STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF HOTELS AND RESTAURANTS,	)	
Petitioner,	)	Case No. 12-2300
vs.	)	
HONG YIP CHINESE RESTAURANT,	)	
Respondent.	)	

RECOMMENDED ORDER

On September 17, 2012, a duly-noticed hearing was held in Lake City, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: He Dong, Qualified Representative
Hong Yip Chinese Restaurant
905 Southwest Main Boulevard, Suite 110
Lake City, Florida 32025

STATEMENT OF THE ISSUE

The issue in this case is whether on July 14, 2011, and October 13, 2011, Respondent was in compliance with food safety requirements of section 509.032, Florida Statutes, and

implementing administrative rules of the Division of Hotels and Restaurants of the Department of Business and Professional Regulation, and if not, what penalty is appropriate.

PRELIMINARY STATEMENT

On October 24, 2011, 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 July 3, 2012.

The case was noticed for hearing on September 17, 2012, in Lake City, Florida. Owner of Respondent, Mr. Dong Jia Qi, who speaks very little English, was not present. Representing the restaurant was Mr. He Dong, manager of the restaurant, and son of the owner. Petitioner presented the testimony of two witnesses, Ms. Jessica Gabbard and Ms. Judy Hentges, both employees of Petitioner, and offered ten exhibits. Petitioner's Exhibits P-1 through P-9 were admitted without objection. Petitioner's Exhibit P-10 was a Final Order issued by an agency Hearing Officer against Hong Yip Restaurant and filed on or about December 2, 2011. It was offered only for consideration of penalty. However, it had not been provided to Respondent by Petitioner seven days prior to hearing as required by the Order of Pre-Hearing Instructions, and it was excluded at hearing and

not considered in the preparation of this order. Mr. Dong testified but offered no exhibits. During the course of the hearing, based on testimony by Petitioner's witnesses and Mr. Dong, Petitioner indicated it did not wish to continue with two charges originally set forth in the Administrative Complaint. The hearing continued on the remaining four allegations of the complaint.

The Transcript was filed with the Division on October 11, 2012. Petitioner timely submitted a Proposed Recommended Order, which was considered.

FINDINGS OF FACT

1. The Division of Hotels and Restaurants (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. Ms. Jessica Gabbard has been employed as a Sanitation and Safety Specialist with the Division for two years. She previously worked for the Department of Agriculture in the Bureau of Animal Disease Control for about eight years. She has had training, including monthly in-house training and field training in food inspection. She conducts between 600 and 800 inspections of food service establishments for safety and sanitation each year.

3. Ms. Judy Hentges is a Senior Sanitation and Safety Specialist with the Division, where she has been employed for 12 years. She also has had training in food inspection, and conducts between 800 and 1000 inspections of food service establishments each year.

4. Respondent is licensed as a permanent public food-service establishment operating as the Hong Yip Chinese Restaurant at 905 Southwest Main Boulevard, Lake City, Florida.

5. As the hearing began, it became apparent that the owner of Respondent, Mr. Dong Jia Qi, who speaks very little English, was not present. Representing the restaurant was Mr. He Dong, manager of the restaurant, and son of the owner. Mr. Dong was present during the inspections that are the subject of this proceeding, interacted with Petitioner's agents on those occasions, and signed the inspection reports. Under all of the circumstances, including the fact that Mr. Dong demonstrated both knowledge of the applicable statutes and rules and the ability to capably and responsibly represent Respondent, Mr. Dong was accepted as both a Qualified Representative and as a witness.

6. On July 14, 2011, Inspector Hentges conducted a food service inspection on Respondent. Inspector Hentges prepared an inspection report on her Personal Data Assistant (PDA) setting forth the violations that she observed during the inspection.

7. During her July inspection, Ms. Hentges observed that Respondent was using dry, powdered food products that had been removed from their original containers and that the products' substitute working containers were not labeled with their common names.

8. Storage of dry, powdered food products in unmarked working containers can cause mistakes in preparation that can be serious to consumers due to product allergies.

9. The Division has determined such storage in working containers poses a significant threat to the public health, safety, or welfare, and has identified this as a critical violation on the DBPR Form HR-5022-015, Food Service Inspection Report.

10. Ms. Hentges observed during the July inspection that Respondent was storing rice and onions in uncovered containers in the walk-in cooler. DBPR Form HR-5022-015, Food Service Inspection Report, indicates that this is a critical violation.

11. Uncovered containers can lead to food contamination by particles, by debris, and by microbes, and the Division of Hotels and Restaurants has determined that this constitutes a significant threat to the public health, safety and welfare.

