

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF HOTELS AND )  
RESTAURANTS, )  
 ) Case No. 12-2946  
Petitioner, )  
 )  
vs. )  
 )  
CHINA KING, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

On November 13, 2012, a duly-noticed hearing was held at video locations in Tampa and Tallahassee, Florida, before F. Scott Boyd, an administrative law judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert L. Ehrhardt, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street, Suite 42  
Tallahassee, Florida 32399-2202

For Respondent: Man Chan, Qualified Representative  
China King  
4941 East Busch Boulevard, Suite 120  
Tampa, Florida 33617

STATEMENT OF THE ISSUE

The issue in this case is whether on April 5 and October 18, 2011, and on February 28, 2012, Respondent was in

compliance with the 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 March 7, 2012, 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 September 12, 2012.

The case was noticed for hearing by video teleconference on November 13, 2012, at locations in Tampa and Tallahassee, Florida. Owner of Respondent, Mr. Chi Kin Chan, was present but spoke very little English. Representing the restaurant was Ms. Man Chan, daughter of the owner, who helps operate the restaurant. Ms. Chan was accepted as a Qualified Representative. Petitioner presented the testimony of Mr. Doug Peterson, an inspector for Petitioner, and offered eight exhibits. Petitioner's Exhibits P-1 through P-8 were admitted without objection. Respondent offered the testimony of two witnesses and no exhibits.

The Transcript was filed with the Division on November 21, 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. Mr. Douglas Peterson has been employed as a Sanitation and Safety Specialist with the Division for five and one-half years. He previously worked in the restaurant industry for over 21 years, including eight years as a kitchen manager and five years as a restaurant assistant manager. He has had training, including monthly in-house training and field training, in food inspection. On average, he conducts about five safety and sanitation inspections of food-service establishments per day, and about 1000 inspections per year.

3. China King is a licensed permanent public food-service establishment operating at 4941 East Busch Boulevard, Suite 120, in Tampa, Florida.

4. The owner of China King, Mr. Chi Kin Chan, speaks very little English. Representing the restaurant was Mr. Chan's daughter, Ms. Man Chan, who assists her father with the restaurant. Under all of the circumstances, including the facts

that Ms. Chan helps operate the restaurant, demonstrated basic knowledge of applicable statutes and rules, and demonstrated her ability to capably and responsibly represent Respondent, Ms. Chan was accepted as a Qualified Representative.

5. China King was inspected by Mr. Peterson on August 25, 2010, and October 26, 2010. The Administrative Complaint alleged violations based upon these inspections, and testimony and exhibits as to these violations were offered at hearing. However, an earlier Administrative Complaint relating to these inspections has already been settled, as discussed below. The Stipulation and Consent Order in the earlier case settled any violations based upon these inspections, and no purpose is served by delineating the details of those inspections here.

6. On April 5, 2011, Inspector Peterson conducted another food service inspection on China King. Inspector Peterson prepared a Food Service Inspection Report, DBPR Form HR 5022-015, using his Personal Data Assistant (PDA) to record the violations that he observed during the inspection. An operator of the restaurant acknowledged receipt of the report on behalf of China King.

7. During the April inspection, Mr. Peterson observed that China King had ready-to-eat, potentially hazardous food prepared on-site and held more than 24 hours that had not been properly date-marked in the walk-in cooler, and noted this on his report.

8. The Division has determined that lack of proper date marking poses a significant threat to the public health, safety, or welfare, and has identified this as a critical violation on DBPR Form HR-5022-015.

9. Mr. Peterson also observed during the April inspection that China King was storing food on the floor in the cooks' line and in the preparation area, and noted this on his report.

10. The Division has determined that storing food on the floor poses a significant threat to the public health, safety, or welfare, and has identified this as a critical violation on DBPR Form HR-5022-015.

11. During the April inspection, Mr. Peterson observed the improper use of a plastic food container or other container with no handle being used to scoop or dispense food that was not ready-to-eat, and noted this on his report.

12. The Division has determined that using containers without handles to scoop or dispense food fails to minimize food contact with bare hands, and poses a significant threat to the public health, safety, or welfare. The Division has identified this as a critical violation on DBPR Form HR-5022-015.

13. On October 18, 2011, Mr. Peterson conducted another inspection of China King. Inspector Peterson again prepared an inspection report on DBPR Form HR 5022-015 using his PDA to record the violations that he observed. An operator of the

restaurant acknowledged receipt of the report on behalf of China King.

14. During the October inspection, Mr. Peterson again observed ready-to-eat, potentially hazardous food prepared on-site and held more than 24 hours that had not been properly date-marked in the walk-in cooler, including egg rolls, cooked chicken, pork, and shrimp. He recorded this information in his report, along with a notation that it was a repeat violation.

