

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF HOTELS AND)
RESTAURANTS,)
)
Petitioner,)
)
vs.) Case No. 13-0446
)
CARINA'S STONE FIRED PIZZA-)
GELATO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This case came before Administrative Law Judge Edward T. Bauer for final hearing by video teleconference on April 12, 2013, at sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

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

For Respondent: Ronald Schwarby, pro se
4743 North Ocean Drive
Sea Ranch Lakes, Florida 33308

STATEMENT OF THE ISSUES

The issues in this disciplinary proceeding arise from Petitioner's allegation that Respondent, a licensed restaurant,

violated several rules and a statutory provision governing food service establishments. If Petitioner proves one or more of the alleged violations, then it will be necessary to consider whether penalties should be imposed on Respondent.

PRELIMINARY STATEMENT

On September 17, 2012, Petitioner Department of Business and Professional Regulation, Division of Hotels and Restaurants ("the Division"), issued a six-count Administrative Complaint ("Complaint") against Respondent Carina's Stone Fired Pizza-Gelato, charging the licensed restaurant with various offenses relating to noncompliance with the rules governing food service establishments. Respondent timely requested a formal hearing to contest the allegations, and, on January 31, 2013, the matter was referred to the Division of Administrative Hearings.

During the final hearing, the Division presented the testimony of Jens Rammelmeier and introduced three exhibits, numbered one through three. Pursuant to the Division's request, the undersigned took official recognition^{1/} of various provisions of the Florida Statutes, the Florida Administrative Code, and the Food Code.^{2/} The owner of the licensed establishment, Ronald Schwarby, testified on behalf of Respondent.

The Transcript of the final hearing was filed on April 29, 2013. The Division timely submitted a Proposed Recommended Order that has been considered in the preparation of this

Recommended Order. Respondent did not file a post-hearing submission of any kind.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2012 edition.

FINDINGS OF FACT

1. The Division is the State agency charged with regulation of hotels and restaurants pursuant to chapter 509, Florida Statutes.

2. At all times material to this case, Respondent was a restaurant operating at 4743 North Ocean Drive, Sea Ranch Lakes, Florida, and holding food service license number 1621866.

3. On June 18, 2012, and August 20, 2012, Respondent was inspected by Jens Rammelmeier, a senior sanitation and safety specialist employed by the Division. During both visits, Mr. Rammelmeier noticed multiple items that were not in compliance with the laws which govern the facilities and operations of licensed restaurants.

4. Through the testimony of Mr. Rammelmeier and the exhibits introduced into evidence during the final hearing, the Division presented clear and convincing evidence that, as of August 20, 2012, the following deficiencies subsisted at Respondent Carina's Stone Fired Pizza-Gelato: (1) ready-to-eat, potentially hazardous food was held for more than 24 hours with no date marking, in violation of Food Code Rule 3-501.17(B);

(2) an employee made bare-hand contact with ready-to-eat foods without a written alternative operating procedure in effect, contrary to Food Code Rule 3-301.11(B); (3) a food handler came into contact with soiled equipment and thereafter engaged in food preparation without washing his hands, in violation of Food Code Rule 2-301.14; (4) an employee engaged in food preparation without wearing a hair restraint, contrary to Food Code Rule 2-402.11; (5) an accumulation of dead roaches was observed under several kitchen counters and a dishwasher, in violation of Food Code Rule 6-501.112; and (6) no proof of required employee training, contrary to section 509.049.

5. Each of the foregoing deficiencies, with the exception of the violation relating to the hair restraint, is considered a critical violation by the Division. Critical food code violations are those that, if uncorrected, present an immediate threat to public safety.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

7. Section 509.261 sets forth the acts for which the Division may impose discipline. This statute 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, of a remedial educational program administered by a food safety training program provider approved by the division, as provided in s. 509.049; and

(c) The suspension, revocation, or refusal of a license issued pursuant to this chapter.

(2) For the purposes of this section, the division may regard as a separate offense each day or portion of a day on which an establishment is operated in violation of a "critical law or rule," as that term is defined by rule.

8. By rule, the Division has defined the term "Food Code" as follows:

Food Code--This term as 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.

Fla. Admin. Code R. 61C-1.001(14).

9. Food Code Rule 3-501.17(b) reads:

Except as provided in paragraphs (D) and (E) of this section, refrigerated, ready-to-eat, potentially hazardous food prepared and packaged by a food processing plant shall be clearly marked, at the time the original container is opened in a food establishment and if the food is held for more than 24 hours, 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 in paragraph (A) of this section; and:
(1) The day the original container is opened in the food establishment shall be counted as day 1; and (2) The day or date marked by the food establishment may not exceed a manufacturer's use-by date if the manufacturer determined the use-by date based on food safety.

10. Food Code Rule 3-301.11(B) provides:

Except when washing fruits and vegetables specified under section 3-302.15 or when otherwise approved, 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.

11. Food Code Rule 2-301.14 reads:

When to wash. Food employees shall clean their hands and exposed portions of their arms as specified under section 2-301.12 immediately before engaging in food preparation including working with exposed food, clean equipment and utensils, and unwrapped single-service and single-use articles and: (A) After touching bare human body parts other than clean hands and clean, exposed portions of arms; (b) After using the toilet room; (C) After caring for or handling service animals or aquatic animals

as specified in paragraph 2-403.11(B);
(D) Except as specified in paragraph 2-401.11(B), after coughing, sneezing, using a handkerchief or disposable tissue, using tobacco, eating, or drinking; (E) After handling soiled equipment or utensils; (F) During food preparation, as often as necessary to remove soil and contamination and to prevent cross contamination when changing tasks; (G) When switching between working with raw food and working with ready-to-eat food; (H) Before donning gloves for working with food; and (I) After engaging in other activities that contaminate the hands.