12. During the July inspection, Ms. Hentges observed a rice scoop on the buffet which was stored in standing water that

was less than 135 degrees Fahrenheit, and noted this on the report.

13. During the July inspection, Ms. Hentges also observed that a wet cloth used for wiping food spills from equipment surfaces was sitting on the counter and was not stored between uses in a chemical sanitizing solution, and noted this in her report. Wet wiping cloths can be breeding grounds for pathogens that can transfer to food.

14. On October 13, 2011, Ms. Gabbard conducted a callback inspection on Respondent. She prepared a handwritten report on DBPR Form HR 5022-015 setting forth violations that she observed.

15. Ms. Gabbard testified that she observed powdered food products at the cooking preparation line that had been removed from their original containers and placed in working containers not marked with their common names. She recorded this information in her report.

16. Mr. Dong testified that he had corrected the labeling problem on the "big bucket" that stored the sugar, cornstarch, salt, and flours that had been written up in the July inspection. Mr. Dong testified that on the callback inspection the problem was written-up because of different products found in another area, on top of the reach-in cooler, in a see-through

container containing peanuts, sesame seed, cashew nuts, and another Chinese product that is a dried root.

17. Ms. Gabbard testified in cross-examination that she did not remember any nuts. Her report indicates "all powdered food products." The report further indicates this violation was "at cookline prepline." Ms. Gabbard's testimony is credited.

18. The unlabeled products Ms. Gabbard observed and noted in her violations report were powdered products at the cookline that could easily be confused, not foods that could be easily and unmistakably recognized, such as peanuts, cashews, and sesame seeds on top of the reach-in cooler.

19. Ms. Gabbard observed uncovered rice and onions in the walk-in cooler. She recorded this in her report. Mr. Dong provided no contradictory testimony at hearing. Respondent did testify that that the film he used to cover the rice and onions did not stick on the aluminum containers used to store the food.

20. Ms. Gabbard observed a rice scoop at the buffet that was being kept in standing water which was less than 135 degrees Fahrenheit, noting this fact in her report. She took the temperature of the water and recorded that it was 45 degrees Fahrenheit. Mr. Dong testified that that they always keep ice in the water to keep it below 41 degrees Fahrenheit. He testified that the water had just been changed so that the ice may have just melted, though he thought ice was still present.

He acknowledged that the water was 45 degrees Fahrenheit as measured with the thermometer. Mr. Dong's testimony that he recently put ice in the container is credible, and the temperature of the water would have been room temperature if this had not been done. The water in which the rice scoop at the buffet line was being stored was 45 degrees Fahrenheit.

21. Ms. Gabbard also observed wet wiping cloths that were not being stored in sanitizing solution between uses, but were located in multiple locations on the counter. She recorded this in her report at the time of the inspection. Mr. Dong admitted the violation at the time of the July inspection. He testified that at the time of the callback inspection in October he was using one cloth and the rest were not in use, but had been cleaned and were hanging on the table to dry.

22. In response, Ms. Gabbard testified that there were multiple cloths around the restaurant laying on the counter. Her testimony was corroborated by her inspection report, prepared at the time of the inspection, which noted, "[o]bserved wet wiping cloth not stored in sanitizing solution between uses. Repeat violation. Located in multiple locations on counter." Mr. Dong's testimony on this violation was less credible than Inspector Gabbard's, and her testimony is credited. The wet wiping cloths had not been cleaned, but had been used, and were not being stored between uses in a chemical sanitizer.

23. Petitioner issued an Administrative Complaint against Respondent for the above violations on October 24, 2011.

24. Additional evidence introduced at hearing showed that Respondent has had five 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 Mr. Dong on October 20, 2009, and filed on December 3, 2009, Respondent agreed to pay a fine of $500.00, but did not admit nor deny the allegations of fact contained in the Administrative Complaint, which would have constituted critical violations.

25. In the second Stipulation and Consent Order, signed by Mr. Dong on January 8, 2010, and entered on March 2, 2010, Respondent agreed to pay a fine of $650.00, but again did not admit or deny the allegations of fact contained in the Administrative Complaint, some of which would have constituted critical violations.

26. In the third Stipulation and Consent Order, signed by Mr. Dong on an unknown date, and entered on May 31, 2011, Respondent agreed to a suspension of the Division of Hotels and Restaurants license for one day. Respondent did not admit or deny the allegations of fact contained in the Administrative Complaint, which would have constituted critical violations.