15. Mr. Peterson also observed food stored on the floor in the walk-in during his October inspection. He recorded this, noting that it was a repeat violation.

16. During the October inspection, Mr. Peterson observed the improper use of a bowl or plastic food container without a handle as a scoop to dispense non ready-to-eat foods such as flour and starch, as well as ready-to-eat foods such as salt and sugar. He noted this in his report, along with a notation that this was corrected on-site.

17. Mr. Peterson also observed an employee with no hair restraint during the October inspection. He noted this in his report along with the fact that it was corrected while he was on-site.

18. On February 28, 2012, Mr. Peterson conducted a stipulation call-back inspection, as well as a full inspection of the China King.

19. A stipulation call-back inspection is an inspection that is required as part of a stipulation which is conducted for the limited purpose of determining whether specific violations noted earlier have been corrected.

20. Inspector Peterson prepared a Call Back Inspection Report, DBPR Form HR 5022-005, as well as DBPR Form HR 5022-015 on February 28, 2012, using his PDA to record the violations that he observed. An operator of the restaurant acknowledged receipt of the reports on behalf of China King.

21. On February 28, 2012, Mr. Peterson again observed that ready-to-eat, potentially hazardous food that had been prepared on-site and held more than 24 hours had not been date-marked. He noted this in his reports.

22. Mr. Peterson again observed food stored on the floor in the walk-in and cooks' line during his February inspection and made note of this in his reports.

23. Mr. Peterson again observed a can without a handle being used to scoop rice on February, 28, 2012, as was noted in his reports.

24. Mr. Peterson also observed an employee without a hair restraint during his February inspection, noting this in his reports.

25. In response to questioning from Respondent at hearing, Inspector Peterson stated that he was familiar with the

description of the inspection process set out on the Division of Hotels and Restaurants' website. Inspector Peterson was aware that these procedures state that an inspector will invite the manager to accompany him on the inspection walk-through, and that the inspector will go over each item on the inspection report. Mr. Peterson testified that at each inspection he advised persons at the restaurant of the violations and the need to correct them.

26. Mr. Chi Kin Chan, owner of China King, testified that Mr. Peterson did show his badge when he conducted the inspection on February 28, 2012, although he did not announce who he was. Mr. Chan testified that Mr. Peterson just went through the restaurant on his own and did not invite Mr. Chan or anyone else from the restaurant to accompany him on his inspection. Mr. Chan testified that Mr. Peterson then just went to the front of the restaurant and prepared his report without discussing any of the alleged violations with Mr. Chan or operators of the restaurant.

27. Mr. Taoso Tevega is engaged to be married to Ms. Man Chan, and so is the prospective son-in-law of Mr. Chan. Mr. Tevega occasionally assists the Chan family with the restaurant, but does not receive any paycheck from China King. He works in the receiving department of Advance Auto Parts.



Mr. Tevega was present at China King during the February 28, 2012, inspection.

28. Mr. Tevega testified that on February 28, 2012, Inspector Peterson just showed up in the back of China King without identifying himself and that he did not ask anyone to accompany him as he went about the restaurant conducting his inspection.

29. Mr. Tevega testified that Mr. Peterson did not discuss or explain the violations to anyone, but just had Ms. Chan sign the report.

30. Mr. Peterson testified that he was in business casual attire, with his employee identification tag secured from a lanyard worn around his neck, and that he presented identification before beginning each inspection.

31. Mr. Peterson identified himself by displaying his badge before and during the February 28, 2012, inspection, as testified to by Mr. Chan and Mr. Peterson.

32. Mr. Peterson did not invite anyone to accompany him as he conducted the inspection on February 28, 2012, as Mr. Chan and Mr. Tevega testified.

33. Mr. Peterson advised operators at the restaurant of the violations and the need to correct them, as he testified.

34. The Division issued an Administrative Complaint against China King for the above violations on or about March 7, 2012.

35. Additional evidence introduced at hearing showed that China King had a previous disciplinary Final Order entered within 24 months of the Administrative Complaint issued in this case. That Stipulation and Consent Order was signed by China King Manager Ko Chan on January 13, 2012, and was filed on January 24, 2012. In the Order, China King agreed to pay a fine of \$900.00, but neither admitted nor denied the allegations of fact contained in the Administrative Complaint. Some of those allegations would have constituted critical violations.

36. The January 24, 2012, Stipulation and Consent Order was in settlement of an Administrative Complaint issued on November 8, 2010. That Administrative Complaint alleged violations of the Food Code based upon inspections conducted on August 25, 2010, and October 26, 2010, two of the inspections for which testimony and documentary evidence was submitted in this case, but which are discussed here only for penalty purposes.

#### CONCLUSIONS OF LAW

37. 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.

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

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

40. 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).

