

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF HOTELS AND )  
RESTAURANTS, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 10-10496  
 )  
PITA'S RESTAURANT, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

On April 6, 2011, an administrative hearing in this case was held by video teleconference in Tampa and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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

For Respondent: (No appearance)

STATEMENT OF THE ISSUES

The issues in the case are whether the allegations set forth in an Administrative Complaint filed by the Department of Business and Professional Regulation, Division of Hotels and

Restaurants (Petitioner), against Pita's Restaurant (Respondent) are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated January 12, 2010, the Petitioner alleged that the Respondent was in violation of certain food safety regulations at the time of inspections conducted by an employee of the Petitioner. The Respondent disputed the allegations and requested a formal administrative hearing. On December 7, 2010, the Petitioner forwarded the dispute to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner presented the testimony of one witness and had Exhibits 1 through 3 admitted into evidence. Although the manager of the Respondent attended the hearing, the Respondent was not represented by legal counsel or a qualified representative and presented no witnesses or exhibits.

The Transcript of the hearing (incorrectly identifying the hearing date as February 14, 2011) was filed on April 20, 2011. The Petitioner filed a Proposed Recommended Order on April 29, 2011.

FINDINGS OF FACT

1. The Petitioner is the state agency charged with regulation of hotels and restaurants pursuant to chapter 509, Florida Statutes (2010).<sup>1/</sup>

2. At all times material to this case, the Respondent was a restaurant operating at 8412 West Hillsborough Avenue, Tampa, Florida 33615, and holding food service license number 3912285.

3. On October 28, 2009, Rich Decker (Mr. Decker), employed by the Petitioner as a sanitation & safety specialist, performed a routine inspection of the Respondent and observed conditions that violated certain provisions of the Food Code.

4. Food Code violations are classified as "critical" or "non-critical." A critical violation of the Food Code is one that poses a significant threat to the public health, safety, or welfare and is a risk factor for food-borne illness. A non-critical violation of the Food Code is one that does not meet the definition of a critical violation.

5. At the conclusion of the October 28, 2009, inspection, Mr. Decker noted the observed violations in an inspection report. The owner of the Respondent signed the report and received a copy at the time of the inspection. Mr. Decker advised the owner that a follow-up "callback" inspection was scheduled to occur on December 28, 2009, and that the violations needed to be corrected by that date.

6. The callback inspection did not occur on December 28, 2009.

7. Mr. Decker performed the callback inspection on January 5, 2010, and observed some of the same Food Code violations noted on the October 28, 2009, inspection report.

8. At the conclusion of the January 5, 2010, inspection, Mr. Decker again noted the observed violations in an inspection report. The manager of the Respondent signed the report and received a copy at the time of the inspection. The Petitioner subsequently filed the Administrative Complaint at issue in this proceeding.

9. During the October 28, 2009, inspection and again during the January 5, 2010, callback inspection, Mr. Decker observed raw eggs being stored above prepared, ready-to-eat pita bread. This violation was deemed to be critical because raw food stored above ready-to-eat food can lead to bacterial contamination of the ready-to-eat food.

10. During the October 28, 2009, inspection and again during the January 5, 2010, callback inspection, Mr. Decker observed unidentified medicine being stored in a refrigeration unit along with food supplies. This violation was deemed to be critical, because the medicine could have contaminated the food.

11. During the October 28, 2009, inspection and again during the January 5, 2010, callback inspection, Mr. Decker observed prepared, ready-to-eat, and potentially-hazardous food being stored without having been date-marked to identify the

last date upon which the food could be consumed. Prepared food has a limited shelf life during which it may be safely consumed. The failure to date-mark prepared food was a critical violation, because such failure may result in the consumption of unsafe food.

12. During the October 28, 2009, inspection and again during the January 5, 2010, callback inspection, Mr. Decker observed that there was no consumer advisory warning related to consumption of raw or undercooked foods posted on the premises. The Food Code requires the posting of such a notice, and the failure to comply is deemed a critical violation, because consumption of certain raw or undercooked foods poses a health risk to some consumers.

13. During the October 28, 2009, inspection and again during the January 5, 2010, callback inspection, Mr. Decker observed an employee engaged in food preparation without wearing a hair net. Although food can be contaminated by human hair, this violation was deemed to be non-critical, because no immediate threat to human health was presented by the violation.

#### CONCLUSIONS OF LAW

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

15. The Petitioner is the state agency charged with the regulation of food service establishments in the State of Florida. See Ch. 509, Fla. Stat.

16. Florida Administrative Code Rule 61C-1.001(14) provides the following definition:

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. A copy of the Food Code, as adopted by the division, is available on the division's Internet website [www.MyFloridaLicense.com/dbpr/hr](http://www.MyFloridaLicense.com/dbpr/hr). A copy of the entire Food Code is available on the U.S. Food and Drug Administration Internet website. Printed copies of the entire Food Code are available through the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

17. The Administrative Complaint alleged violations of the Food Code provisions cited herein. The Petitioner has the burden of proving by clear and convincing evidence the allegations set forth in the Administrative Complaint against the 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.

18. Rule 61C-1.005(5) provides, in relevant part, as follows:

Definitions.

(a) "Critical violation" means a violation determined by the division to pose a significant threat to the public health, safety, or welfare and which is identified as a food borne illness risk factor, a public health intervention, or critical in DBPR Form HR-5022-014 Lodging Inspection Report or DBPR Form HR-5022-015 Food Service Inspection Report, incorporated by reference in subsection 61C-1.002(8), F.A.C., and not otherwise identified in this rule.

