inspector Craig prepared and signed an inspection report setting forth the violations she encountered during the inspection.

7. On the date of that inspection, Inspector Craig notified Respondent about the violations. Respondent's representative, Manny Kokkolis, signed the inspection report. The inspector also informed Mr. Kokkolis that all of the violations would have to be corrected by December 28, 2009.

8. On January 21, 2010, Inspector Craig performed a callback inspection of Olive Tree Restaurant. During the inspection, she prepared and signed an inspection report indicating that some of the violations had not been corrected.

9. On the date of the callback inspection, Inspector Craig made Respondent aware of the violations that had not been corrected, and Respondent's representative, Caitlin Tellier, signed the inspection report. Based on the violations that had not been corrected, the inspector recommended an administrative complaint be issued against Respondent.

10. The most serious violation observed during the October 26, 2009, and January 21, 2010, inspections was no certified food manager on duty with four or more employees engaged in food preparation. This is a critical violation because public food service establishments are required to have a certified food service manager on site when four or more employees are engaged in food preparation to oversee the employees and ensure compliance with the laws and rules relating to public food safety.

11. Respondent admitted there was no certified food manager on duty when Inspector Craig made her two visits to Respondent's food service establishment.

12. The next most serious violation observed during the two inspections was food stored on the floor in the dry storage area. This is a critical violation because packaged food must be stored at least six inches above the floor to prevent contamination by pathogens.

13. Respondent testified that cases of food may have been placed on the ground after delivery and had not been there long. However, Food Code Rule 3-305.11 requires food to be protected from contamination at all times by storing the food at least six inches above the floor.

14. The next most serious violations observed during the two inspections were accumulation of food residue on the

reach-in freezer and soiled reach-in cooler and freezer gaskets. These are critical violations as well because pathogens on the food contact surface can contaminate the food product.

15. Respondent testified that the refrigerator and gaskets acquire a build-up of mold, despite his efforts to keep them clean. He noted that the mold and residue was on the outside of the freezer and cooler. He also testified that following the callback visit by Inspector Craig, he had an additional two employees certified to handle food and supervise those who are handling food.

16. The final three violations were all deemed non-critical by Inspector Craig. The first concerned the storage of bakery pan liners on the floor in the dry storage area. This is non-critical, but single serve articles can become contaminated before their intended use if exposed to pathogens like those found on the restaurant's floor.

17. The second non-critical violation observed by Inspector Craig was the build-up of a mold-like substance on the surface of the mop sink. Although non-critical, the objective of cleaning is sanitization and that objective is not met when the mop sink is encrusted with mold.

18. The final non-critical violation observed by Inspector Craig was that the floor and wall junctures were not coved.

CONCLUSIONS OF LAW

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

20. The Division of Hotels and Restaurants (Division) has jurisdiction over the operation of public lodging establishments and food service establishments pursuant to section 20.165 and chapter 509.

21. Section 509.261(1) provides that any public lodging establishment or public food service establishment that has operated or is operating in violation of chapter 509, or the rules promulgated thereunder, is subject to fines not to exceed \$1,000 per offense, and the suspension, revocation, or refusal of a license.

22. The Administrative Complaint alleged violations of the food code provisions cited herein. Petitioner has the burden of proving by clear and convincing evidence the allegations set forth in the Administrative Complaint against Respondent. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The burden has been met.

23. In addition, the disciplinary action may only be based upon the offenses specifically alleged in the administrative complaint. See Sternberg v. Dep't of Prof'l Reg., Bd. of Med.

Exam'rs, 465 So. 2d 1324, 1325 (Fla. 1st DCA 1985); Kinney v. Dep't of State, 501 So. 2d 129, 133 (Fla. 5th DCA 1987); Hunter v. Dep't of Prof'l Reg., 458 So. 2d 842, 844 (Fla. 2d DCA 1984).

24. Section 509.032(6) provides that the Division shall adopt such rules as are necessary to carry out the provisions of this chapter.

25. Florida Administrative Code Rule 61C-1.005(6) states:

Standard penalties. This section specifies the penalties routinely imposed against licensees and applies to all violations of law subject to a penalty under Chapter 509, F.S. Any violation requiring an emergency suspension or closure, as authorized by Chapter 509, F.S., shall be assessed at the highest allowable fine amount.

