

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF HOTELS AND)	
RESTAURANTS,)	
)	
Petitioner,)	
)	
vs.)	Case Nos. 12-2627
)	12-2748
ISLAND WAY CAFE,)	
)	
Respondent.)	
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RECOMMENDED ORDER

On September 24, 2012, an administrative hearing in these cases was held by video teleconference in St. Petersburg and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

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

For Respondent: Mark Anthony Suarez, pro se
Island Way Cafe
288 Windward Passage
Clearwater, Florida 33767

STATEMENT OF THE ISSUES

After the hearing had concluded, the Petitioner filed a Notice of Voluntary Dismissal in DOAH Case No. 12-2627. Accordingly, the remaining issues for consideration are whether the allegations of the Administrative Complaint filed in DOAH Case No. 12-2748 are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By an Administrative Complaint dated May 15, 2012, the Department of Business and Professional Regulation, Division of Hotels and Restaurants (Petitioner), alleged that Island Way Cafe (Respondent), a restaurant owned and operated by Mark Anthony Suarez, was in violation of certain Food Code regulations. The Respondent filed an Election of Rights form, indicating that there was no dispute regarding the allegations of the complaint and that an informal hearing was requested to submit mitigating evidence.

On August 15, 2012, the Petitioner forwarded the dispute to DOAH, advising that subsequent to the Respondent's filing of the Election of Rights form, the Respondent expressed a preference for a formal DOAH hearing. DOAH scheduled and conducted the formal hearing.

At the hearing, the Petitioner presented the testimony of one witness and had Exhibits 1 through 3 and 5 through 7 admitted into evidence. Mr. Suarez testified on behalf of the Respondent.

The Transcript of the hearing was filed on October 15, 2012. The Petitioner filed a Proposed Recommended Order that has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is the state agency charged with regulation of restaurants pursuant to chapter 509, Florida Statutes (2012).

2. At all times material to this case, the Respondent was a restaurant operating at 288 Windward Passage, Clearwater, Florida 33767.

3. The Food Code identifies proper food storage temperatures for potentially-hazardous food products. The storage of such products at improper temperatures can result in bacterial contamination of the product and can cause serious illness in humans who consume contaminated products.

4. Violations of food temperature regulations that present an immediate threat to public safety are deemed to be "critical" violations of the Food Code.

5. At the hearing, Mr. Suarez acknowledged that the Respondent had been disciplined by the Petitioner for food temperatures in excess of those permitted by relevant Food Code

regulations and that he had paid an administrative fine pursuant to a previous Final Order.

6. On May 9, 2012, Christine Craig, a trained sanitation safety specialist employed by the Petitioner, performed a "callback" inspection at the Respondent. The violations referenced herein were identified by Ms. Craig as critical.

7. The relevant portion of the Food Code requires that certain products be stored at temperatures of 41 degrees Fahrenheit or less. Previous inspections at the Respondent revealed that holding temperatures of some food products stored in a reach-in cooler and in a two-door glass upright cooler did not comply with the Food Code requirements.

8. The purpose of the May 9, 2012, callback inspection was to determine whether food temperature violations indentified in the previous routine inspections had been resolved.

9. During the callback inspection, Ms. Craig found that ham, chicken broth, and cream cheese were being held in the referenced coolers at temperatures in excess of 41 degrees Fahrenheit, which were critical violations of the Food Code.

10. The Respondent did not dispute Ms. Craig's testimony or the results of her inspection.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2012).

12. The Petitioner is the state agency charged with the regulation of food service establishments in the State of Florida. See ch. 509, Florida Statutes (2012). The Petitioner has adopted by incorporation the various provisions of the Food Code referenced herein. See Fla. Admin. Code R. 61C-4.010(1).

13. The Petitioner has the burden of proving by clear and convincing evidence the allegations set forth in the Administrative Complaint against the Respondent. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The burden has been met.

14. The Administrative Complaint charged the Respondent with a violation of Food Code Rule 3-501.16(A)(2), which requires that, except in limited circumstances not applicable to this case, potentially-hazardous food must be maintained at temperatures of 41 degrees Fahrenheit or less. The evidence established that the Respondent failed to maintain potentially hazardous foods at a temperature of 41 degrees Fahrenheit or less as required by the Food Code.

15. Section 509.261(1), Florida Statutes (2011), provides that a food service establishment operating in violation of applicable statutes or rules may be fined in an amount not to exceed \$1,000 per offense. In addition, such offenses may be disciplined by mandatory attendance at an educational program sponsored by the Hospitality Education Program, or by suspension, revocation, or refusal of a license.

16. Florida Administrative Code Rule 61C-1.005(6)(b)2. identifies the appropriate administrative fine applicable in this case as ranging from \$500 to \$1,000.

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 imposing a fine of \$750 against the Respondent and requiring that the Respondent complete an appropriate educational program related to the violation identified herein.

DONE AND ENTERED this 27th day of November, 2012, in
Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of November, 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.