

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF HOTELS AND)	
RESTAURANTS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 10-10925
)	
FALCON CATERING SERVICE, NO. 7,)	
)	
Respondent.)	
<hr/>)	
DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF HOTELS AND)	
RESTAURANTS,)	
)	
Petitioner,)	
)	
vs.)	Case No. 10-10930
)	
FALCON CATERING SERVICE, NO. 8,)	
)	
Respondent.)	
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RECOMMENDED ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on March 3, 2011, via video teleconference with sites in Tallahassee and Orlando, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings. The parties were represented as set forth below.

APPEARANCES

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

For Respondents: Sabrina Falcon, pro se
Falcon Catering Service
642 Mendoza Drive
Orlando, Florida 32825

STATEMENT OF THE ISSUES

The issues in these consolidated cases are stated in the counts set forth in the Administrative Complaint for each case: Whether Falcon Catering Service No. 7 (hereinafter "Falcon 7") and Falcon Catering Service No. 8 (hereinafter "Falcon 8") failed to maintain the proper protection and temperature requirements for food sold from their mobile site in violation of the federal Food and Drug Administration Food Code ("Food Code"). In the Prehearing Stipulation filed in this matter, each Respondent generally admitted to the violations in the Administrative Complaints, but suggested that mitigating factors should absolve them of the charges or greatly reduce any administrative fine imposed.

PRELIMINARY STATEMENT

On or about February 4, 2010, and September 13, 2010, Petitioner, Department of Business and Professional Regulation, Division of Hotels and Restaurants (hereinafter the "Division"),

filed Administrative Complaints against Falcon 7 and Falcon 8, respectively. Each Respondent returned the Election of Rights form seeking a formal administrative hearing. The Administrative Complaints and Election of Rights forms were forwarded to the Division of Administrative Hearings ("DOAH") on December 28, 2010, and assigned to the undersigned Administrative Law Judge so that a formal administrative hearing could be conducted. The cases were consolidated by Order dated January 5, 2011.

At the final hearing, the Division called two witnesses: Andrea Piel, senior investigator, and Valarie Freeman, district manager. Petitioner's Exhibits 1 through 10 were admitted into evidence. Official recognition was taken of sections 509.032 and 509.049, Florida Statutes; Florida Administrative Code Rules 61C-1.001 and 61C-1.005; and Food Code Rules 2-301, 3-301, 3-306, 3-501, 5-103, and 5-202. (Unless specifically stated otherwise herein, all references to Florida Statutes shall be to the 2010 codification.)

Respondents called one witness: Sabrina Falcon. No independent exhibits were offered into evidence by Respondents.

A Transcript of the final hearing was ordered by the parties and filed at DOAH on March 30, 2011. The parties were given ten days from the filing of the Transcript to submit proposed recommended orders. A letter from the representative

for each Respondent was filed at DOAH on March 10, 2011, via fax. The letter contained attachments that appear to be demonstrative exhibits supporting the statements in the letter, but those exhibits were not considered for purposes of this Recommended Order. The Division timely submitted a Proposed Recommended Order. The submissions by both parties were duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Division is responsible for monitoring all licensed food establishments in the state. It is the Division's duty to ensure that all such establishments comply with the standards set forth in relevant statutes and rules.

2. Respondents Falcon 7 and Falcon 8 are licensed mobile food dispensing vehicles. Falcon 7 has license No. MFD5852560, which was initially issued on April 23, 2005; Falcon 8 has license No. MFD5852642, which was issued on October 19, 2005. Each of the Respondents serves meals and snacks to, inter alia, laborers at construction sites.

3. On or about March 13, 2009, the Division conducted a food service inspection on Falcon 7. At that time, the food truck was located at 4880 Distribution Court, Orlando, Florida. One of the Food Code violations found by the inspector was Item 53b. That citation meant there was no validation of

employee training on the truck. A follow-up inspection was deemed to be required.

