

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS)
AND RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 10-10696
)
I LOVE N.Y. PIZZA,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A hearing was held pursuant to notice, on January 31, 2011, 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: Louise Wilhite-St. Laurent
Qualified Representative
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 December 16, 2010. A formal hearing was set for January 31, 2011. The hearing took place as scheduled.

At the commencement of the hearing, the Division's representative entered her appearance, but no appearance was made on behalf of Respondent. The hearing was recessed until 10:00 a.m. 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 the testimony of one witness, Daniel Fulton. Petitioner's Exhibits numbered 1 through 7 were admitted into evidence. Official Recognition was requested of relevant portions of the Florida Statutes, Florida Administrative Code, and 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 February 4, 2011. Petitioner timely filed a Proposed Recommended Order, which has been considered in preparation of this Recommended Order. Respondent did not file a post-hearing submission. References to the Florida Statutes are to the 2009 version, unless otherwise specified.

FINDINGS OF FACT

1. Petitioner, the Department of Business and Professional Regulation, Division of Hotels and Restaurants, 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 1102924 as a public food establishment by the Division.

3. Daniel Fulton is currently self-employed as a restaurant consultant. Previously, he was employed by the Division for 24 years, including as a Senior Sanitation Safety Specialist for 12 years. Prior to working for the Division, Mr. Fulton owned a restaurant for four years and worked as a manager in other restaurants for approximately four years. Mr. Fulton received training in laws and rules pertaining to

public food and lodging establishments, received a food manager certification, and was standardized in Hazard Analysis and Critical Control Points. During his employment with the Division, Mr. Fulton received continuing education in the amount of 40 hours per year, and performed approximately 600 inspections per year.

4. Critical violations are violations that, if not corrected, are more likely to cause food-borne illnesses. Non-critical violations are violations that are less likely to cause food-borne illnesses.

5. On March 23, 2009, Mr. Fulton conducted a routine inspection of Respondent's premises. During the inspection, Mr. Fulton prepared and signed an inspection report using a Personal Data Assistant. The inspection report set forth those violations he observed during his inspection visit. During the inspection visit, Mr. Fulton made Respondent's owner, who signed the inspection report, aware of the violations and that they needed to be corrected by the following day. Mr. Fulton informed Respondent's owner that he would be conducting a callback inspection the following day.

6. On March 24, 2009, Mr. Fulton performed a callback inspection at Respondent's premises. During this inspection, Mr. Fulton prepared and signed a callback inspection report indicating that two of the violations noted on the previous day

had not been corrected. He notified Respondent that he was recommending that the Division issue an Administrative Complaint on the two violations that were not corrected, and that time extensions were given on two other violations.^{1/} Respondent's owner signed for the callback inspection report.

7. On October 29, 2009, Mr. Fulton conducted another routine inspection at Respondent's premises. During the inspection, Mr. Fulton prepared and signed another inspection report. Respondent's owner signed for the report. One of the violations noted by Mr. Fulton in the two earlier-referenced inspections had not been corrected.

8. Mr. Fulton notified Respondent of the violations and informed Respondent that the violations needed to be corrected by a callback date of December 30, 2009.

9. On January 11, 2010, Mr. Fulton conducted another callback inspection at Respondent's premises. During this inspection, he prepared and signed an inspection report indicating that some of the violations noted on the October 29, 2009 inspection report had not been corrected. He notified Respondent of the violations observed and that he was recommending that an Administrative Complaint be issued for the violations he also observed during his previous inspections. Respondent's owner signed for the report.

10. The most serious violation Mr. Fulton observed during each of his inspections of Respondent's premises was potentially hazardous cold food held at greater than 41 degrees Fahrenheit. Mr. Fulton observed numerous foods at temperatures greater than 41 degrees. This is a critical violation because bacteria grow on food at an increasingly faster rate as the food temperature rises from 41 degrees.

11. The next most serious violation observed by Mr. Fulton during each of his inspections was "potentially hazardous food held under public health control without markings indicating the four-hour limit." Mr. Fulton observed that Respondent's whiteboard, which Respondent uses to track the time when food leaves temperature control, did not contain the times certain food had been made. Four hours is the maximum period that food is able to be safely held out of temperature. This is a critical violation because the longer foods are held out of the proper temperature, the greater the risk of bacterial growth.

