

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 11-4371
)
ALMA CARIBE CAFÉ RESTAURANT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This case came before Administrative Law Judge Edward T. Bauer for final hearing by video teleconference on November 16, 2011, at sites in Tallahassee and Miami, Florida.

APPEARANCES

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

For Respondent: No appearance

STATEMENT OF THE ISSUES

The issues in this disciplinary proceeding arise from Petitioner's allegation that Respondent, a licensed restaurant, violated several rules and a statutory provision governing food service establishments. If Petitioner proves one or more of the

alleged violations, then it will be necessary to consider whether penalties should be imposed on Respondent.

PRELIMINARY STATEMENT

On August 19, 2010, Petitioner Department of Business and Professional Regulation, Division of Hotels and Restaurants ("the Division"), issued a five-count Administrative Complaint ("Complaint") against Respondent Alma Caribe Café Restaurant, charging the licensed restaurant with various offenses relating to noncompliance with the rules governing food service establishments. Respondent timely requested a formal hearing to contest the allegations, and, on August 25, 2011, the matter was referred to the Division of Administrative Hearings.

The parties were properly notified that the final hearing would commence at 9:00 a.m. on November 16, 2011. At the designated time and place, the undersigned and the Qualified Representative for Petitioner appeared. Respondent's representative, however, did not appear. After waiting approximately 30 minutes and upon review of the file, from which it was determined that Respondent had been given adequate notice of the final hearing, the undersigned commenced the proceeding.

During the final hearing, the Division presented the testimony of Reginald Garcia and introduced three exhibits, numbered one through three. Pursuant to Petitioner's request, the undersigned took official recognition of the Food Code.^{1/}

The Transcript of the final hearing was filed on December 7, 2011. The Division timely submitted a Proposed Recommended Order that has been considered in the preparation of this Recommended Order. Respondent did not file a post-hearing submission of any kind.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2010 edition.

FINDINGS OF FACT

1. The Division is the State agency charged with regulation of hotels and restaurants pursuant to chapter 509, Florida Statutes.

2. At all times material to this case, Respondent was a restaurant operating at 3100 Northwest 17th Avenue, Miami, Florida, and holding food service license number 2328990.

3. On May 19, 2010, and July 23, 2010, Respondent was inspected by Reginald Garcia, a sanitation and safety specialist employed by the Division. During both visits, Mr. Garcia noticed multiple items that were not in compliance with the laws which govern the facilities and operations of licensed restaurants.

4. Through the testimony of Mr. Garcia and the exhibits introduced into evidence during the final hearing, the Division presented clear and convincing evidence that as of July 23, 2010, the following deficiencies subsisted at Respondent Alma

Caribe Café Restaurant: (1) potentially hazardous food held at a temperature greater than 41 degrees Fahrenheit, contrary to Food Code Rule 3-501.16(A); (2) potentially hazardous food not cooled from 135 to 41 degrees Fahrenheit within six hours, in violation of Food Code Rule 3-501.14(A); (3) holding equipment incapable of maintaining potentially hazardous food at proper temperatures, in violation of Food Code Rule 4-301.11; (4) raw food stored over cooked food, contrary to Food Code Rule 3-302.11(A) (1); and (5) no proof of required employee training, in violation of section 509.049, Florida Statutes.

5. Each of the foregoing deficiencies is considered a critical violation by the Division. Critical food code violations are those that, if uncorrected, present an immediate threat to public safety.

CONCLUSIONS OF LAW

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

7. Section 509.261, Florida Statutes, sets forth the acts for which the Division may impose discipline. This statute provides, in pertinent part:

(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.

8. By rule, the Division has defined the term "Food Code" as follows:

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.

Fla. Admin. Code R. 61C-1.001(14).

9. Food Code Rule 3-501.16(A) reads:

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.

10. Food Code Rule 3-501.14(A) provides:

Cooked potentially hazardous food shall be cooled: (1) within 2 hours, from 135 degrees Fahrenheit to 70 degrees Fahrenheit; and (2) within a total of 6 hours, from 135 degrees Fahrenheit to 41 degrees Fahrenheit or less.

