

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 11-3435
)
LOWE'S GOOD EATON RESTAURANT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on November 7, 2011, in Orlando, Florida, before Susan Belyeu Kirkland, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charles F. Tunnickliff, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399

For Respondent: Shea Lowe, pro se
Lowe's Good Eaton Restaurant
429 East Kennedy Boulevard
Eatonville, Florida 32751

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated Florida Administrative Code Rule 61C-1.004(2)(b) and the

following provisions of the Food Code: 3-202.11, 3-501.16(A), 4-501.11, 5-203.14, 6-202.14, and 6-202.11, and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On July 20, 2010, Petitioner, Department of Business and Professional Regulation, Division of Hotels and Restaurants (Department), filed an Administrative Complaint against Lowe's Good Eaton Restaurant (Restaurant), alleging that the Restaurant violated rule 61C-1.004(2)(b) and the following provisions of the Food Code: 3-202.11, 3-501.16(A), 4-501.11, 5-203.14, 6-202.14, and 6-202.11. The Restaurant requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings on November 28, 2011.

At the final hearing, official recognition was taken of section 509.032(6), Florida Statutes (2009);^{1/} rules 61C-1.001(14), 61C-1.004(2)(b), and 61C-1.005; and Food Code Rules 3-202.11, 3-501.16(A), 4-501.11, 5-203.14, 6-202.14, and 6-202.11.

The Department called Dennis Watson as its witness at the final hearing. Petitioner's Exhibits 1 through 4 were admitted in evidence. Shea Lowe testified in behalf of the Restaurant. The Restaurant did not submit any exhibits.

The one-volume Transcript was filed on November 28, 2011. The parties agreed to file their proposed recommended orders

within ten days of the filing of the Transcript. The Department filed Petitioner's Proposed Recommended Order on December 7, 2011. As of the date of this Recommended Order, the Restaurant has not filed any post-hearing submittal.

FINDINGS OF FACT

1. The Department is the state agency charged with regulating the operation of public food service establishments, pursuant to section 20.165 and chapter 509, Florida Statutes.

2. The Restaurant is and has been at all times material to this proceeding licensed by the Department, license number 58-11330. The Restaurant is owned by Shea Lowe (Mr. Lowe) and is located in Eatonville, Florida.

3. On April 14, 2010, Dennis Watson (Mr. Watson), an inspector for the Department, made a routine inspection of the Restaurant. Mr. Watson found that the temperature of the pancake batter that was being used on the cook line was 67 degrees, Fahrenheit (F.); the temperature of the sausage on the cook line was 64 Degrees, F.; eggs were being held on the cook line for more than 30 minutes at a temperature greater than 45 degrees, F.; the gaskets/seals on a cold holding unit were in poor repair; lights in the food storage area were missing proper covers; the vacuum breaker was missing at the hose bibb outside the back door; and the door to the men's restroom was not tight-fitting and self-closing.

4. The Restaurant was given a warning for the violations found during the April 14, 2010, inspection. The Restaurant was given until June 14, 2010, to correct the violations.

5. On June 15, 2010, Mr. Watson returned to the Restaurant for a call-back inspection. Mr. Watson found the following violations: the gaskets/seals on the cold holding unit were in poor repair; the vacuum breaker was missing at the hose bibb outside at the back door; the pancake batter and sausage were being held on the cook line for more than 30 minutes at temperatures greater than 41 degrees, F.; raw eggs in the shell were held on the cook line for more 30 minutes at room temperature; food in the glass door coolers were held at temperatures between 49 and 53 degrees, F.; the lights over the food storage rack/kitchen were missing the proper covers; and the door to the men's restroom was not tight-fitting and self-closing.

6. The failure to maintain the food in the coolers at 41 degrees, F.; the failure to maintain raw, shell eggs at a temperature of 45 degrees, F.; the failure to keep the pancake batter and sausage on the cook line at the proper temperature; the failure to install a vacuum breaker on the hose bib outside the back door; and the failure to have a self-closing door for the men's restroom are critical violations. Rule 61C-1.005(5)(a) defines "critical violation" as a violation which

poses a significant threat to the public health, safety, or welfare and which is identified as a food-borne illness risk factor or a public health intervention.

7. Mr. Lowe acknowledged that the coolers were not working properly and has since replaced the coolers. He bought a self-closing latch for the restroom door, but the door will not self-close because the door frame does not fit the door, and he cannot afford to repair the door. He now keeps the eggs in the cooler until time to cook them. He has purchased some covers for the lights, but he did not know if they were in place when the inspections took place. The failure to have a self-closing door in the men's restroom and the failure to maintain the gaskets on the cooler door are non-critical violations.

8. Both inspection reports were signed by persons other than Mr. Lowe. Mr. Lowe was not present for either inspection.

9. The Restaurant has been previously disciplined by a Final Order entered on December 2, 2008, based on Stipulation and Consent Order entered into by the parties.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 & 120.57, Fla. Stat. (2011).

11. The Department has the burden to establish the allegations in the Administrative Complaint by clear and

convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

12. The Department has alleged several violations of the Food Code. Rule 61C-1.001(14) defines "Food Code" as follows:

[P]aragraph 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 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.

13. The Department has alleged that the Restaurant has violated Food Code Rules 3-202.11, 3-501.16(A), 4-501.11, 5-203.14, 6-202.14, and 6-202.11. Food Code Rule 3-202.11 provides:

(A) Except as specified in paragraph (B) of this section, refrigerated potentially hazardous food shall be at a temperature of 41 degrees Fahrenheit or below when received.