12. The next most serious violation observed by Mr. Fulton during the October 29, 2009 and January 11, 2010, inspections was that food preparation employees were not using hair restraints. This is a violation because food workers not wearing hair restraints have a tendency to contaminate their hands by touching their hair and scalp, which can cross-contaminate food that they touch with their hands.

13. In 2008, two Final Orders were entered by the Division in cases in which in which fines were imposed for the violations alleged in two Administrative Complaints, as a result of settlement agreements between the parties.

CONCLUSIONS OF LAW

14. 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).

15. The Division is the state agency charged with regulating public food service establishments pursuant to section 20.165 and chapter 509, Florida Statutes.

16. Pursuant to section 509.261(1), the Division may impose penalties for violations of chapter 509, including an administrative fine of no more than \$1,000 per offense, attendance at personal expense at an educational program sponsored by the Hospitality Education Program, and the suspension or revocation of Respondent's license.

17. Because the Division 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., Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

18. Paragraph 1-201.10(B) and Chapters 2, 3, 4, 5, 6 and 7 of the Food Code have been incorporated by reference into the

Division's rules governing public food establishments. Fla. Admin. Code R. 61C-1.001(14).

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

3-501.19 Time as a Public Health Control

(A) Except as specified under (B) of this section, if time only, rather than time in conjunction with temperature, is used as the public health control for a working supply of potentially hazardous food before cooking, or for ready-to-eat potentially hazardous food that is displayed or held for service for immediate consumption:

(1) The food shall be marked or otherwise identified to indicate the time that is 4 hours past the point in time when the food is removed from the temperature control.

* * *

3-501.16 (A) Except during preparation, cooking, or cooling, or when time is used as the public health control as specified under Section 3-501.19, and except as specified in paragraph (B) of this Section, potentially hazardous food shall be maintained:

(1) at 135 degrees Fahrenheit or above, except that roasts cooked to a temperature and for a time specified in paragraph 3-401.11(B) or reheated as specified in paragraph 3-401.11(E) may be held at a temperature of 130 degrees Fahrenheit or above; or

(2) at a temperature specified in the following: (A) 41 degrees Fahrenheit or less.

* * *

2-402.11 Effectiveness

(A) Except as provided in paragraph (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. . . .

20. The Division proved by clear and convincing evidence that Respondent violated rule 3-501.19(A)(1) of the Food Code in that Respondent held potentially hazardous food under time as a public health control without noting the time which was four hours past the time when food was removed from temperature control.

21. The Division proved by clear and convincing evidence that Respondent violated rule 3-501.16(A) of the Food Code, because Respondent held potentially hazardous food at greater than 41 degrees Fahrenheit.

22. The Division proved by clear and convincing evidence that Respondent violated rule 2-402.11 of the Food Code, because Respondent's food preparation employees were not wearing hair restraints.

23. The violations in this matter occurred both prior to and after the adoption of Florida Administrative Code Rule 61C-1.005, which sets forth the current penalty guidelines to be imposed against licensees for violations of the applicable statutes and rules. Therefore, section 509.261(1) sets forth

the appropriate penalty guidelines for violations occurring prior to the adoption of the Division's current penalty guidelines set forth in the above-referenced rule.

24. In its Proposed Recommended Order, the Division proposes the imposition of a \$2,400 fine for the violations contained in the Administrative Complaint. In light of the Division having proven two critical violations and one non-critical violation, and the history of repeated critical violations by Respondent, 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 \$2,400 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 15th day of March, 2011, 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 15th day of March, 2011.

ENDNOTE

1/ According to the Division, a separate Administrative Complaint resulted from these two uncorrected violations. The present case also involves the same two violations because they were observed during the October 29, 2009 and January 11, 2010 inspections, which took place after that Administrative Complaint was issued.

COPIES FURNISHED:

Louise Wilhite-St. Laurent
Qualified Representative
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1015

Christiano Savona
I Love N.Y. Pizza
490 Northeast 23rd Avenue
Gainesville, Florida 32609

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

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.