11. Food Code Rule 4-301.11 reads:

Cooling, heating and holding capacities. Equipment for cooling and heating food, and holding cold and hot food, shall be sufficient in number and capacity to provide food temperatures as specified under Chapter 3.

12. Food Code Rule 3-302.11(A) (1) provides, in relevant part:

Food shall be protected from cross contamination by: (1) Separating raw animal foods during storage, preparation, holding, and display from . . . [c]ooked ready-to-eat food.

13. Section 509.049, Florida Statutes, reads, in pertinent part:

(1) The division shall adopt, by rule, minimum food safety protection standards for the training of all food service employees who are responsible for the storage, preparation, display, or serving of foods to the public in establishments regulated under this chapter. These standards shall not include an examination, but shall provide for a food safety training certificate

program for food service employees to be administered by a private nonprofit provider chosen by the division.

* * *

(5) It shall be the duty of each public food service establishment to provide training in accordance with the described rule to all food service employees of the public food service establishment. The public food service establishment may designate any certified food service manager to perform this function. Food service employees must receive certification within 60 days after employment. Certification pursuant to this section shall remain valid for 3 years. All public food service establishments must provide the division with proof of employee training upon request, including, but not limited to, at the time of any division inspection of the establishment. Proof of training for each food service employee shall include the name of the trained employee, the date of birth of the trained employee, the date the training occurred, and the approved food safety training program used.

(emphasis added).

14. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a professional license is penal in nature. State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Division must prove the charges against Respondent by clear and convincing evidence. Dep't of Banking and Fin., Div. of Secs. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294-95

(Fla. 1987); Nair v. Dep't of Bus. & Prof'l Reg., 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

15. Clear and convincing evidence:

requires 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 lacking in confusion as to the facts in issue. The evidence must be of such a 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.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

16. The undersigned has determined, as a matter of ultimate fact, that the Division established Respondent's guilt regarding noncompliance with the following provisions: Food Code Rule 3-501.16(A), as charged in Count One of the Complaint; Food Code Rule 3-501.14(A), as alleged in Count Two; Food Code Rule 4-301.11, as charged in Count Three; Food Code Rule 3-202.11(A)(1), as alleged in Count Four; and section 509.049, as alleged in Count Five. In making these determinations, the undersigned concludes that "the plain language of the applicable . . . rules, being clear and unambiguous, [can] be applied in a straightforward manner to the historical events at hand without simultaneously examining extrinsic evidence of legislative intent or resorting to principles of

interpretation." Dep't of Bus. & Prof'l Reg., Div. of Hotels & Rests. v. Latin Am. Cafeteria, Inc., Case No. 05-2733 (Fla. DOAH Nov. 2, 2005; Fla. DBPR Dec. 13, 2005). It is therefore unnecessary to make additional legal conclusions concerning these violations. Id.

17. As the instant case involves a first offense, Florida Administrative Code Rule 61C-1.005(6) provides for a fine ranging from \$250 to \$500 for each of the five critical violations committed by Respondent. Petitioner recommends, and the undersigned agrees, that the minimum fine of \$250 should be imposed with respect to each count.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Division of Hotels and Restaurants enter a final order: (a) finding Respondent guilty in accordance with the foregoing Recommended Order; and (b) ordering Respondent to pay an administrative penalty in the amount of \$1250, to be paid within 30 days after the filing of the final order with the agency clerk.

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



Edward T. Bauer
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 20th day of December, 2011.

ENDNOTE

^{1/} The Food Code is a publication of the U.S. Food and Drug Administration, portions of which have been adopted by reference as rules of the Division. See Fla. Admin. Code R. 61C-1.001(14).

COPIES FURNISHED:

Sara Strickland, Qualified Representative
Charles F. Tunnicliff, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

Evarista Daniel
Alma Caribe Café Restaurant
3100 Northwest 17th Avenue
Miami, Florida 33142

William L. Veach, Director

Division of Hotels and Restaurants
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399

Layne Smith, General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399

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.