

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
DIVISION OF HOTELS AND )  
RESTAURANTS, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 13-0807  
 )  
EL CRAZY POLLO LATIN GRILL, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held on April 16, 2013, by video-teleconference at sites in Tallahassee and Orlando, Florida, before Thomas P. Crapps, a designated Administrative Law Judge of the 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: Elena B. Hidalgo  
El Crazy Pollo Latin Grill  
5756 Dahlia Drive  
Orlando, Florida 32807

STATEMENT OF THE ISSUES

Whether Respondent violated the Food Code by failing to control pests; and, if so, the appropriate penalty.

PRELIMINARY STATEMENT

On November 27, 2012, the Florida Department of Business and Professional Regulation, Division of Hotels and Restaurants (Department), issued an Administrative Complaint charging Respondent, El Crazy Pollo Latin Grill (Restaurant), with violating chapter 509, Florida Statutes (2012)<sup>1/</sup> and the applicable rules governing the operation of restaurants. Specifically, the Administrative Complaint alleged that the Restaurant failed to control pests based on an inspection finding "evidence of roach infestation inside the facility."

On January 22, 2013, Elena Hidalgo (Ms. Hidalgo), as the Restaurant's owner, filed a request for an administrative hearing. On March 7, 2013, the Department transmitted the case to DOAH for a final hearing. The undersigned was assigned the case, and set the case for final hearing on April 16, 2013.

At the final hearing, the Department presented the testimony of Wilberto Goris, a sanitation and safety specialist, Valerie Freeman, a district manager for the Department, and introduced three exhibits into evidence. The undersigned took official recognition of section 509.032(6); Florida Administrative Code rules 61C-1.001(14) and 61C-1.005; and Food Code rule 6-501.111.

The Restaurant failed to appear at the final hearing. A one-volume Transcript was filed on May 10, 2013, and the Department submitted a proposed recommended order. Respondent failed to file a proposed recommended order.

#### FINDINGS OF FACT

1. The Department is the state agency charged with the licensing and regulation of restaurants. §§ 590.01, et seq., Fla. Stat.; and Fla. Admin. Code 61C-4.

2. The Restaurant is a licensed public food service establishment located at 5756 Dahlia Drive, Orlando, Florida, and holds state food service license number 58-12588.

3. Mr. Goris is a sanitation and safety specialist for the Department, and has worked for the Department for the past eight years. Mr. Goris' experience includes working for the U.S. Army as a food safety inspector for eight years. Further, Mr. Goris received the Department's standardized training on the laws and rules governing public food service establishments. Finally, he is a certified food manager and obtains monthly in-house training from the Department concerning his job duties.

4. On November 15, 2012, Mr. Goris performed a routine inspection of the Restaurant starting at 8:49 a.m. At the time of the inspection, the Restaurant was fully operational and open for business. Mr. Goris observed live roaches at the Restaurant throughout the food preparation area, including over the three-

compartment sink, and in the cracks and crevices of the wood table. He also observed dead roaches in the food preparation room inside the hand sink, behind equipment, and on the table where utensils for the oven were stored.

5. Critical violations are those violations that, if uncorrected, are most likely to contribute to contamination, illness, or environmental health hazards. Insects and other pests are capable of transmitting diseases to humans by contaminating the food or food contact surfaces, and this roach infestation was identified by Mr. Goris as a "critical" violation.

6. Edwin Ortiz, the Restaurant's manager, was present with Mr. Goris as he conducted the inspection. At the conclusion of the inspection, Mr. Goris recorded the observed violations in an inspection report which he printed out, and Mr. Ortiz signed the inspection report.

7. In addition to the roach infestation, the Restaurant was cited for additional violations which are detailed in Mr. Goris' inspection report.

8. The Department introduced into evidence a certified copy of the Department's records concerning a past administrative sanction involving the Restaurant. Specifically, the Department's evidence showed that on October 11, 2011, the Restaurant was charged with violating rule 6-501.111 of the Food

Code for its failure to control pests, and that the Restaurant failed to challenge the allegations. Consequently, the Department's records show that on January 3, 2012, the Department fined Respondent \$400.00 for the violation.

9. Based on the Restaurant's prior disciplinary history and the health danger involved, the Department closed the Restaurant.

#### CONCLUSIONS OF LAW

10. DOAH has jurisdiction over the parties and subject matter of this proceeding. §§ 120.57(1) and 120.569, Fla. Stat.

11. The Department is the state agency charged with regulating public food service establishments pursuant to section 20.165 and chapter 509, Florida Statutes. As part of its duties, the Department licenses and inspects restaurants located in the State. § 509.032, Fla. Stat.

12. Section 509.032(6) provides the Department with the authority to adopt rules necessary to carry out the provisions of chapter 509. The Department has incorporated portions of federal regulations and guidelines into the Food Code of Florida. Fla. Admin. Code R 61C-1.001(14).<sup>2/</sup> The Department has adopted the Food Code of the United States Department of Health and Human Services 2001 as a guideline for inspection of public food establishments. Id.