12. Food Code Rule 2-402.11 provides, in relevant part:

Effectiveness. (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-services and single-use articles.

(B) This section does not apply to food employees such as counter staff

13. Food Code Rule 6-501.112 reads:

Removing dead or trapped birds, insects, rodents, and other pests. Dead or trapped birds, insects, rodents, and other pests shall be removed from control devices and the premises at a frequency that prevents their accumulation, decomposition, or the attraction of pests.

14. Section 509.049 reads, in pertinent part:

(1) The division shall adopt, by rule, minimum food safety protection standards for the training of all food service employees

who are responsible for the storage, preparation, display, or serving of foods to the public in establishments regulated under this chapter. These standards shall not include an examination, but shall provide for a food safety training certificate program for food service employees to be administered by a private nonprofit provider chosen by the division.

* * *

(5) It shall be the duty of each public food service establishment to provide training in accordance with the described rule to all food service employees of the public food service establishment. The public food service establishment may designate any certified food service manager to perform this function. Food service employees must receive certification within 60 days after employment. Certification pursuant to this section shall remain valid for 3 years. All public food service establishments must provide the division with proof of employee training upon request, including, but not limited to, at the time of any division inspection of the establishment. Proof of training for each food service employee shall include the name of the trained employee, the date of birth of the trained employee, the date the training occurred, and the approved food safety training program used.

(emphasis added).

15. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a professional license is penal in nature. State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Division must prove the charges against Respondent by clear

and convincing evidence. Dep't of Banking & Fin., Div. of Secs. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987); Nair v. Dep't of Bus. & Prof'l Reg., 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

16. Clear and convincing evidence:

requires that 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 lacking in confusion as to the facts in issue. The evidence must be of such a 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.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

17. The undersigned has determined, as a matter of ultimate fact, that the Division established Respondent's guilt regarding noncompliance with the following provisions: Food Code Rule 3-501.17(B), as charged in Count One of the Complaint; Food Code Rule 3-301.11(B), as alleged in Count Two; Food Code Rule 2-301.14, as alleged in Count Three; Food Code Rule 2-402.11, as charged in Count Four; Food Code Rule 6-501.112, as alleged in Count Five; and section 509.049. In making these determinations, the undersigned concludes that "the plain language of the applicable . . . rules, being clear and

unambiguous, [can] be applied in a straightforward manner to the historical events at hand without simultaneously examining extrinsic evidence of legislative intent or resorting to principles of interpretation." Dep't of Bus. & Prof'l Reg., Div. of Hotels & Rests. v. Latin Am. Cafeteria, Inc., Case No. 05-2733 (Fla. DOAH Nov. 2, 2005; Fla. DBPR Dec. 13, 2005). It is therefore unnecessary to make additional legal conclusions concerning these violations. Id.

18. In determining the appropriate punitive action to recommend in this case, it is necessary to consult the Division's penalty guidelines. As the instant matter involves a first offense, Florida Administrative Code Rule 61C-1.005(6)(b) provides for a fine ranging from \$250 to \$500 for each of the five critical violations committed by Respondent. With respect to the lone non-critical violation, the guidelines call for a fine of \$150 to \$300.

19. Rule 61C-1.005(7) provides that, in applying the penalty guidelines, various aggravating and mitigating circumstances may be considered, such as the licensee's disciplinary history--or lack thereof--within the preceding 60 months. See Fla. Admin. Code R. 61C-1.005(7)(a)5. & (7)(b)7. In light of the absence of any disciplinary history on the part of Respondent, the undersigned recommends mitigated fines of

\$200 for each of the five critical violations, as well as a reduced fine of \$100 for the non-critical violation.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Division of Hotels and Restaurants enter a final order: (a) finding Respondent guilty in accordance with the foregoing Recommended Order; and (b) ordering Respondent to pay an administrative penalty in the amount of \$1100, to be paid within 30 days after the filing of the final order with the agency clerk.

DONE AND ENTERED this 13th day of May, 2013, in Tallahassee, Leon County, Florida.



Edward T. Bauer
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of May, 2013.

ENDNOTES

^{1/} Specifically, the undersigned has taken official recognition of sections 509.032 and 509.049, Florida Statutes; Florida

Administrative Code Rules 61C-1.001 and 61C-1.005; and Food Code Rules 2-301.14, 2-402.11, 3-301.11, 3-501.17, and 6-501.112.

^{2/} The Food Code is a publication of the U.S. Food and Drug Administration, portions of which have been adopted by reference as rules of the Division. See Fla. Admin. Code R. 61C-1.001(14).

COPIES FURNISHED:

Charles F. Tunnicliff, Esquire
Sara C. Hassler, Qualified Representative
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

Ronald Schwarby
4743 North Ocean Drive
Sea Ranch Lakes, Florida 33308

William L. Veach, Director
Division of Hotels and Restaurants
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399

J. Layne Smith, General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399

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.