

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
) Case No. 11-3987
Petitioner,)
)
vs.)
)
THE GREEN MANGO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On October 31, 2011, a duly-noticed hearing was held in Tallahassee and Gainesville, Florida, via video teleconference, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Sara Strickland, Qualified Representative
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

Charles F. Tunnickliff, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
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For Respondent: Nalini Pandey, pro se
6839 Southwest 82nd Terrace
Gainesville, Florida 32608

STATEMENT OF THE ISSUE

The issue in this case is whether on April 19, 2010, and July 27, 2010, Respondent was in compliance with food safety requirements set forth in administrative rules of the Division of Hotels and Restaurants of the Department of Business and Professional Regulation (Division), and if not, what penalty is appropriate.

PRELIMINARY STATEMENT

On August 2, 2010, Petitioner filed an Administrative Complaint against Respondent alleging violations of rules implementing chapter 509, Florida Statutes, relating to food safety. Respondent requested an administrative hearing and the matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge on August 9, 2011.

The case was noticed for video teleconference hearing on October 31, 2011, in Tallahassee and Gainesville, Florida, locations. On October 28, 2011, Petitioner requested approval of a Qualified Representative, which was subsequently granted. At hearing, Petitioner presented the testimony of one witness and offered five exhibits. Petitioner's Exhibits P-1 and P-2 were admitted without objection. Petitioner's Exhibits P-3 and P-4 were objected to by Respondent on the basis that they were irrelevant. The objections were overruled, with Petitioner's Exhibit 4 being admitted only on the issue of appropriate

penalty, should violations be proven. Petitioner's Exhibit P-5 was offered as rebuttal evidence to show, contrary to Respondent's testimony, that Petitioner had notified Respondent that the Federal Food and Drug Administration would have to approve a lab test challenge for ghee to be classified as a "non-potentially hazardous food." Petitioner's Exhibit P-5 was admitted for that limited purpose, but not as evidence that such procedures are or are not required. Petitioner also requested official recognition of provisions of the Florida Statutes, the Florida Administrative Code, and incorporated provisions of the Federal Food Code, which was granted. Ms. Pandey testified on behalf of Respondent. Ms. Pandey also sought to conduct a courtroom demonstration of differences between butter and ghee, which was objected to by Petitioner because Petitioner had not been given prior notice. Ruling was reserved and Respondent was permitted to proffer the demonstration. As discussed below, the evidentiary demonstration is not admitted as evidence because Respondent failed to establish its relevance to the issues in this case.

At Respondent's request, the parties were given until December 29, 2011, to submit proposed recommended orders. The Transcript was filed with the Division on November 17, 2011. Both parties timely submitted Proposed Recommended Orders, which were considered.

FINDINGS OF FACT

1. The Division is responsible for monitoring all licensed food service establishments in the state to ensure that they comply with the standards set forth in relevant statutes and rules.

2. Julianne Browning has been employed as a senior inspector with the Division for six or seven years. It is part of her responsibility to inspect food service establishments for safety and sanitation. She conducts approximately 850 inspections each year.

3. Respondent is licensed as a public food establishment operating as The Green Mango at 7625 West Newberry Road, Gainesville Florida.

4. On April 19, 2010, Ms. Browning conducted a food service inspection on Respondent. Ms. Browning prepared and signed an inspection report setting forth the violations that she observed during the inspection.

5. During her April inspection, Ms. Browning observed an employee engage in food preparation, handle clean equipment or utensils, or touch unwrapped single service items, without washing hands. Ms. Browning identified this as a critical violation on DBPR Form HR-5022-015, the Food Service Inspection Report. The failure of a food service employee to wash their

hands constitutes a significant threat to the public health, safety, and welfare.

6. Inspector Browning also observed in April potentially hazardous cold food held at temperatures greater than 41 degrees Fahrenheit. Specifically, she observed potatoes at 68 degrees, batter at 70 degrees, rice at 85 degrees, soup at 55 degrees, turnovers at 90 degrees, and butter at 90 degrees. Ms. Browning made notes of these observations in her report. She identified this as a critical violation on DBPR Form HR-5022-015, the Food Service Inspection Report.