4. On April 10, 2009, a follow-up inspection was conducted by the Division. At that time, Item 53b was cited as a repeat offense. Also, Item 8a was cited. Item 8a refers to protection of food from contaminants and keeping food at an acceptable temperature. Notes by the inspector indicate that a further violation of Item 8a occurred because customers were allowed to serve themselves directly from food containers, and there was no fan in operation during the serving of food.

5. On May 28, 2009, another inspection of Falcon 7 was conducted. At that time, the food truck was located at 12720 South Orange Blossom Trail, Orlando, Florida. Item 8a was again cited as a deficiency. The inspector's notes indicate that food was not properly protected from contamination and that customers were being served "buffet style" from the back of the truck. The inspector noted that this was a repeat violation.

6. A follow-up or "call-back" inspection was conducted on December 3, 2009, at which time the temperature in Orlando was unusually cold. The food truck was at the same address on Orange Blossom Trail as noted in the prior inspection. Falcon 7 was again found to have been serving food buffet style from the back of the food truck. An Item 8a violation was again noted by the inspector.

7. Another inspection of Falcon 7 was conducted on January 19, 2010, another very cold day in Orlando. At that time, the food truck was located at the same site as the last two inspections. The inspector cited the food truck for an Item 8a violation again, stating that the food was not being protected from contaminants. Dust was flying up on the back of the truck to exposed food items.

8. An inspection of Falcon 8 was conducted on August 25, 2009, while the truck was located at 4880 Distribution Court, Orlando, Florida. An Item 8a violation was noted by the inspector, who found that displayed food was not properly protected from contaminants. The food truck was located under an Interstate 4 overpass and was open to flying debris. The inspector noted that customers were being served buffet style and that there was no protection of food from contamination by the customers.

9. A follow-up inspection for Falcon 8 was conducted on August 27, 2009, at 9:12 a.m., while the food truck was located at the same site. Another Item 8a violation was cited at that time. The violation notes indicate essentially the same situation that had been cited in the initial inspection two days earlier.

10. Less than one hour after the follow-up inspection, another inspection was conducted on Falcon 8 at the same

location as the prior two inspections. There were no Item 8a citations issued during this inspection, but the food truck was found to have no water available for hand washing. The food truck employee was using a hand sanitizer to clean her hands.

11. Respondents do not dispute the facts set forth above. However, Respondents provided mitigating facts for consideration in the assessment of any penalty that might be imposed. Those mitigating factors are as follows:

a. The food trucks were serving an inordinately large number of workers during the dates of the inspections. The City of Orlando was constructing its new basketball arena, and there were numerous laborers involved in the project.

b. In order to serve the workers, it was necessary for the food trucks to put their food out on tables, rather than ladle the food directly from the food warmers in the food truck. In fact, the shelves in the food trucks are so narrow that dipping food out of the warmers would be impossible.

c. Due to the cold weather in Orlando during this time, it was impossible to keep the food at acceptable temperature levels for very long.

d. The large number of workers washing their hands at the food trucks caused the trucks to run out

of water much more quickly than normal. When the water ran out, the employees took care to sanitize their hands as well as possible.

12. Ms. Falcon testified that the inspector's testimony concerning use of tables to serve food was erroneous. However, Sabrina Falcon was not present during the inspections, and her contradictory testimony is not reliable.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

14. The burden of proof is on Petitioner to show, by clear and convincing evidence, that Respondents committed the acts alleged in the Administrative Complaints. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The clear and convincing evidence standard is used in the instant case because the action is a penal licensure proceeding. Munch v. Dep't. of Prof'l Reg., 592 So. 2d 1136 (Fla. 1st DCA 1992).

15. Clear and convincing evidence is an intermediate standard of proof which is more than the "preponderance of the evidence" standard used in most civil cases, but less than the "beyond a reasonable doubt" standard used in criminal cases.

See State v. Graham, 240 So. 2d 486 (Fla. 2d DCA 1970). Clear and convincing evidence has been defined as evidence which:

[R]equires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony 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 a firm belief or 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) (citations omitted).

