

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF HOTELS )  
AND RESTAURANTS, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 12-0524  
 )  
BANGIN BARBEQUE, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

A hearing was held pursuant to notice, on April 5, 2012, by Barbara J. Staros, assigned Administrative Law Judge of the Division of Administrative Hearings, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Marc A. Drexler, Esquire  
Sarah Morgan, Qualified Representative  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-1015

For Respondent: No appearance

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

Petitioner, Department of Business and Professional Regulation, Division of Hotels and Restaurants, filed an Administrative Complaint alleging violations of the provisions of chapter 509, Florida Statutes, or the applicable rules governing the operation of public food establishments.

Respondent disputed the allegations in the Administrative Complaint and petitioned for a formal administrative hearing. The case was referred to the Division of Administrative Hearings on or about February 8, 2012. A Notice of Hearing was issued on February 14, 2012, scheduling the formal hearing for April 5, 2012. The Notice of Hearing was mailed to the parties at their addresses of record. The hearing took place as scheduled.

At the commencement of the hearing, the Petitioner's counsel entered his appearance, and Petitioner's Request to Accept Qualified Representative was granted. No appearance was made on behalf of Respondent. The hearing was recessed for approximately 20 minutes to give a representative of Respondent an opportunity to appear, but no appearance was made on behalf of Respondent.

At hearing, Petitioner presented testimony of two witnesses, Edward Bouza and Cynthia Ross. Petitioner's Exhibits numbered 1, 2 and 4 were admitted into evidence. Petitioner also withdrew allegations in the Administrative Complaint

referencing an April 6, 2011, inspection. Official Recognition was requested of section 509.032(6), Florida Statutes, Florida Administrative Code Rules 61C-4.001(14), and 61C-1.005, and pertinent portions of the United States Food and Drug Administration's Food Code (Food Code). The request was granted.

A Transcript consisting of one volume was filed on April 23, 2012. Petitioner timely filed a Proposed Recommended Order, which has been considered in the preparation of this Recommended Order. Respondent did not file a post-hearing submission. References to Florida Statutes are to the 2011 version, unless otherwise indicated.

#### FINDINGS OF FACT

1. Petitioner, the Department of Business and Professional Regulation, Division of Hotels and Restaurants (Division), is the state agency charged with the duty and responsibility of regulating the operation of hotel and restaurant establishments pursuant to section 20.165 and chapter 509, Florida Statutes.

2. Respondent is located in Tallahassee, Florida, with a business address of 710 West Orange Avenue. Respondent was issued license number 2014 by the Division as a mobile food dispensing vehicle.

3. Critical violations are those violations that, if not corrected, could contribute to food-borne illness, environmental health hazards, or contamination of food.

4. Edward Bouza is employed by the Division as a plans examiner. Before becoming a plans examiner, he worked for the Division as a Sanitation and Safety Specialist inspector. Mr. Bouza has received three to four months of in-field training regarding public food service and inspections. During the time he was a Sanitation and Safety Specialist, he continued to receive continuing education training on a monthly basis. He performed approximately 800 to 1,000 inspections each year.

5. Cynthia Ross is employed by the Division as a supervisor. She supervises nine inspectors. Prior to becoming a supervisor, Ms. Ross worked as a Sanitation and Safety Specialist for two years. Prior to working at the Division, Ms. Ross worked as a general manager of a Ruby Tuesday restaurant for 15 years, as a general manager of a fine dining establishment for three years, and as an owner/operator of a full-service restaurant for seven years. She received training on the Food Code and was trained in the laws and rules pertaining to public food service and lodging establishments. In her former capacity as a Sanitation and Safety Specialist, she received continuing education training on a monthly basis and performed approximately 1,000 inspections a year.

6. On April 1, 2011, Mr. Bouza and Ms. Ross conducted a routine food service inspection of Respondent's premises. They observed Respondent operating without any water at its hand sink, its three-compartment sink, and without hot water at its hand sink. These are critical violations because without hot and cold running water, Respondent could not perform basic cleaning functions in its establishment, could not properly wash its equipment, or allow its employees to wash their hands.

7. During the inspection, Mr. Bouza and Ms. Ross prepared, signed, and issued an inspection report setting forth the violations they observed. Anthony Rivers, Respondent's owner, was present and signed the inspection report indicating receipt.

8. An immediate Administrative Complaint and an Emergency Closure Order were issued based on the violations documented on the April 1, 2011 inspection report.

#### CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57(1), Fla. Stat.

10. The Division is the state agency charged with regulating public food service establishments pursuant to section 20.165 and chapter 509, Florida Statutes.

11. Pursuant to section 509.261(1), the Division may impose penalties for violations of chapter 509, including an administrative fine of no more than \$1,000 for each separate offense, attendance at personal expense at an educational program sponsored by the Hospitality Education Program, and the suspension or revocation of Respondent's license.

12. Because the Department seeks the imposition of an administrative fine, the Department has the burden of proving by clear and convincing evidence the specific allegations in the Administrative Complaint. See, e.g., Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

13. Section 509.032(6) provides that the Division of Hotels and Restaurants shall adopt such rules as are necessary to carry out the provisions of chapter 509. Paragraph 1-201.10(B) and chapters 2, 3, 4, 5, 6 and 7 of the United States Food and Drug Administration's Food Code (Food Code) have been incorporated by reference into the Department's rules governing public food establishments. Fla. Admin. Code R. 61C-1.001(14).

14. Through the Administrative Complaint, Respondent is alleged to have violated the following provisions of the Food Code, which read in pertinent part:

5-103.12

Pressure. Water under pressure shall be provided to all fixtures, equipment, and non-food equipment that are required to use water

except that water supplied as specified under §§ 5-104.12(A) and (B) to a temporary food establishment or in response to a temporary interruption of a water supply need not be under pressure.

\* \* \*

5-202.12

Handwashing Facility, Installation.

(A) A handwashing lavatory shall be equipped to provide water at a temperature of at least 38° C (100° degrees F) through a mixing valve or combination faucet.

(B) A steam-mixing valve may not be used at a handwashing lavatory.

15. The Division proved by clear and convincing evidence that Respondent violated rule 5-103.12, Food Code, in that both inspectors observed that Respondent's establishment did not have any running water at its hand sink and three-compartment sink.

16. The Division proved by clear and convincing evidence that Respondent violated rule 5-202.12(A) and (B), Food Code, in that Respondent's establishment had no running water at its hand sink.

17. The Administrative Complaint groups the above violations of rules 5-103.12 and 5-202.12(A) and (B), Food Code, as a single violation. Accordingly, the Division seeks only one penalty to be assessed for both violations. The Division suggests a fine of \$500.

18. Respondent proved that Respondent committed one critical violation.

19. In its Proposed Recommended Order, the Division proposes the imposition of a fine of \$500 for violation of one critical violation. Florida Administrative Code Rule 61C-1.005(6) sets forth the penalty guidelines to be imposed against licensees for violations of the applicable statutes and rules. The recommended penalty is consistent with these guidelines.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That the Division enter a Final Order which confirms the violations found, and imposes an administrative fine in the amount of \$500 due and payable to the Division of Hotels and Restaurants, 1940 North Monroe Street, Tallahassee, Florida, 32399-1011, within 30 calendar days of the date the Final Order is filed with the Agency Clerk.



DONE AND ENTERED this 9th day of May, 2012, in  
Tallahassee, Leon County, Florida.



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Barbara J. Staros  
Administrative Law Judge  
Division of Administrative Hearings  
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1230 Apalachee Parkway  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 9th day of May, 2012.

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.