27. In the fourth Stipulation and Consent Order, signed by Mr. Dong on an unknown date, and entered on May 31, 2011, Respondent agreed to a suspension of the Division of Hotels and Restaurants license for one day. Respondent did not admit or deny the allegations of fact contained in the Administrative Complaint, which would have constituted a critical violation.

28. In the fifth Stipulation and Consent Order, signed by Mr. Dong on an unknown date, and entered on May 31, 2011, Respondent agreed to a suspension of the Division of Hotels and Restaurants license for one day. Respondent did not admit or deny the allegations of fact contained in the Administrative Complaint, which would have constituted critical violations.

CONCLUSIONS OF LAW

29. 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.

30. Petitioner is given responsibility to inspect public food service establishments to enforce the provisions of chapter 509, Florida Statutes, (2011)[1/] pursuant to section 509.032(2)(c).

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

32. 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).

33. 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).

34. 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); Hunter v. Dep't of Prof'l Reg., 458 So. 2d 842, 844 (Fla. 2d DCA 1984).

35. During the course of the hearing, based on testimony by Petitioner's witnesses and Mr. Dong, Petitioner indicated that it did not wish to pursue charges 2 and 6 as set forth in the Administrative Complaint. Charge 2 alleged that Respondent had violated section 3-501.16(A) of the Food Code by holding

chicken and shrimp at 45 degrees Fahrenheit in the reach-in cooler and holding pork and chicken at 44 degrees Fahrenheit in the walk-in cooler. Charge 6 alleged that Respondent had violated section 5-205.15 of the Food Code by not maintaining a plumbing system in good repair. The Department declined to present any further evidence as to these two charges. Charges 2 and 6, as outlined above, were not proved by clear and convincing evidence and should be dismissed. Only the four remaining charges are considered here.

36. 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.

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

38. The Division has adopted Florida Administrative Code Rule 61C-1.001(13), which incorporates by reference various provisions of the 2001 U. S. Food and Drug Administration Food Code (Food Code), including paragraph 1-201.10(B), all of chapters 2 through 7, Annex 3, Annex 5, the 2001 Food Code Errata Sheet, and the Supplement to the 2001 FDA Food Code (August 29, 2003).

39. Food Code Section 3-302.12 is entitled "Food Storage Containers, Identified with Common Name of Food." This section is noted as a critical violation and provides:

> Working containers holding FOOD or FOOD ingredients that are removed from their original packages for use in the FOOD ESTABLISHMENT, such as cooking oils, flour, herbs, potato flakes, salt, spices, and sugar shall be identified with the common name of the FOOD *except that containers holding FOOD that can be readily and unmistakably recognized such as dry pasta need not be identified*.

40. The testimony of Inspectors Gabbard and Hentges, indicated that Respondent had working containers of dry powdered food products that had been removed from their original containers and were not identified by their common name on both July 14, 2011, and October 13, 2011. Inspectors Gabbard and Hentges are experienced and knowledgeable professionals and their testimony is credited. The written reports prepared by these inspectors and the time of the inspection corroborated their testimony.

41. Petitioner proved by clear and convincing evidence that Respondent violated Food Code Rule 3-302.12, as incorporated by reference in rules of the Division, on July 14, 2011, and October 13, 2011.

42. Food Code Section 3-302.11 is entitled "Packaged and Unpackaged Food - Separation, Packaging, and Segregation." This

section is marked as a critical violation, and provides in relevant part:

> (A) FOOD shall be protected from cross contamination by:
>
> * * *
>
> (4) Except as specified in paragraph (B) of this section, storing the FOOD in packages, covered containers, or wrappings . . ..

43. The testimony and admitted reports of Inspectors Gabbard and Hentges documenting Respondent's storing of rice and onions in uncovered containers in the walk-in cooler on July 14, 2011, and October 13, 2011, were clear and convincing and the reports were recorded at the time of the observation. The DBPR Form HR-5022-015 of each inspector identified this violation as critical. Mr. He Dong offered no credible evidence to the contrary.

44. Petitioner proved by clear and convincing evidence that Respondent violated Food Code Rule 3-302.11, as incorporated by reference in rules of the Division, on July 14, 2011, and had not corrected the violation on October 13, 2011.