7. Potatoes, batter, rice, soup, and turnovers are potentially hazardous foods and Respondent failed to maintain them at a temperature of 41 degrees Fahrenheit or less. This failure constituted a significant threat to the public health, safety, and welfare.

8. On July 27, 2010, Ms. Browning conducted another food service inspection on Respondent. Again she prepared and signed an inspection report setting forth the violations that she observed during the inspection.

9. During the July inspection, Ms. Browning again observed an employee engage in food preparation, handle clean equipment or utensils, or touch unwrapped single service items, without washing hands. She observed that an employee did not wash his hands before putting on gloves to prepare food. Ms. Browning

identified this as a critical violation on DBPR Form HR-5022-015, the Food Service Inspection Report.

10. It is necessary for employees preparing food to wash their hands even if they are going to be wearing gloves because the gloves could have a tear, or a pin hole, or be otherwise compromised. The failure to wash hands constituted a significant threat to the public health, safety, and welfare.

11. During the July inspection, Ms. Browning observed what she described as clarified butter, which here will be referred to as ghee, on the counter with a temperature of 80 degrees. Inspector Browning also again observed potentially hazardous cold food held at temperatures greater than 41 degrees Fahrenheit. In this instance she observed cream at 47 degrees, tofu at 45 degrees, milk at 45 degrees, potatoes at 45 degrees, yoghurt at 45 degrees, and cooked vegetables at 55 degrees. Ms. Browning identified this as a critical violation on DBPR Form HR-5022-015, the Food Service Inspection Report.

12. Cream, tofu, milk, potatoes, yoghurt, and cooked vegetables are potentially hazardous foods and Respondent failed to maintain them at a temperature of 41 degrees Fahrenheit or less.

13. Potentially hazardous food must be kept at 41 degrees Fahrenheit or below because when the temperature rises above that temperature, bacteria begin to grow at a much faster rate.

A person consuming the food can then contract a food-borne illness. The failure to maintain these temperatures constituted a significant threat to the public health, safety, and welfare.

14. Ms. Pandey, witness for Respondent, is an experienced cook. She worked for many years at a Hare Krishna Temple in Alachua County. She is knowledgeable in the preparation and use of ghee.

15. Ms. Pandey testified that ghee is a form of clarified butter that has been used for a great many years in India, and is still used in significant amounts there, precisely because of the widespread lack of refrigeration. Ghee does not spoil as fast as butter or milk or yoghurt. Ms. Pandey testified that ghee is not perishable and that it is therefore not dangerous when at room temperature. She further testified that refrigeration in fact makes it very difficult to use ghee, because it becomes hard and loses its flavor.

16. It was not clear from the evidence presented that ghee is a potentially hazardous food or that failure to keep it at a temperature of 41 degrees Fahrenheit or less constituted a significant threat to the public health, safety, or welfare.

17. The testimony and admitted reports of Inspector Browning as to the failure of Respondent's employee to wash his hands were clear and the reports were recorded at the time of the observation. Ms. Pandey offered no evidence to the

contrary. Her unsworn assertion during argument that her husband was not preparing food, but only put on protective gloves because he was aware of the inspection and was scared was not credible, even if it had been offered as testimony.

18. The testimony and admitted reports of Inspector Browning as to the temperature of the foods was clear and was recorded at the time of the observation. Ms. Pandey offered no evidence to the contrary. Her unsworn assertion during argument that the refrigerator holding the food was not being used in the restaurant but was only for storage of personal items was not credible, even if it had been offered as testimony.

19. Petitioner issued an Administrative Complaint against Respondent for the above violations on August 2, 2010.

20. Respondent has had two previous disciplinary Final Orders entered within 24 months of the Administrative Complaint issued in this case. In the first Stipulation and Consent Order, signed by Anuradha Pandey on January 10, 2010, and entered on January 15, 2010, Respondent agreed to pay a fine of \$1550.00, but did not admit nor deny the allegations of fact contained in the Administrative Complaint, which would have constituted critical violations. In the second Stipulation and Consent Order, signed by Anuradha Pandey on June 2, 2010, and entered on June 10, 2010, Respondent agreed to pay a fine of \$2,000.00, but again did not admit or deny the allegations of

fact contained in the Administrative Complaint, which would have constituted critical violations.