41. 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).

42. 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).

43. 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.

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

45. The Division has adopted Florida Administrative Code Rule 61C-1.001(14), 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).

46. Food Code Section 3-501.17 is entitled "Ready-to-Eat, Potentially Hazardous Food, Date Marking." This section is noted as a critical violation and provides in relevant part:

(A) Except as specified in paragraph(D) of this section, refrigerated, ready-to-eat, POTENTIALLY HAZARDOUS FOOD prepared and held in a FOOD ESTABLISHMENT for more than 24 hours shall be clearly marked to indicate

the date or day by which the FOOD shall be consumed on the PREMISES, sold, or discarded, based on the temperature and time combinations specified below:

(1) 5°C (41°F) or less for a maximum of 7 days; or

(2) 7°C (45°F) or between 5°C (41°F) and 7°C (45°F) for a maximum of 4 days in existing refrigeration EQUIPMENT that is not capable of maintaining the FOOD at 5°C (41°F) or less if:

(a) The EQUIPMENT is in place and in use in the FOOD ESTABLISHMENT, and

(b) Within 5 years of the REGULATORY AUTHORITY'S adoption of this CODE, the EQUIPMENT is upgraded or replaced to maintain FOOD at a temperature of 5°C (41°F) or less.

The day of preparation shall be counted as Day 1.

\* \* \*

(D) Paragraphs (A) and (B) of this section do not apply to individual meal portions served or rePACKAGED for sale from a bulk container upon a CONSUMER'S request.

47. The testimony of Inspector Peterson indicated that Respondent had ready-to-eat, potentially hazardous food prepared on-site and held more than 24 hours that had not been properly date-marked in the walk-in cooler on April 5, 2011; October 18, 2011; and February 28, 2012. Inspector Peterson is an experienced and knowledgeable professional and his testimony is credited. The reports prepared by Mr. Peterson at the time of

the inspections corroborated his testimony. Respondent offered no evidence to the contrary.

48. Petitioner proved by clear and convincing evidence that Respondent violated Food Code Rule 3-501.17(A), as incorporated by reference in rules of the Division, on April 5, 2011; October 18, 2011; and February 28, 2012.

49. Food Code Section 3-305.11 is entitled "Food Storage." This section is noted as a critical violation and provides:

(A) Except as specified in paragraphs (B) and (C) of this section, FOOD shall be protected from contamination by storing the FOOD:

(1) In a clean, dry location;

(2) Where it is not exposed to splash, dust, or other contamination; and

(3) At least 15 cm (6 inches) above the floor.

(B) *FOOD in packages and working containers may be stored less than 15 cm (6 inches) above the floor on case lot handling EQUIPMENT as specified under section 4-204.122.*

(C) *Pressurized BEVERAGE containers, cased FOOD in waterproof containers such as bottles or cans, and milk containers in plastic crates may be stored on a floor that is clean and not exposed to floor moisture.*

50. The testimony and admitted reports of Inspector Peterson documenting that Respondent stored food on the floor in

the cooks' line and in the preparation area on April 5, 2011, on the floor in the walk-in cooler on October 18, 2011, and on the floor in the walk-in cooler and cooks' line on February 28, 2012, were clear and convincing and the reports were recorded at the time of the observation. The DBPR Form HR-5022-015 identified this violation as critical. No credible evidence to the contrary was offered.

51. Petitioner proved by clear and convincing evidence that Respondent violated Food Code Rule 3-305.11, as incorporated by reference in rules of the Division, on April 5, 2011; October 18, 2011; and February 28, 2012.

52. Food Code Rule 3-301.11, as revised in the Supplement, is entitled "Preventing Contamination from Hands." This section is noted as a critical violation and provides:

(A) Food EMPLOYEES shall wash their hands as specified under § 2-301.12.

(B) *Except when washing fruits and vegetables as specified under § 3-302.15 or as specified in paragraph (C) of this section, FOOD EMPLOYEES may not contact exposed, READY-TO-EAT FOOD with their bare hands and shall use suitable UTENSILS such as deli tissue, spatulas, tongs, SINGLE-USE gloves, or dispensing EQUIPMENT.*

(C) *When otherwise APPROVED, FOOD EMPLOYEES not serving a HIGHLY SUSCEPTIBLE POPULATION may contact exposed, READY-TO-EAT FOOD with their bare hands.*

(D) FOOD EMPLOYEES shall minimize bare hand and arm contact with exposed FOOD that is not in a READY-TO-EAT form.

