

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 12-0436
)
PIATTINI PIZZERIA AND CAFE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on May 4, 2012, via video teleconference with sites in Orlando and Tallahassee, Florida. The parties appeared before Administrative Law Judge Lynne A. Quimby-Pennock of the Division of Administrative Hearings (DOAH).

APPEARANCES

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

For Respondent: Maria Radojkovic, pro se
Piattini Pizzeria and Cafe
595 West Church Street, Suite L
Orlando, Florida 32805

STATEMENT OF THE ISSUES

Whether Respondent committed the violations set forth in the Administrative Complaint, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On or about February 28, 2011, Petitioner, Department of Business and Professional Regulation, Division of Hotels and Restaurants (Petitioner), filed an Administrative Complaint against Respondent, Piattini Pizzeria and Cafe (the Restaurant), alleging violations of certain provisions of chapter 509, Florida Statutes (2010),^{1/} or the applicable rules governing the operation of public food service establishments. The Administrative Complaint requested an order imposing one or more sanctions against the Restaurant.

The Restaurant disputed the allegations in the Administrative Complaint and timely requested a formal administrative hearing. Petitioner forwarded the case to DOAH for the assignment of an Administrative Law Judge.

At the final hearing, Petitioner presented one witness: Will Goris, a sanitation and safety specialist. Petitioner offered four exhibits into evidence, all of which were admitted without objection. Petitioner asked for official recognition of section 509.032(6); Florida Administrative Code Rules 61C-1.001(14) and 61C-1.005; and rule 6-501.111, Food Code. The

request was granted. The Restaurant called one witness: Maria Radojkovic, manager of the Restaurant. The Restaurant offered no exhibits into evidence.

The one-volume Transcript of the final hearing was filed on May 21, 2012. At hearing, both parties were advised that their proposed recommended orders were due ten days after the Transcript was filed with DOAH. Petitioner timely filed its Proposed Recommended Order, which has been considered in the preparation of this Recommended Order. To date, the Restaurant has not filed any post-hearing submittal.

FINDINGS OF FACT

1. At all times material to this case, the Restaurant was a licensed public food service establishment located at 595 West Church Street, Suite L, Orlando, Florida. The Restaurant was first licensed in July 2006, and its food service license number is 5811488.

2. Petitioner is the state agency charged with the regulation of hotels (public lodging establishments) and restaurants (public food service establishments) pursuant to chapter 509.

3. Will Goris is a sanitation and safety specialist for Petitioner. Mr. Goris has worked for Petitioner for eight years. Prior to working for Petitioner, Mr. Goris worked for the U.S. Army for eight years as a food safety inspector. Mr. Goris

received Petitioner's standardized training on the laws and rules governing public food service establishments.^{2/} Mr. Goris is a certified food manager and obtains monthly in-house training from Petitioner on his job duties.

4. On February 22, 2011, Mr. Goris performed a routine inspection of the Restaurant starting at approximately 12:39 p.m. The Restaurant was fully operational at the time, as it was the lunch hour. Mr. Goris observed live roach activity (infestation) at the Restaurant in the following locations: under a mat by the three-compartment sink; on a peg board adjacent to a hand-sink; under a box of onions; inside a box of pasta; by the water heater; and by the wheels of the reach-in cooler. Mr. Goris also observed dead roaches in various locations at the Restaurant.

5. Critical violations are those violations that, if uncorrected, are most likely to contribute to contamination, illness or environmental health hazards. Insects and other pests are capable of transmitting diseases to humans by contaminating the food or food contact surfaces, and this roach infestation was identified by Mr. Goris as a "critical" violation.

6. Maria Radojkovic is the manager of the Restaurant. As Mr. Goris was conducting the inspection, he asked Ms. Radojkovic to observe the same roach activity he was observing. At the conclusion of the February 22, 2011, inspection, Mr. Goris recorded the observed violations in an inspection report which he

printed out. Ms. Radojkovic signed the inspection report and received a copy of it at that time.

7. There was no evidence to dispute the allegations. Ms. Radojkovic confirmed that the roaches "got brought in by deliveries and boxes." The Restaurant had at least two extermination companies to combat the roach infestation problem. When the first company was unsuccessful, Ms. Radojkovic hired a different company. However, it took several months for the second company to "get rid of" the roaches.

8. Ms. Radojkovic expressed her understanding that the Restaurant needs to be clean, and she is aware of the various access points for roaches to enter it. Although she maintains it is impossible for any restaurant to be roach-free, Ms. Radojkovic maintains that it "just takes time to contain" them.