(b) "Non-critical violation" means a violation not meeting the definition of critical violation and not otherwise identified in this rule.

19. The Administrative Complaint charged the Respondent with a violation of Food Code Rule 3-302.11(A)(1), which provides as follows:

3-302.11 Packaged and Unpackaged Food-- Separation, Packaging, and Segregation.

(A) Food shall be protected from cross contamination by:

(1) Separating raw animal foods during storage, preparation, holding, and display from:

(a) Raw ready-to-eat food including other raw animal food such as fish for sushi or molluscan shellfish, or other raw ready-to-eat food such as vegetables, and

(b) Cooked ready-to-eat food[.]

20. The evidence established that on October 28, 2009, and January 5, 2010, the Respondent violated the referenced Food Code provision by locating raw food over prepared, ready-to-eat food, a critical violation.

21. The Administrative Complaint charged the Respondent with a violation of Food Code Rule 7-207.11, which provides as follows:

7-207.11 Restriction and Storage.

(A) Only those medicines that are necessary for the health of Employees shall be allowed in a food establishment. This section does not apply to medicines that are stored or displayed for retail sale.

(B) Medicines that are in a food establishment for the Employees' use shall be labeled as specified under § 7-101.11 and located to prevent the contamination of food, equipment, utensils, linens, and single-service and single-use articles.

22. The evidence established that on October 28, 2009, and January 5, 2010, the Respondent violated the referenced Food Code provision by storing medication in a food cooler that also contained food supplies, a critical violation.

23. The Administrative Complaint charged the Respondent with a violation of Food Code Rule 3-501.17(A), which provides as follows:

3-501.17 Ready-to-Eat, Potentially Hazardous Food, Date Marking.



(A) Except as specified in ¶ (D) of this section, refrigerated, ready-to-eat, potentially hazardous food prepared and held in a food establishment for more than 24 hours shall be clearly marked 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 below:

(1) 5°C (41°F) or less for a maximum of 7 days; or

(2) 7°C (45°F) or between 5°C (41°F) and 7°C (45°F) for a maximum of 4 days in existing refrigeration equipment that is not capable of maintaining the food at 5°C (41°F) or less if:

(a) The equipment is in place and in use in the food establishment, and

(b) Within 5 years of the regulatory authority's adoption of this code, the equipment is upgraded or replaced to maintain food at a temperature of 5°C (41°F) or less.

The day of preparation shall be counted as Day 1.

24. The evidence established that on October 28, 2009, and January 5, 2010, the Respondent violated the referenced Food Code provision by storing potentially-hazardous food without clearly marking the stored food with the last date for human consumption, a critical violation.

25. The Administrative Complaint charged the Respondent with a violation of Food Code Rule 3-603.11, which provides as follows:

3-603.11 Consumption of Animal Foods that are Raw, Undercooked, or Not Otherwise Processed to Eliminate Pathogens.\*

Except as specified in ¶ 3-401.11(C) and Subparagraph 3-401.11(D) (3) and under ¶ 3-801.11(D), if an animal food such as beef, eggs, fish, lamb, milk, pork, poultry, or shellfish that is raw, undercooked, or not otherwise processed to eliminate pathogens is offered in a ready-to-eat form as a deli, menu, vended, or other item; or as a raw ingredient in another ready-to-eat food, the permit holder shall inform consumers by brochures, deli case or menu advisories, label statements, table tents, placards, or other effective written means of the significantly increased risk associated with certain especially vulnerable consumers eating such foods in raw or undercooked form.

26. The evidence established that on October 28, 2009, and January 5, 2010, the Respondent violated the referenced Food Code provision by failing to post the required disclosure information, a critical violation.

27. The Administrative Complaint charged the Respondent with a violation of Food Code Rule 2-402.11, which provides as follows:

Hair Restraints

2-402.11 Effectiveness.

(A) Except as provided in ¶ (B) of this section, food employees shall wear hair restraints such as hats, hair coverings or nets, beard restraints, and clothing that covers body hair, that are designed and worn to effectively keep their hair from contacting exposed food; clean equipment,

utensils, and linens; and unwrapped single-service and single-use articles.

(B) This section does not apply to food employees such as counter staff who only serve beverages and wrapped or packaged foods, hostesses, and wait staff if they present a minimal risk of contaminating exposed food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles.

28. The evidence established that on October 28, 2009, and January 5, 2010, the Respondent violated the referenced Food Code provision by failing to require that all appropriate employees wear hairnets, a non-critical violation.

29. Section 509.261 provides, in relevant part, as follows:

Revocation or suspension of licenses; fines; procedure.--

(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.

30. Rule 61C-1.005(6) provides, in relevant part, as follows:

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.

\* \* \*

(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.

31. This case involves four critical violations and one non-critical violation, all observed on two separate dates. According to the cited rule, the total standard penalty for the violations for each date ranges from \$1,150 to \$2,300. Application of the referenced statute would limit the maximum penalty to \$2,000, based on the two days upon which critical Food Code violations were observed during the inspections of the

Respondent. The Petitioner's Proposed Recommended Order seeks a total penalty of \$1,350.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Business and Professional Regulation, Division of Hotels and Restaurants, enter a final order imposing a fine of \$1,350 against the Respondent and requiring that the Respondent complete an appropriate educational program related to the violations identified herein.

DONE AND ENTERED this 20th day of May, 2011, in Tallahassee, Leon County, Florida.

*William F. Quattlebaum*

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WILLIAM F. QUATTLEBAUM  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 20th day of May, 2011.

ENDNOTE

<sup>1/</sup> All references to Florida Statutes are to Florida Statutes (2010), unless otherwise stated.

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.