(B) If a temperature other than 41 degrees Fahrenheit for a potentially hazardous food is specified in law governing its distribution, such as laws governing milk and molluscan shellfish, the food may be received at the specified temperature.

(C) Raw shell eggs shall be received in refrigerated equipment that maintains an ambient temperature of 45 degrees Fahrenheit or less.

(D) Potentially hazardous food that is cooked to a temperature and for a time

specified under sections 3-401.11 - 3.401.12 and received hot shall be a temperature of 135 degrees Fahrenheit or above.

(E) A food that is labeled frozen and shipped frozen by a food processing plant shall be received frozen.

(F) Upon receipt, potentially hazardous food shall be free of evidence of temperature and abuse.

14. Food Code Rule 3-501.16(A) provides:

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 3-403.11(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.

15. The Department has established by clear and convincing evidence that the Restaurant has violated Food Code Rules 3-202.11 and 3-501.16(A) by holding pancake batter and sausage on the cook line for more than 30 minutes at temperatures greater than 41 degrees, F.; holding raw eggs in the shell on the cook line for more 30 minutes at room temperature; holding food in the glass door coolers at temperatures between 49 and 53 degrees, F.

16. The Department has alleged that the Restaurant has violated Food Code Rule 4-501.11, which provides:

Good repair and proper adjustment.

(A) Equipment shall be maintained in a state of repair and condition that meets the requirements specified in parts 4-1 and 4-2.

(B) Equipment components such as doors, seals, hinges, fasteners, and kick plates shall be kept intact, tight and adjusted in accordance with manufacturers' specifications.

17. The Department has established by clear and convincing evidence that the Restaurant has violated Food Code Rule 4-501.11. The gasket on the door of the cooler was not in good repair.

18. The Department has alleged that the Restaurant has violated Food Code Rule 5-203.14, which provides:

Backflow prevention devices, when required.

A plumbing system shall be installed to preclude backflow of a solid, liquid, or gas contaminant into the water supply system at each point of use at the food establishment, including a hose bibb if a hose is attached or on a hose bibb if a hose is not attached and backflow prevention is required by law, by:

(A) Providing an air gap as specified under section 5-202.13; or

(B) Installing an approved backflow prevention device as specified under section 5-202.14.

19. The Department has established that the Restaurant was in violation of Food Code Rule 5-203.14. The vacuum breaker was missing on the hose bibb outside the back door of the Restaurant.

20. Food Code Rule 6-202.14 provides:

Except where a toilet room is located outside a FOOD ESTABLISHMENT and does not open directly into the FOOD ESTABLISHMENT such as a toilet room that is provided by the management of a shopping mall, a toilet room located on the PREMISES shall be completely enclosed and provided with a tight-fitting and self-closing door.

21. Rule 61C-1.004(2)(B) provides:

Public bathrooms shall be completely enclosed and shall have tight-fitting, self-closing doors, or in public lodging establishments or bathrooms located outside a public food service establishment, have entrances and exits constructed in such a manner as to ensure privacy of occupants. Such doors shall not be left open except during cleaning or maintenance except that this requirement does not apply to a toilet room that is located outside a food establishment and does not open directly into the food establishment such as a toilet that is provided by the management of a shopping mall.

22. The Department has established that the Restaurant was in violation of rule 61C-1.002(2)(b) and Food Code Rule 6-202.14. The door to the men's restroom was not self-closing.

23. The Department has alleged that the Restaurant has violated Food Code Rule 6-202.11, which provides:

Light Bulbs, protective shielding.

(A) Except as specified in paragraph (B) of this Section, light bulbs shall be shielded, coated, or otherwise shatter-resistant in areas where there is exposed food, clean equipment, utensils, and linens; or unwrapped single-service and single-use articles.

(B) Shielded, coated, or otherwise shatter-resistant bulbs need not be used in areas used only for storing food in unopened packages, if:

(1) The integrity of the packages cannot be affected by broken glass falling onto them; and

(2) The packages are capable of being cleaned of debris from broken bulbs before the packages are opened.

(C) An infrared or other heat lamp shall be protected against breakage by a shield surrounding and extending beyond the bulb so that only the face of the bulb is exposed.

24. The Department has established that the Restaurant violated Food Code Rule 6-202.11. The lights over the food storage rack in the kitchen were missing the proper covers.

25. Rule 61C-1.005(5)(d) defines a "second offense" as follows:

a violation of any law subject to penalty under Chapter 509, F.S., after one disciplinary Final Order involving the same licensee has been filed with the Agency Clerk within the 24 months preceding the date the current administrative complaint is issued, even if the current violation is not the same as the previous violation.

26. The violations established in this proceeding are second offenses. Rule 61C-1.005(6)(a) provides that discipline for a second-offense, non-critical violation is an administrative fine of \$250 to \$500. Rule 61C-1.005(6)(b) provides that discipline for a second-offense, critical violation is an administrative fine of \$500 to \$1,000. The Department has established three critical violations and two non-critical violations.

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, finding that Lowe's Good Eaton Restaurant violated rule 61C-1.004(2)(B) and Food Code Rules 3-202.11, 3-501.16(A), 4-501.11, 5-203.14, 6-202.14, and 6-202.114-50; and imposing an administrative fine of \$500 for each of the three critical violations and \$250 for each of the two non-critical violations for a total administrative fine of \$2,000.

DONE AND ENTERED this 14th day of December, 2011, in
Tallahassee, Leon County, Florida.

Susan Belyeu Kirklund

SUSAN BELYEU KIRKLAND
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of December, 2011.

ENDNOTE

^{1/} Unless otherwise indicated, all references to the Florida
Statutes are to the 2009 version.

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.