9. None of the other putative violations mentioned in the inspection report (Petitioner's Exhibit 2) were addressed at final hearing and are therefore irrelevant to this proceeding.

10. No evidence was introduced that a patron had become ill as a result of the infestation.

11. On February 22, 2011, the Restaurant was served an Emergency Order of Suspension (ESO) following the inspection of that date. Although there was no testimony as to when the ESO was actually lifted, at the time of the hearing, the Restaurant was open for business.

12. On February 28, 2010, a Final Order was issued involving the Restaurant regarding an Administrative Complaint that was issued on September 29, 2009. This Administrative Complaint was based on a June 16, 2009, inspection and a September 9, 2009, re-inspection. The issue therein was unrelated to the issue at hand.

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 (2011).

14. Petitioner is the state agency charged with the regulation of public food service establishments in the State of Florida pursuant to section 20.165, Florida Statutes, and chapter 509.

15. Petitioner has the burden of proving by clear and convincing evidence that the Restaurant violated chapter 509, the Food Code provisions promulgated pursuant to that chapter, and the Florida Administrative Code rules. See Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987); Pic N'Save Central Fla., Inc. v Dep't of Bus. & Prof'l Reg., Div. of Alcoholic Beverages & Tobacco, 601 So. 2d 245, 249 (Fla. 1st DCA 1992).

16. Section 509.013(5) (a) provides:

(5) (a) "Public food service establishment" means any building, vehicle, place, or structure, or any room or division in a building, vehicle, place, or structure where food is prepared, served, or sold for immediate consumption on or in the vicinity of the premises; called for or taken out by customers; or prepared prior to being delivered to another location for consumption.

The Restaurant is a public food service establishment as defined in chapter 509.

17. Section 509.032 provides as follows in pertinent part:

(1) GENERAL.--The Division shall carry out all of the provisions of this chapter and all other applicable laws and rules relating to the inspection or regulation of . . . public food service establishments for the purpose of safeguarding the public health, safety, and welfare. . . .

(2) INSPECTION OF PREMISES.--

(a) The Division has responsibility and jurisdiction for all inspections required by this chapter. The Division has responsibility for quality assurance. Each licensed establishment shall be inspected at least biannually, . . . and shall be inspected at such other times as the Division determines is necessary to ensure the public's health, safety, and welfare. The Division shall establish a system to determine inspection frequency.

(b) For purposes of performing required inspections and the enforcement of this chapter, the Division has the right of entry and access to . . . public food service establishments at any reasonable time.

(c) Public food service establishment inspections shall be conducted to enforce provisions of this part and to educate, inform, and promote cooperation between the Division and the establishment.

(d) The Division shall adopt and enforce sanitation rules consistent with law to ensure the protection of the public from food-borne illness in those establishments licensed under this chapter. These rules shall provide the standards and requirements for obtaining, storing, preparing, processing, serving, or displaying food in public food service establishments, approving public food service establishment facility plans, conducting necessary public food service establishment inspections for compliance with sanitation regulations, cooperating and coordinating with the Department of Health in epidemiological investigations, and initiating enforcement actions, and for other such responsibilities deemed necessary by the Division. The Division may not establish by rule any regulation governing the design, construction, erection, alteration, modification, repair, or demolition of any . . . public food service establishment. . . .

* * *

(6) RULEMAKING AUTHORITY.--The Division shall adopt such rules as are necessary to carry out the provisions of this chapter.

The Restaurant was duly inspected under Petitioner's authority as granted by chapter 509.

18. Rule 61C-1.001(14) provides:

Except when otherwise defined in this rule, the definitions provided in paragraph 1-201.10(B), Food Code, 2001 *Recommendations of the United States Public Health Service/Food*

and Drug Administration, the 2001 Food Code Errata Sheet (August 23, 2002); and Supplement to the 2001 FDA Food Code (August 29, 2003) shall apply to Chapters 61C-1, 61C-3 and 61C-4, F.A.C. In addition, the following definitions apply to Chapters 61C-1, 61C-3 and 61C-4, F.A.C.:

* * *

(14) 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. A copy of the Food Code, as adopted by the division, is available on the division's Internet website www.MyFloridaLicense.com/dbpr/hr. A copy of the entire Food Code is available on the U.S. Food and Drug Administration Internet website. Printed copies of the entire Food Code are available through the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

19. Petitioner has adopted the Food Code of the United States Department of Health and Human Services 2001 as a guideline for inspecting public food service establishments in Florida. Rule 6-501.111, Food Code, provides:

6-501.111 Controlling Pests.

