

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF HOTELS AND )  
RESTAURANTS, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 12-1174  
 )  
VALENTINOS CUCINA ITALIANA, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on June 11, 2012, by video teleconference with connecting sites in Lauderdale Lakes and Tallahassee, Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Giovanni Rocchio, pro se  
Valentinos Cucina Italiana  
1145 South Federal Highway  
Fort Lauderdale, Florida 33316

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent committed the offenses set forth in the Administrative Complaint dated June 27, 2011, and, if so, what action should be taken.

PRELIMINARY STATEMENT

The Department of Business and Professional Regulation, Division of Hotels and Restaurants, hereinafter Department, issued an Administrative Complaint against Valentinos Cucina Italiana, hereinafter Restaurant, dated June 27, 2011. The Department charged the Restaurant with a three-count Administrative Complaint: Count 1--violating section 509, Florida Statutes, through a violation of Food Code Rule 3-302.11(A) (1) in that (A) raw animal food was observed stored over ready-to-eat food (eggs, reach-in cooler) and (B) raw animal food was observed not properly separated from ready-to-eat food (beef, reach-in cooler); Count 2--violating section 509 through a violation of Food Code Rule 5-205.11(A) in that (A) the hand wash sink was observed not accessible for employee use at all times (kitchen) and (B) the hand wash sink was observed used for purposes other than handwashing (kitchen); and Count 3--violating section 509 through a violation of Food Code Rule 6-301.12 in that (A) the hand wash sink was observed lacking proper hand drying provisions (kitchen), (B) the handwashing cleanser was observed lacking at a hand washing lavatory

(kitchen), and (C) no handwashing sign was provided at a handsink used by food employees (kitchen). The Restaurant disputed the material allegations of fact and requested a hearing. On March 30, 2012, this matter was referred to the Division of Administrative Hearings.

Prior to hearing, as to Count 3, the Department dismissed Counts 3(A) and (C), thereby, Count 3(B) was remaining. Further, as to Count 3(B), the Department corrected the citation of the Food Code violation from a violation of Food Code Rule 6-301.12 to a violation of Food Code Rule 6-301.11 and set forth the provision of the said corrected citation. Moreover, at hearing, as to Count 1, the Department dismissed Count 1(B), thereby, Count 1(A) was remaining; and as to Count 2, the Department dismissed Count 2(B), thereby, Count 2(A) was remaining.

At hearing, the Department presented the testimony of two witnesses and entered three exhibits (Petitioner's Exhibits numbered 1 through 3) into evidence. Giovanni Rocchio testified on behalf of the Restaurant. The undersigned took Official Recognition of section 509.032(6), Florida Statutes; Florida Administrative Code Rules 61C-1.001(14) and 61C-1.005; and Food Code Rules 3-302.11(A)(1), 5-205.11(A), and 6-301.12.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was

set for ten days following the filing of the transcript. The Transcript, consisting of one volume, was filed on June 27, 2012. The Department timely filed its post-hearing submission. The Restaurant did not file a post-hearing submission. The Department's post-hearing submission has been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. At all times material hereto, the Restaurant was licensed as a public food service establishment in the State of Florida by the Department, having been issued license type 2010 and license number 1620035.

2. At all times material hereto, the Restaurant was located at 1145 South Federal Highway, Fort Lauderdale, Florida 33316.

3. A critical violation in food service is considered to be a violation of the Food Code that, if not corrected, will most likely cause and is directly related to food-borne illness, food contamination, or environmental hazards.

4. A non-critical violation in food service is considered to be a violation that is less likely to cause and will not directly contribute to food-borne illness or food contamination.

5. On October 27, 2010, Lynden Lewis, an inspector with the Department, conducted a routine inspection of the Restaurant.

6. During the inspection, Inspector Lewis found violations, which were considered to be critical and non-critical violations. Further, during the inspection, Inspector Lewis prepared a food inspection report, setting forth the alleged violations and that the violations were required to be corrected by the next unannounced inspection. The inspection report was signed by Inspector Lewis and a representative of the Restaurant. Inspector Lewis made the representative aware of the alleged violations and that the violations were required to be corrected by the next unannounced inspection, and he provided the representative with a copy of the inspection report.

7. On June 16, 2011, Inspector Lewis and Begum Khatoon, an inspector with the Department, conducted an unannounced routine inspection of the Restaurant. Among other things, three critical violations were not corrected from the routine inspection of October 27, 2010. During the unannounced inspection, Inspector Khatoon prepared a food inspection report, setting forth, among other things, the alleged critical violations. The unannounced inspection report was signed by Inspector Khatoon and a representative of the Restaurant, and Inspector Khatoon provided the representative with a copy of the inspection report. Inspector Khatoon made the representative aware of the alleged violations and that an administrative complaint would be recommended.