21. The June 10, 2010 Stipulation and Consent Order was in settlement of an administrative complaint issued on May 10, 2010, alleging violations of the Food Code revealed in an April 19, 2010 inspection, one of the same inspections for which evidence was submitted in this case.

CONCLUSIONS OF LAW

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

23. Petitioner is given responsibility to inspect public food service establishments to enforce the provisions of chapter 509, Florida Statutes, pursuant to section 509.032(2)(c).

24. As a licensed public food service establishment, Respondent is subject to inspection and to the requirements of chapter 509 and implementing rules.

25. Petitioner has the burden of proof to show, by clear and convincing evidence, that Respondent committed the acts alleged in the Administrative Complaint. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

26. Clear and convincing evidence has been defined as requiring:

[T]hat 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).

27. 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).

28. Section 509.032(2)(d) requires Petitioner to adopt and enforce standards and requirements for obtaining, storing, preparing, processing, serving or displaying food to protect the public from food-borne illness in public food service establishments.

29. Section 509.032(6) gives the Division authority to adopt rules to carry out the provisions of chapter 509.

30. The Division has adopted Florida Administrative Code Rule 61C-1.001(14), which incorporates by reference various provisions of the 2001 U. S. Food and Drug Administration Food Code (Food Code), including definitions found in paragraph 1-201.10(B), all of chapters 2 and 3, and certain changes made by the Supplement to the 2001 FDA Food Code (August 29, 2003).

31. Food Code Rule 2-301.14, as incorporated by reference, is entitled, "When to Wash" and provides:

FOOD EMPLOYEES shall clean their hands and exposed portions of their arms as specified under paragraph 2-301.12 immediately before engaging in FOOD preparation including working with exposed FOOD, clean EQUIPMENT and UTENSILS, and unwrapped SINGLE-SERVICE and SINGLE-USE ARTICLES and:

- (A) After touching bare human body parts other than clean hands and clean, exposed portions of arms;
- (B) After using the toilet room;
- (C) After caring for or handling SERVICE ANIMALS or aquatic animals as specified in paragraph 2-403.11(B);
- (D) Except as specified in paragraph 2-401.11(B), after coughing, sneezing, using a handkerchief or disposable tissue, using tobacco, eating, or drinking;
- (E) After handling soiled EQUIPMENT or UTENSILS;
- (F) During FOOD preparation, as often as necessary to remove soil and contamination and to prevent cross contamination when changing tasks;
- (G) When switching between working with raw FOOD and working with READY-TO-EAT FOOD;
- (H) Before donning gloves for working with FOOD; and
- (I) After engaging in other activities that contaminate the hands.

32. Petitioner proved by clear and convincing evidence that Respondent violated Food Code Rule 2-301.14, as incorporated by reference in rules of the Division, on April 19, 2010, and again on July 27, 2010.

33. Food Code Rule 3-501.16(A) is entitled, "Potentially Hazardous Food, Hot and Cold Holding" and provides:

(A) Except during preparation, cooking, or cooling, or when time is used as the public health control as specified under paragraph 3-501.19, and except as specified in paragraph (B) of this section, POTENTIALLY HAZARDOUS FOOD shall be maintained:

(1) At 57°C (135°F) 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 54°C (130°F) or above; or

(2) At a temperature specified in the following:

(a) 5°C (41°F) or less; of

(b) 7°C (45°F) or between 5°C (41°F) and 7°C (45°F) in existing refrigeration EQUIPMENT that is not capable of maintaining the FOOD at 5°C (41°F) or less if:

(i) The EQUIPMENT is in place and in use in the FOOD ESTABLISHMENT, and

(ii) 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.

34. Food Code Rule 1-201.10(B)(65) defines the term

"Potentially Hazardous Food" as follows:

(a) "Potentially hazardous food" means a FOOD that is natural or synthetic and that requires temperature control because it is in a form capable of supporting:

(i) The rapid and progressive growth of infectious or toxigenic microorganisms;

(ii) The growth and toxin production of *Clostridium Botulinum*; or

(iii) In raw shell EGGS, the growth of *Salmonella Enteritidis*.