(a) Non-critical violation.

1. 1st offense - Administrative fine of \$150 to \$300.

2. 2nd offense - Administrative fine of \$250 to \$500.

3. 3rd and any subsequent offense - Administrative fine of \$350 to \$1000, license suspension, or both.

(b) Critical violation. Fines may be imposed for each day or portion of a day that the violation exists, beginning on the date of the initial inspection and continuing until the violation is corrected.

1. 1st offense - Administrative fine of \$250 to \$500.

2. 2nd offense - Administrative fine of \$500 to \$1,000.

3. 3rd and any subsequent offense - Administrative fine of \$750 to \$1,000, license suspension, or both.

(c) Misrepresenting food or food product. Fines may be imposed for each day or portion of a day that the violation exists, beginning on the date of the initial

inspection and continuing until the violation is corrected.

1. 1st offense - Administrative fine of \$500 or license suspension.

2. 2nd offense - Administrative fine of \$1,000, license suspension, or both.

3. 3rd and any subsequent offense - Administrative fine of \$1,000, license suspension, or license revocation or any combination thereof.

26. Food Code Rule 3-305.11 states, in pertinent part:

Food Storage.

(A) Except as specified in ¶¶ (B) and (C) of this section, FOOD shall be protected from contamination by storing the FOOD:

(1) In a clean, dry location;

(2) Where it is not exposed to splash, dust, or other contamination; and

(3) At least 15 cm (6 inches) above the floor.

27. Petitioner proved by clear and convincing evidence that Respondent violated Food Code Rule 3-305.11 because Respondent stored food on the ground.

28. Food Code Rule 4-601.11(A) states, in pertinent part:

"EQUIPMENT FOOD-CONTACT SURFACES and UTENSILS shall be clean to sight and touch."

29. Food Code Rule 4-602.11(C) and (D) states, in pertinent part:

(C) Except as specified in ¶ (D) of this section, if used with POTENTIALLY HAZARDOUS FOOD, EQUIPMENT FOOD-CONTACT SURFACES and UTENSILS shall be cleaned throughout the day at least every 4 hours.

(D) *Surfaces of UTENSILS and EQUIPMENT contacting POTENTIALLY HAZARDOUS FOOD may be*

cleaned less frequently than every 4 hours if:

(1) In storage, containers of POTENTIALLY HAZARDOUS FOOD and their contents are maintained at temperatures specified under Chapter 3 and the containers are cleaned when they are empty;

(2) UTENSILS and EQUIPMENT are used to prepare FOOD in a refrigerated room or area that is maintained at one of the temperatures on the following chart and:

(a) The UTENSILS and EQUIPMENT are cleaned at the frequency in the following chart that corresponds to the temperature:

* * *

(3) Containers in serving situations such as salad bars, delis, and cafeteria lines hold ready-to-eat POTENTIALLY HAZARDOUS FOOD that is maintained at the temperatures specified under Chapter 3, are intermittently combined with additional supplies of the same FOOD that is at the required temperature, and the containers are cleaned at least every 24 hours;

(4) TEMPERATURE MEASURING DEVICES are maintained in contact with FOOD, such as when left in a container of deli FOOD or in a roast, held at temperatures specified under Chapter 3;

(5) EQUIPMENT is used for storage of PACKAGED or UNPACKAGED FOODS such as a reach-in refrigerator and the EQUIPMENT is cleaned at a frequency necessary to preclude accumulation of soil residues;

(6) The cleaning schedule is APPROVED based on consideration of:

(a) Characteristics of the EQUIPMENT and its use,

(b) The type of FOOD involved,

(c) The amount of FOOD residue accumulation, and

(d) The temperature at which the FOOD is maintained during the operation and the potential for the rapid and progressive multiplication of pathogenic or toxigenic

microorganisms that are capable of causing foodborne disease; or

(7) In-use UTENSILS are intermittently stored in a container of water in which the water is maintained at 60°C (140°F) or more and the UTENSILS and container are cleaned at least every 24 hours or at a frequency necessary to preclude accumulation of soil residues.