8. The most serious alleged critical violation, which had been found on October 27, 2010, and was not corrected by June 16, 2011, was raw animal food was stored over ready-to-eat food--raw eggs were being stored over yogurt--in the reach-in cooler. This violation is critical because the ready-to-eat food (yogurt) has already been cooked and gone through the process of pathogenic destruction and will not go through that process again; whereas, the raw animal food (eggs) has not been cooked and not gone through the process of pathogenic destruction. Cross-contamination could occur from the raw animal food by dripping onto or touching of the ready-to-eat food, and any pathogens present on the ready-to-eat food, as a result of the cross-contamination, would pass-on to consumers when the ready-to-eat food is served. Mr. Rocchio's testimony that eggs are stored on the bottom of the refrigerator (reach-in cooler) is found to be credible; however, most importantly, the evidence fails to show that, on the day of the inspection, eggs were stored on the bottom of the refrigerator.

9. The next most serious alleged critical violation, which had been found on October 27, 2010, and was not corrected by June 16, 2011, was the hand wash sink in the kitchen was not accessible for employee use at all times. A garbage can was placed in front of the hand wash sink in the kitchen, making the sink inaccessible to employees at all times to wash their hands.

Even though Mr. Rochhio testified, and his testimony is found to be credible, that the garbage can was "not a large garbage can," the evidence fails to show, most importantly, that the garbage can did not cause the hand wash sink to be inaccessible to the employees at all times. This violation is a critical violation because the hands of employees become contaminated as employees work and, if the handwash sink is not accessible, the employees will be discouraged from washing their hands.

10. The next most serious alleged critical violation, which had been found on October 27, 2010, and was not corrected by June 16, 2011, was handwashing cleanser was lacking at the hand washing lavatory in the kitchen. This violation is a critical violation because hands are a vehicle of contamination, and the use of soap by employees, when washing their hands, removes bacteria and viruses that can contaminate the employees' hands.

#### CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes (2012).

12. The Department has the burden of proof to show by clear and convincing evidence that the Restaurant committed the offenses set forth in the Administrative Complaint. Dep't of

Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

13. Section 509.032, Florida Statutes (2010),<sup>1</sup> provides in pertinent part:

(1) GENERAL. --The division [Division of Hotels and Restaurants of the Department of Business and Professional Regulation] 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 lodging establishments and 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 . . . .

(b) For purposes of performing required inspections and the enforcement of this chapter, the division has the right of entry and access to public lodging establishments and 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 . . . conducting necessary public food service establishment inspections for compliance with sanitation regulations . . . and initiating enforcement actions, and for other such responsibilities deemed necessary by the division . . . .

\* \* \*

(3) SANITARY STANDARDS; EMERGENCIES; TEMPORARY FOOD SERVICE EVENTS. --The division shall:

(a) Prescribe sanitary standards which shall be enforced in public food service establishments.

\* \* \*

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

14. Florida Administrative Code Rule 61C-1.001 provides in pertinent part:

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 is 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](http://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.

15. Food Code Rule 3-302.11 provides in pertinent part:

(A) Food shall be protected from cross contamination by:

(1) Separating raw animal foods during storage, preparation, holding, and display from:

(a) Raw ready-to-eat food including other raw animal food such as fish for sushi or molluscan shellfish, or other raw ready-to-eat food such as vegetables, and

(b) Cooked ready-to-eat food. . . .

16. The evidence is clear and convincing and demonstrates that the Restaurant violated rule 3-302.11(A)(1) in that the raw animal food (the eggs) was stored over the ready-to-eat food (the yogurt). Furthermore, the evidence is clear and convincing and demonstrates that the violation was a critical violation.

17. Food Code Rule 5-205.11 provides in pertinent part:

(A) A handwashing facility shall be maintained so that it is accessible at all times for employee use.

18. The evidence is clear and convincing and demonstrates that the Restaurant violated rule 5-205.11(A) in that a garbage can blocked employees' access to the handwashing sink in the kitchen. Furthermore, the evidence is clear and convincing and demonstrates that the violation was a critical violation.

19. Food Code Rule 6-301.11 provides:

Each handwashing lavatory or group of 2 adjacent lavatories shall be provided with a supply of hand cleansing liquid, powder, or bar soap.

20. The evidence is clear and convincing and demonstrates that the Restaurant violated rule 6-301.11 in that no handwashing cleanser (liquid, powder, or soap) was provided at the handwash sink in the kitchen. Furthermore, the evidence is clear and convincing and demonstrates that the violation was a critical violation.

21. As to penalty, section 509.261, Florida Statutes, 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.

22. Florida Administrative Code Rule 61C-1.005 provides in pertinent part:

(1) This rule sets out the disciplinary guidelines for imposing penalties upon public lodging establishments and 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.

\* \* \*

(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.

\* \* \*

(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.

\* \* \*

(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.

\* \* \*

(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.

23. The Department suggests an administrative fine in the amount of \$250.00 per critical violation, totaling \$750.00. The undersigned considers the suggested administrative fine reasonable under the circumstances of this case.

#### 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:

1. Finding that Valentinos Cucina Italiana violated section 509, Florida Statutes, through a violation of Food Code Rules 3-302.11(A)(1), 5-205.11(A), and 6-301.11; and

2. Imposing an administrative fine in the amount of \$750.00 against Valentinos Cucina Italiana.

DONE AND ENTERED this 25th day of July, 2012, in  
Tallahassee, Leon County, Florida.

*Errol H. Powell*

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ERROL H. POWELL  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 25th day of July, 2012.

ENDNOTE

<sup>1/</sup> All future references to Florida Statutes will be for 2010.

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.