16. Disciplinary actions may be based only upon those offenses specifically alleged in the Administrative Complaint. See Cottrill v. Dep't of Ins., 685 So. 2d 1371 (Fla. 1st DCA 1996); Kinney v. Dep't of State, 501 So. 2d 129, 133 (Fla. 5th DCA 1987); and Hunter v. Dep't of Prof'l Reg., 458 So. 2d 842, 844 (Fla. 2d DCA 1984). A statute imposing a penalty is never to be construed in a manner that expands the statute. Hotel and Rest. Comm'n v. Sunny Seas No. One, 104 So. 2d 570, 571 (Fla. 1958).

17. Section 509.032(6) gives the Division authority to adopt such rules as it deems necessary to carry out the provisions of the chapter. Rule 61C-1.001(14) adopts the federal Food and Drug Administration Food Code so that it can be relied upon by the Division. Rule 61C-1.005(6) sets forth the

standard penalties that may be imposed upon a finding of a violation of the Food Code.

18. In DOAH Case No. 10-10925, Falcon 7 violated Food Code Rule 3-501.16(A) by failing to maintain food at an appropriate temperature.

19. In DOAH Case No. 10-10930, Falcon 8 violated Food Code Rule 3-501.16(A), as well as rule 3-306.11 pertaining to protecting food from contamination; rules 2-301.12 and 2-301.14 regarding hand-washing requirements; and rule 5-202.12(A) and (B) concerning food temperatures.

20. The violations in DOAH Case No. 10-10925 occurred both prior to and after the adoption of rule 61C-1.005(6) (e), the Division's current penalty guideline rule. Section 509.261(1) provides the appropriate penalty for violations occurring prior to adoption of the new guidelines. See Dep't of Bus. and Prof'l Reg. v. I Love N.Y. Pizza, Case No. 10-10696 (Fla. DOAH Mar. 15, 2011). The violations in DOAH Case No. 10-10930 occurred after the adoption of the current guidelines, thus, the guidelines would apply.

21. Section 509.261(a) provides for a fine not to exceed \$1,000 per offense. Rule 61C-1.005(6) states as follows:

(6) 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.

* * *

(7) Aggravating or mitigating factors. The division may deviate from the standard penalties in paragraphs (a) through (h) of subsection (6) above, based upon the consideration of aggravating or mitigating factors present in a specific case. The division shall consider the following aggravating and mitigating factors in determining the appropriate disciplinary action to be imposed and in deviating from the standard penalties:

* * *

(b) Mitigating factors.

1. Violation resulted from an act of God or nature.

2. Length of time since the violation occurred.

3. Length of time the licensee has been in operation.

4. Effect of the penalty upon the licensee's livelihood.

5. Attempts by the licensee to correct the violation.

6. Number of previous inspections without violations of Chapter 509, F.S., and the rules adopted pursuant thereto.

7. Disciplinary history of the licensee within the 60 months preceding the date the current administrative complaint was issued.

8. Any other mitigating factors, as relevant under the circumstances. . . .

22. Respondents are guilty of critical violations of the Food Code. However, the food temperatures were adversely affected by the extremely cold weather--an act of God. Respondents mitigated the violation concerning lack of water in two ways: First, the violation occurred only due to an unusually large number of customers that day; second, Respondents immediately drove back to the commissary to refill the water tanks. These factors should be considered when imposing a fine against Respondents.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by Petitioner, Department of Business and Professional Regulation, Division of Hotels and Restaurants, imposing a fine of \$500.00 against Falcon Catering Service, No. 7, in DOAH Case No. 10-10925; and a fine of \$750.00 against Falcon Catering Service, No. 8, in DOAH Case No. 10-10930. All fines should be paid within 30 days of the entry of the Final Order by the Division.

DONE AND ENTERED this 10th day of May, 2011, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of May, 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.