13. Rule 6-501.111, Food Code, specifically addresses "Controlling Pests," and provides that:

The presence of insects, rodents, and other pests shall be controlled to minimize their presence on the premises by:

(A) Routinely inspecting incoming shipments of food and supplies;

(B) Routinely inspecting the premises for evidence of pests;

(C) Using methods, if pests are found, such as trapping devices or other means of pest control as specified under §§ 7-202.12, 7-206.12, and 7-206.13; and

(D) Eliminating harborage conditions.

14. The Department has the burden of proof to show by clear and convincing evidence<sup>3/</sup> that Respondent violated the Food Code as alleged in the Administrative Complaint. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). Moreover, it is clear that disciplinary actions may be based only on the offenses charged in the Administrative Complaint. See Cottrill v. Dep't of Ins., 685 So. 2d 1371 (Fla. 1st DCA 1996). A penal statute is strictly construed against the charging agency. Hotel & Rest. Comm'n v. Sunny Seas No. One, 104 So. 2d 570, 571 (Fla. 1958).

15. The Department met its burden of showing by clear and convincing evidence that the Restaurant contained pests and, thus, violated rule 6-501.111, Food Code. At the time of the inspection, the Restaurant had an active roach infestation, which, if uncorrected, could have led to food contamination.

16. In determining the appropriate penalty, the Department has set out disciplinary guidelines in Florida Administrative Code Rule 61C-1.005.<sup>4/</sup> Rule 61C-1.005 creates different categories of violations, as well as aggravating and mitigating factors that the Department considers in fashioning an appropriate penalty.

17. Applying rule 61C-1.005 to the facts in the instant case, the undersigned finds that the appropriate penalty is a \$1,000.00 fine.<sup>5/</sup>

18. The Department proved that the Restaurant's violation is a critical violation as defined by rule 61C-1.005(5) (a). Further, the Department introduced evidence showing that the current violation is the Restaurant's second offense within 24 months preceding the Administrative Complaint in this case. See Fla. Admin. Code R. 61C-1.005(5) (d). Under rule 61C-1.005(6) (b), the standard penalty is an administrative fine of \$500.00 to \$1,000.00 for each day or portion of the day that the violation exists. The evidence here showed that the violation occurred on November 15, 2012, and that the Department closed the restaurant.

19. There was no evidence showing any aggravating or mitigating factors for deviating from the standard penalty set out in rule 61C-1.005(6) (b). Fla. Admin. Code R. 61C-1.005(7).

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 finding that Respondent violated rule 6-501.111, Food Code by failing to control its roach infestation, and that the Restaurant be fined \$1,000.00 based on its prior disciplinary history.

DONE AND ENTERED this 21st day of May, 2013, in Tallahassee, Leon County, Florida.



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THOMAS P. CRAPPS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 21st day of May, 2013.

ENDNOTES

<sup>1/</sup> References to Florida Statutes shall be the 2012 version unless otherwise indicated.

<sup>2/</sup> Florida Administrative Code Rule 61C-1.001(14) states in certain part:

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 Guide Errata Sheet ((August 23, 2002); and Supplement to the 2001 FDA Food Code (August 29, 2003), herein adopted by reference.

<sup>3/</sup> 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 evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts of the issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief of 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).

<sup>4/</sup> Florida Administrative Code Rule 61C-1.005, provides, in pertinent part:

(1) This rule sets out the disciplinary guidelines for imposing penalties upon . . . 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.

(2) These disciplinary guidelines are descriptive in nature and do not use the language used to formally allege a violation in a specific case. This rule is not intended to specifically describe all possible violations of law that may be committed by a . . . public food service establishment and that may be subject to penalty imposed by the division.

(3) The division may impose penalties against a . . . public food service establishment for a specific violation not included in the language of this rule. If a specific violation is not included in the language of this rule, the division shall impose a penalty corresponding to the most similar violation listed in this rule.

(4) These disciplinary guidelines do not limit the division's authority to order a . . . public food service establishment to cease and desist from any unlawful practice, or other action authorized by law.

(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.

(b) "Non-critical violation" means a violation not meeting the definition of critical violation 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.

(d) "Second offense," and "second and any subsequent offense" 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.

(e) "Third and any subsequent offense" means 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.

(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 \$250.00 to \$500.00.

2. 2nd offense--Administrative fine of \$500.00 to \$1,000.00.

3. 3rd and any subsequent offense--Administrative fine of \$750.00 to \$1,000.00, license suspension, or both.

\* \* \*

(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.

<sup>5/</sup> The Department in its Proposed Recommended Order recommended the \$1,000.00 fine consistent with its guidelines.

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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.