(b) "Potentially hazardous food" includes an animal FOOD (a FOOD of animal origin) that is raw or heat-treated; a FOOD of plant origin that is heat-treated or consists of raw seed sprouts; cut melons; and garlic-in-oil mixtures that are not modified in a way that results in mixtures that do not support growth as specified under subparagraph (a) of this definition.

(c) "Potentially hazardous food" does not include:

(i) An air-cooled hard-boiled EGG with shell intact, or a shell EGG that is not hard-boiled, but has been treated to destroy all viable *Salmonellae*;

(ii) A FOOD with an a_w value of 0.85 or less;

(iii) A FOOD with a pH level of 4.6 or below when measured at 24°C (75°F);

(iv) A FOOD, in an unopened HERMETICALLY SEALED CONTAINER, that is commercially processed to achieve and maintain commercial

sterility under conditions of nonrefrigerated storage and distribution;

(v) A FOOD for which laboratory evidence demonstrates that the rapid and progressive growth of infectious or toxigenic microorganisms or the growth of *S. Enteritidis* in EGGS or *C. Botulinum* can not occur, such as a FOOD that has an a_w and a pH that are above the levels specified under subparagraphs (c)(ii) and (iii) of this definition and that may contain a preservative, other barrier to the growth of microorganisms, or a combination of barriers that inhibit the growth of microorganisms; or

(vi) A FOOD that does not support the growth of microorganisms as specified under Subparagraph (a) of this definition even though the FOOD may contain an infectious or toxigenic microorganism or chemical or physical contaminant at a level sufficient to cause illness.

35. Petitioner proved by clear and convincing evidence that Respondent violated Food Code Rule 2-501.16(A), as incorporated by reference in rules of the Division, on April 19, 2010. Potatoes, batter, rice, soup, and turnovers are potentially hazardous foods and Respondent failed to maintain them at a temperature of 41 degrees Fahrenheit or less.

36. Petitioner similarly proved by clear and convincing evidence that Respondent violated Food Code Rule 2-501.16(A), as incorporated by reference in rules of the Division, on July 27, 2010. Cream, tofu, milk, potatoes, yoghurt, and vegetables are

potentially hazardous foods and Respondent failed to maintain them at a temperature of 41 degrees Fahrenheit or less.

37. As the principle element of Respondent's defense, Ms. Pandey sought to conduct a courtroom demonstration to prove that ghee is not hazardous. Petitioner objected on the grounds that Respondent had not advised the Division that there would be a demonstration. The undersigned reserved ruling and permitted Respondent to proffer her demonstration. She attempted to show that butter, due to the amount of water in it, would not burn; while ghee, because it had been cooked down to a semi-solid state with excess water removed, would. Experiments and demonstrations, no less than testimony or documentary evidence, are admissible provided the demonstrations are conducted under the same or similar circumstances as those in issue at trial. Mutual Life Ins. Co. v. Bell, 147 Fla. 734, 738 (Fla. 1941). The strict requirement of "essential similarity" has even been relaxed. "The issue is one of the weight to be given the evidence rather than its relevance or materiality." GMC v. McGee, 837 So. 2d 1010, 1039 (Fla. 4th DCA 2002), quoting Johnson v. State, 442 So. 2d 193, 196 (Fla. 1984).

38. While Petitioner had not been put on specific notice that Respondent was going to make a demonstration regarding perishability, Respondent's position that ghee is not a potentially hazardous food was known to Petitioner, and no

prejudice was shown. Ms. Pandey failed, however, to demonstrate any scientific connection between combustion and perishability. While nicely dramatic, the demonstration therefore was not relevant to the issue of whether or not ghee is in fact a potentially hazardous food, and was not considered in the preparation of this Recommended Order.