30. Petitioner proved by clear and convincing evidence that Respondent violated Food Code Rule 4-601.11(A) because an accumulation of food residue was on the interior of the reach-in freezer in Respondent's establishment. Petitioner also proved by clear and convincing evidence that Respondent violated Food Code Rule 4-602.11(C) and (D) because gaskets on the reach-in cooler and freezer were soiled.

31. Food Code Rule 4-601.11(C) states in pertinent part: "NonFOOD-CONTACT SURFACES of EQUIPMENT shall be kept free of an accumulation of dust, dirt, FOOD residue, and other debris."

32. Petitioner proved by clear and convincing evidence that Respondent violated Food Code Rule 4-601.11(C) because a build-up of mold-like substance was observed on the surface of the mop sink in Respondent's establishment.

33. Food Code Rule 4-903.11(C) and (D) states in pertinent part:

Equipment, Utensils, Linens, and Single-Service and Single-Use Articles.

(C) SINGLE-SERVICE and SINGLE-USE ARTICLES shall be stored as specified under ¶ (A) of this section and shall be kept in the

original protective package or stored by using other means that afford protection from contamination until used.

(D) *Items that are kept in closed packages may be stored less than 15 cm (6 inches) above the floor on dollies, pallets, racks, and skids that are designed as specified under § 4-204.122.*

34. Petitioner proved by clear and convincing evidence that Respondent violated Food Code Rule 4-903.11(C) and (D) because Respondent stored single-use bakery pan liners on the floor in the dry storage area.

35. Food Code Rule 6-201.13 states in pertinent part:

Floor and Wall Junctures, Coved, and Enclosed or Sealed.

(A) In FOOD ESTABLISHMENTS in which cleaning methods other than water flushing are used for cleaning floors, the floor and wall junctures shall be coved and closed to no larger than 1 mm (one thirty-second inch).

(B) The floors in FOOD ESTABLISHMENTS in which water flush cleaning methods are used shall be provided with drains and be graded to drain, and the floor and wall junctures shall be covered and SEALED.

36. Petitioner proved by clear and convincing evidence that Respondent violated Food Code Rule 6-201.13 because the floor and wall junctures were not coved in the dish room of Respondent's establishment.

37. Florida Administrative Code Rule 61C-4.023(1) states, in pertinent part:

All managers who are responsible for the storage, preparation, display, and serving

of foods to the public shall have passed a certification test approved by the division demonstrating a basic knowledge of food protection practices as adopted by the division. . . . Each licensed establishment shall have a minimum of one certified food protection manager responsible for all periods of operation. The operator shall designate in writing the certified food protection manager or managers for each location. A current list of certified food protection managers shall be available upon request in each establishment. When four or more employees, at one time, are engaged in the storage, preparation or serving of food in a licensed establishment, there shall be at least one certified food protection manager present at all times when said activities are taking place. The certified food protection manager or managers need not be present in the establishment during those periods of operation when there are three or fewer employees engaged in the storage, preparation, or serving of foods.

38. Petitioner proved by clear and convincing evidence that Respondent violated rule 61C-4.023(1), because four or more employees were engaged in food preparation without a certified food manager present in Respondent's establishment.

39. Petitioner did not present evidence that the violations committed by Respondent were anything other than first offenses. Petitioner recommended a total penalty of \$1,200, which represents the minimum penalty authorized under rule 61C-1.005(6).

40. Mr. Parnos, Respondent's owner, mitigated the penalty for not having a certified food service manager on site at the

time of the inspections by having two additional employees certified subsequent to the second inspection.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a final order imposing a penalty in the amount of \$250 for the critical violation concerning Respondent's failure to have a certified food manager on duty; \$250 for the critical violation of storing food on the floor in the dry storage area; \$250 for the critical violation of food residue on the freezer and cooler gaskets; \$150 for the non-critical violation of storing bakery pan liners on the floor in the dry storage area; \$150 for the non-critical violation of allowing a mold-like build-up on the mop sink; and \$150 for the non-critical violation of not having the floor and wall junctures coved. The total fine in the amount of \$1,200 shall be paid to the Division of Hotels and Restaurants within 30 days of the entry of its final order.

DONE AND ENTERED this 15th day of July, 2011, in
Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 15th day of July, 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.