53. The testimony and admitted reports of Inspector Peterson indicated that Respondent was using a plastic food container or other container with no handle to scoop or dispense food that was not ready-to-eat on April 5, 2011, and committed similar violations on October 18, 2011, and February 28, 2012. While the rule does not absolutely prohibit the touching of not ready-to-eat food with bare hands, it does require that such contact be minimized. The use of a metal can or plastic bowl without a handle greatly increases the likelihood that the food will come in contact with bare hands. Respondent did not take action to minimize this contact by utilizing a scoop or other implement with a handle. Respondent offered no credible evidence to the contrary.

54. Petitioner proved by clear and convincing evidence that Respondent violated Food Code Rule 3-301.11(D), as supplemented and incorporated by reference in rules of the Division, on April 5, 2011, October 18, 2011, and February 28, 2012.

55. Food Code Rule 2-402.11 is entitled "Effectiveness." and provides:

(A) Except as provided in paragraph (B) of this section, FOOD EMPLOYEES shall wear hair restraints such as hats, hair coverings or



nets, beard restraints, and clothing that covers body hair, that are designed and worn to effectively keep their hair from contacting exposed FOOD; clean EQUIPMENT, UTENSILS, and LINENS; and unwrapped SINGLE-SERVICE and SINGLE-USE ARTICLES.

*(B) This section does not apply to FOOD EMPLOYEES such as counter staff who only serve BEVERAGES and wrapped or PACKAGED FOODS, hostesses, and wait staff if they present a minimal RISK of contaminating exposed FOOD; clean EQUIPMENT, UTENSILS, and LINENS; and unwrapped SINGLESERVICE and SINGLE-USE ARTICLES.*

56. The testimony and admitted reports of Inspector Peterson indicated that on October 18, 2011, and February 28, 2012, an employee of Respondent was observed with no hair restraint, and that the violation was corrected on-site. Respondent provided no evidence to refute hair restraint violations on October 18, 2011, or February 28, 2012.

57. While Inspector Peterson also testified that he observed an employee without a hair restraint on his April 5, 2011, inspection, this violation was not recorded on the report prepared at the time of that inspection, and his testimony on this point is discredited. His memory of the violations by Respondent on that day may well be incorrect, especially given the great number of inspections he performs and the fact that failure to wear hair restraints was a violation for Respondent on other occasions.

58. Petitioner proved by clear and convincing evidence that Respondent violated Food Code Rule 2-402.11, as incorporated by reference in rules of the Division, on October 18, 2011, and February 28, 2012. As DBPR Form HR 5022-015 reflects, this is a not a critical violation.

59. Section 509.032(2)(c) provides, "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." Inspector Peterson's failure to invite the manager to accompany him on the inspection walk-through on February 28, 2012, may not foster education and cooperation, but it does not affect the other findings or conclusions in this case. Respondent was otherwise given complete notice of the findings of the February 28, 2012, inspection.

60. 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.

61. 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.

62. 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.

63. The violations of Food Code Rules 3-501.17(A), 3.305.11, and 3-301.11(D) were determined by Petitioner to pose a significant threat to the public health, safety, or welfare and were identified as critical on DBPR Form HR-5022-015, Food Service Inspection Report. They were therefore critical violations within the meaning of rule 61C-1.005(a).

64. The violation of Food Code Rule 2-402.11 is a non-critical violation.

65. Rule 61C-1.005(5)(d) defines "second and any subsequent offense" to 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."

66. There is a Final Order in a disciplinary case involving Respondent that was filed within 24 months of the Administrative Complaint issued in this case on March 7, 2012: Case No. 2012-055792, filed January 24, 2012. This earlier Order involved allegations of both critical and non-critical violations. The three critical violations and one non-critical

violation proven here are therefore "second and any subsequent offenses" within the meaning of rule 61C-1.005(e).

67. As noted earlier, the Administrative Complaint charged, and Petitioner presented evidence of, violations occurring on August 25, 2010, and October 26, 2010. However, the January 24, 2012, Stipulation and Consent Order was in settlement of violations documented at these same inspections. The August 25, 2010, and October 26, 2010, violations therefore are not considered here as new offenses, but are considered only for penalty purposes.

68. In Kaplan v. Dep't 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 \$500 to \$1,000, on each of the three critical violations and an administrative fine of \$250 to \$500 on the non-critical violation.

69. In light of the earlier disciplinary order and the several violations proven here, a fine of \$750 for each of the three critical violations and \$375 for the non-critical violation, for a total fine of \$2,625, is reasonable.

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 finding China King in violation of three critical violations and one non-critical violation and imposing a fine of \$2,625, to be paid within 30 calendar days of the filing of the Final Order with the Agency Clerk.

DONE AND ENTERED this 11th day of December, 2012, in Tallahassee, Leon County, Florida.

*F. Scott Boyd*

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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 11th day of December, 2012.

ENDNOTE

<sup>1/</sup> All references to statutes and rules are to the versions in effect at the time of the alleged violations in April and October of 2011 and February of 2012, 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.