The presence of insects, rodents, and other pests shall be controlled to minimize their presence on the premises by:

(A) Routinely inspecting incoming shipments of food and supplies;

(B) Routinely inspecting the premises for evidence of pests;

(C) Using methods, if pests are found, such as trapping devices or other means of pest control as specified under §§ 7-202.12, 7-206.12, and 7-206.13; and

(D) Eliminating harborage conditions.

20. Rule 61C-1.005, which is set forth in pertinent part herein, provides:

(1) This rule sets out the disciplinary guidelines for imposing penalties upon . . . public food service establishments under the jurisdiction of the Division of Hotels and Restaurants (division) in administrative actions. The purpose of this rule is to notify licensees of the standard range of penalties routinely imposed unless the division finds it necessary to deviate from the standard penalties for the reasons stated within this rule.

(2) These disciplinary guidelines are descriptive in nature and do not use the language used to formally allege a violation in a specific case. This rule is not intended to specifically describe all possible violations of law that may be committed by a . . . public food service establishment and that may be subject to penalty imposed by the division.

(3) The division may impose penalties against a . . . public food service establishment for a specific violation not included in the language of this rule. If a specific violation is not included in the language of this rule, the division shall impose a penalty corresponding to the most similar violation listed in this rule.

(4) These disciplinary guidelines do not limit the division's authority to order a . . . public food service establishment to cease and desist from any unlawful practice, or other action authorized by law.

(5) Definitions.

(a) "Critical 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.

(b) "Non-critical violation" means a violation not meeting the definition of critical violation and not otherwise identified in this rule.

(c) "First offense" means a violation of any law subject to penalty under Chapter 509, F.S., when no 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.

(d) "Second offense," and "second and any subsequent offense" mean 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.

(e) "Third and any subsequent offense" means 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.

(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.

* * *

(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:

(a) Aggravating factors.

1. Possible danger to the public.
2. Length of time since the violation occurred.
3. Number of violations in the current administrative complaint.
4. Severity of violations in the current administrative complaint.
5. Disciplinary history of the licensee within the 60 months preceding the date the current administrative complaint was issued.
6. Number of Emergency Orders of Suspension or Closure against the same licensee filed with the Agency Clerk by the division within the 12 months preceding the date the current administrative complaint was issued.
7. The current administrative complaint alleges a violation for obstruction of division personnel.
8. The licensee was prosecuted by another authority having jurisdiction resulting in a violation of Chapter 509, F.S., including but not limited to cases based on discrimination, civil rights violations, and criminal violations.
9. Actual physical damage or bodily harm caused to persons or property by the violation.
10. Any other aggravating factors, as relevant under the circumstances.

(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.

21. Petitioner proved by clear and convincing evidence that the Restaurant violated rule 6-501.111, Food Code. At the time of the inspection, the Restaurant had an active roach infestation, which, if uncorrected, could have led to food contamination. No evidence was presented that any patrons became ill as a result of the infestation. Petitioner proved the Restaurant committed one critical violation.

22. In mitigation, there was testimony that the Restaurant knew of the roach infestation and hired two outside companies to address the infestation. Further, it has been 16 months since the violation occurred, and it has been corrected.

23. In aggravation, there was a possible health danger to the public, an ESO was issued as a result of the critical violation, and a prior Final Order had been entered against the Restaurant in 2010.

24. In its Proposed Recommended Order, Petitioner proposed the imposition of a fine of \$1,000 for violation of one critical violation. The recommended penalty is consistent with the guidelines set forth in rules 61C-1.005(5) (a) and (d) and 61C-1.005(6).

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, enter a final order which confirms the violation found and imposes an administrative fine in the amount of \$1,000 due and payable to the Division of Hotels and Restaurants, 1940 North Monroe Street, Tallahassee, Florida 32399-1011, within 30 days after the filing of the final order with the agency clerk.

DONE AND ENTERED this 13th day of June, 2012, in
Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
Division of Administrative Hearings
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1230 Apalachee Parkway
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Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of June, 2012.

ENDNOTES

^{1/} Unless specifically stated otherwise, all references to
Florida Statutes will be to the 2010 version.

^{2/} Mr. Goris has also been trained on the statutes and rules
regulating public lodging establishments; however, that area is
not under scrutiny and will not be addressed further.

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.