39. Ms. Pandey's testimony that ghee was developed to retard spoilage and is not dangerous at room temperature is credible. While she did not prove that ghee is not a "potentially hazardous food" because it falls under Food Code Rule (65)(c)(v) or (vi), she need not do so. While the law is clear that the Division does not have the burden of proving the inapplicability of every exception or exemption to a penal statute, exclusions are treated somewhat differently. As explained by the Supreme Court in Purifoy v. State, 359 So. 2d 446, 448-449 (Fla. 1978):

The crucial difference between an 893.02(2) exclusion and 893.10(1) exemption (or exception) is that one who claims the benefits of the latter in effect admits possession of the contraband but claims that his possession was expressly authorized by law. In contrast, defendants (such as Purifoy) who claim the benefit of the former deny that the matter in their possession is a prohibited substance. In other words, Section 893.10(1) provides an excuse for what would otherwise be criminal conduct, and the burden of establishing that excuse properly rests as a matter of defense on the individual claiming it since there is

nothing to excuse until the state has proven the elements of a crime. Section 893.02(2), however, simply tests whether particular conduct is in fact criminal. To ignore this distinction is to relieve the state of proving an essential element of the crime and to require the accused to establish his innocence.

40. Food Code Rule 1-201.10(B) (65) (c) similarly provides an exclusion, not an exemption (or exception). The rule provides that "potentially hazardous foods" do not include certain foods that do not support the growth of microorganisms. It is critical to note that this language does not describe certain foods which come under the definition of "potentially hazardous foods" but are then exempted from regulation, thereby creating an affirmative defense and shifting the burden of proof to Respondent. Rather, the language describes certain foods that simply do not fall within the category of "potentially hazardous foods" in the first place. Ms. Pandey has credibly raised doubt as to whether ghee in fact is a "potentially hazardous food" at all.

41. The burden is on the Petitioner to prove by clear and convincing evidence that ghee is in fact a "potentially hazardous food." The Petitioner has failed to meet this burden with respect to ghee.

42. Section 509.261(1), Florida Statutes, provides that any public food service establishment that operates in violation

of chapter 509, or implementing rules, is subject to fines not to exceed \$1000.00 per offense, and the suspension or revocation of a license.

43. The Division has adopted rule 61C-1.005(6), establishing disciplinary guidelines for the imposition of penalties for violations of the Food Code. It provides in pertinent part:

(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.

* * *

(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.

44. Rule 61C-1.005(5)(a) provides that:

'[c]ritical 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.

45. Petitioner presented evidence of critical violations occurring on April 19, 2010. However, the June 10, 2010, Stipulation and Consent Order was in settlement of an earlier administrative complaint issued on May 10, 2010, that alleged violations documented at this same inspection. The April 19, 2010, violations therefore are not considered here as new offenses, but are considered only for penalty purposes.

46. The two violations of July 27, 2010, discussed above posed a significant threat to the public health, safety, or welfare and were identified as critical on the DBPR Form HR-5022-015 Food Service Inspection Report. They were therefore critical violations within the meaning of rule 61C-1.005(a).

47. Rule 61C-1.005(5)(e) defines "third and any subsequent offense" to mean "a violation of any law subject to penalty under Chapter 509, F.S., after two or more disciplinary Final Orders involving the same licensee have 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."

48. The two previous disciplinary Final Orders entered within 24 months of the administrative complaint, filed with the

agency clerk, and accepted as an exhibit in this case make these violations "third and subsequent offenses" within the meaning of rule 61C-1.005(e). In Kaplan v. Department of Health, 8 So. 3d 391 (Fla. 5th DCA 2009), it was held that prior discipline imposed as a result of Stipulation and Consent Order could constitute a prior offense for purposes of penalty calculation, even in the absence of a specific finding of statutory violation.

RECOMMENDATION

Upon consideration of the above 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 total fine of \$1500.00 against The Green Mango for the two critical violations occurring on July 27, 2010, to be paid within 30 calendar days of the filing of the Final Order with the Agency Clerk.

DONE AND ENTERED this 23rd day of January, 2012, in
Tallahassee, Leon County, Florida.

F. Scott Boyd

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of January, 2012.

ENDNOTE

^{1/} All references to statutes and rules are to the versions in effect in 2010, the time of the alleged violations, except as otherwise indicated.

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.