45. Food Code Rule 3-304.12, as revised in the Supplement, is entitled "In-Use Utensils, Between-Use Storage" and provides:

> During pauses in FOOD preparation or dispensing, FOOD preparation and dispensing UTENSILS shall be stored:

> (A) Except as specified under paragraph (B) of this section, in the FOOD with their handles above the top of the FOOD and the container;
>
> (B) In FOOD that is not POTENTIALLY HAZARDOUS with their handles above the top of the FOOD within containers or EQUIPMENT that can be closed, such as bins of sugar, flour, or cinnamon;
>
> (C) On a clean portion of the FOOD preparation table or cooking EQUIPMENT only if the in-use UTENSIL and the FOOD-CONTACT surface of the FOOD preparation table or cooking EQUIPMENT are cleaned and SANITIZED at a frequency specified under §§ 4-602.11 and 4-702.11;
>
> (D) In running water of sufficient velocity to flush particulates to the drain, if used with moist FOOD such as ice cream or mashed potatoes;
>
> (E) In a clean, protected location if the UTENSILS, such as ice scoops, are used only with a FOOD that is not POTENTIALLY HAZARDOUS; or
>
> (F) In a container of water if the water is maintained at a temperature of at least 57°C (135°F) and the container is cleaned at a frequency specified under Subparagraph 4-602.11(D)(7).

46. The testimony and admitted reports of Inspectors Gabbard and Hentges indicated that a rice scoop on the buffet was stored in standing water that was less than 135 degrees Fahrenheit on July 14, 2011, and October 13, 2011. Mr. Dong offered no testimony showing that the rice scoop was stored in any fashion authorized by the Food Code, but corroborated the

inspectors' statements with his testimony describing that, in the interest of food safety, he routinely placed ice in the water. Ms. Gabbard's testimony and report indicate that the temperature of the water was 45 degrees.

47. Petitioner proved by clear and convincing evidence that Respondent violated Food Code Rule 3-304.12, as incorporated by reference in rules of the Division, on July 14, 2011, and had not corrected the violation on October 13, 2011.

48. Food Code Rule 3-304.14 is entitled "Wiping Cloths, Use Limitation" and provides in paragraph B:

> (B) Cloths used for wiping FOOD spills shall be:
>
> (1) Dry and used for wiping FOOD spills from TABLEWARE and carry-out containers; or
>
> (2) Wet and cleaned as specified under paragraph 4-802.11(D), stored in a chemical sanitizer at a concentration specified in § 4-501.114, and used for wiping spills from FOOD-contact and non-FOOD-CONTACT SURFACES of EQUIPMENT.

49. The testimony and admitted reports of Inspectors Gabbard and Hentges indicated that a wet wiping cloth used for wiping food spills from equipment surfaces was not stored between uses in a chemical sanitizing solution on July 14, 2011, and October 13, 2011. Several dirty cloths were found at various locations on the counter during the October inspection. This conclusion is supported by testimony and by the Food

Service Inspection Report which was prepared at the time of the inspection.

50. Petitioner proved by clear and convincing evidence that Respondent violated Food Code Rule 3-304.14, as incorporated by reference in rules of the Division, on July 14, 2011, and had not corrected the violation on October 13, 2011.

51. Section 509.261(1) provides that any public food service establishment that operates in violation of chapter 509, or implementing rules, is subject to fines not to exceed $1,000.00 per offense, and the suspension or revocation of a license.

52. 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.
>
> (a) Non-critical violation.
> 1. 1st offense – Administrative fine of $150 to $300.
>
> 2. 2nd offense – Administrative fine of $250 to $500.

> 3. 3rd and any subsequent offense – Administrative fine of $350 to $1000, license suspension, or both.
>
> (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.

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

> '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.

54. The violations of Food Code Rule 3-302.12 and Food Code Rule 3.302.11(A)(4) were determined by Petitioner to pose 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).

55. 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."

56. Final Orders in five disciplinary cases involving Respondent that were filed within 24 months of the Administrative Complaint issued in this case on November 12, 2011, were accepted into evidence: Case No. 2009049594, filed December 3, 2009; Case No. 2009065228, filed March 2, 2010; Case No. 2010022141, filed May 31, 2011; Case No. 2011004215, filed May 31, 2011; and Case No. 2011014672, filed May 31, 2011. Each of these earlier orders involved allegations of one or more critical violations. The two critical violations proven here are therefore "third and any 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. Respondent is therefore subject to an administrative fine of $750 to $1,000, license suspension, or

both, on the two critical violations alone.

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:

1. Dismissing Counts 2 and 6 of the Administrative Complaint and

2. Finding the Hong Yip Chinese Restaurant in violation of two critical and two non-critical violations and suspending its license for three consecutive days beginning the first Monday after 40 days from the date the final order becomes effective.

DONE AND ENTERED this 6th day of November, 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 6th day of November, 2012.

ENDNOTE

[1/] All references to statutes and rules are to the versions in effect in 2011, 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.