

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND  
PROFESSIONAL REGULATION,  
DIVISION OF HOTELS AND  
RESTAURANTS,

Petitioner,

vs.

Case No. 14-4646

CHEF CREOLE SEAFOOD, INC., d/b/a  
CHEF CREOLE,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on November 14, 2014, by video teleconference between Miami and Tallahassee, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Marc A. Drexler, Esquire  
Jesse Dyer, Qualified Representative  
Department of Business and  
Professional Regulation  
Division of Hotels and Restaurants  
1940 North Monroe Street, Suite 42  
Tallahassee, Florida 32399-2022

For Respondent: Wilkinson Sejour, pro se  
Chef Creole  
13125 West Dixie Highway  
North Miami, Florida 33161

STATEMENT OF THE ISSUE

Whether Chef Creole Seafood, Inc., d/b/a Chef Creole (Respondent), committed the offenses alleged in the Administrative Complaint dated August 5, 2014, and if so, the penalties that should be imposed.

PRELIMINARY STATEMENT

Respondent is a duly licensed restaurant. On August 5, 2014, the Department of Business and Professional Regulation, Division of Hotels and Restaurants (Petitioner) filed an Administrative Complaint against Respondent that contained factual allegations based on an inspection of Respondent's facility on April 21, 2014, and a call-back inspection on June 23, 2014. Based on those inspections, Petitioner charged Respondent, in separately numbered paragraphs, with certain violations of the Food Code.<sup>1/</sup> On November 6, 2014, Petitioner dismissed two of those alleged violations. The following alleged violations were at issue during the formal hearing:

1. Respondent stored food on the floor in violation of Food Code rule 3-305.11(A) (3), (B), and (C).
2. Respondent stored food under a dripping water line in a walk-in cooler in violation of Food Code rule 3-305.12(G).
3. Respondent's employee did not change single-use gloves after changing tasks in violation of Food Code rule 3-304.15(A).

4. Respondent's food manager's certification had expired in violation of Florida Administrative Code Rule 61C-4.023(1).

5. Respondent had four or more employees engaged in food preparation or handling without having a certified food service manager on duty in violation of Food Code rule 61C-4.023(1).

Respondent timely requested a formal administrative hearing to challenge the allegations of the Administrative Complaint. On October 6, 2014, the matter was referred to DOAH, and this proceeding followed.

At the formal hearing, Petitioner presented the testimony of Shannon Bures (a sanitation and safety specialist employed by Petitioner) and offered five sequentially numbered exhibits, each of which was admitted into evidence.

Respondent presented the testimony of Wilkinson Sejour, the owner and president of Respondent. Respondent offered no exhibits.

At the request of Petitioner, the undersigned took official recognition of section 509.032(6), Florida Statutes; Florida Administrative Code Rules 61C-1.001(14), 61C-1.005, and 61C-4.023(1); and Food Code rules 3-304.15(A), 3-305.11(A), (B), and (C), 3-305.12(G), and 5-501.16(A)(2).

A Transcript of the proceedings was filed on December 9, 2014. At the request of Respondent, the deadline for the filing of proposed recommended orders was extended to January 8, 2015.

Petitioner and Respondent filed proposed recommended orders, which have been duly-considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times relevant to this proceeding, Chef Creole Seafood, Inc., d/b/a Chef Creole (Respondent), was a restaurant subject to the regulation of the Department of Business and Professional Regulation, Division of Hotels and Restaurants (Petitioner). Respondent's license number is 2330245. Respondent is required to comply with all relevant provisions set forth in chapter 509, Florida Statutes; Florida Administrative Code Chapter 61C; and the Food Code.

2. Respondent has multiple locations. Respondent's address at issue in this proceeding is 200 Northwest 54th Street, Miami, Florida 33127 (the subject premises).

3. At all times relevant to this proceeding, Wilkinson Sejour was Respondent's owner and president.

4. Sharon Bures is employed by Petitioner as a sanitation and safety specialist. Ms. Bures is properly trained to conduct inspections of food service facilities to ensure compliance with applicable regulations. Ms. Bures performed approximately 720 inspections during the fiscal year that preceded the formal hearing.

5. On April 21, 2014, beginning at 3:57 p.m., Ms. Bures

performed a routine inspection of the subject premises. As part of the inspection, Ms. Bures prepared a Food Service Inspection Report (Petitioner's Exhibit 2) setting forth her findings. Ms. Bures prepared this report utilizing an electronic device while at the subject premises. Ms. Bures reviewed her findings with Mr. Sejour, the person in charge of the subject premises, and discussed with Mr. Sejour the deficiencies identified on Petitioner's Exhibit 2. Mr. Sejour signed Petitioner's Exhibit 2.

6. Petitioner's Exhibit 2 reflects that the subject premises was required to correct the noted deficiencies, and advised that a callback inspection would be conducted on or after June 21, 2014.

7. Petitioner's Exhibit 2 identified each of the alleged violations at issue in this proceeding.

8. Ms. Bures performed the callback inspection of the subject premises on June 23, 2014, beginning at approximately 2:55 p.m. Ms. Bures prepared a callback Report (Petitioner's Exhibit 3) setting forth her findings. Ms. Bures reviewed her findings with Mr. Sejour and explained to him the reasons for the deficiencies identified by Petitioner's Exhibit 3. Ms. Bures' findings included deficiencies that had been noted in the inspection on April 21, 2014, but had not been corrected. The uncorrected deficiencies found during the callback inspection

include the five alleged violations at issue in this proceeding.

9. Petitioner has classified two of the alleged violations as "basic," two as "intermediate," and one as "high priority."

10. A "basic item" is, pursuant to rule 61C-1.001(5), an item defined in the Food Code as a "Core Item." Rule 61C-1.005(5)(c) defines a basic violation as follows:

(c) "Basic violation" means a violation of a basic item, as defined in Rule 61C-1.001, F.A.C., or a violation of Chapter 509, F.S., or Chapter 61C, F.A.C., which relates to general sanitation, operational controls, standard operating procedures, facilities or structures, equipment design, or general maintenance and not meeting the definition of high priority violation or intermediate violation and is not otherwise identified in subsection (6) of this rule.

11. An "intermediate item" is, pursuant to rule 61C-1.001(19), an item defined in the Food Code as a "Priority Foundation Item." Rule 61C-1.005(5)(b) defines an intermediate violation as follows:

(b) "Intermediate violation" means a violation of an intermediate item, as defined in Rule 61C-1.001, F.A.C., or a violation of Chapter 509, F.S., or Chapter 61C, F.A.C., which relates to specific actions, equipment or procedures that contribute to the occurrence of a high priority violation, but does not meet the definition of high priority violation or basic violation and is not otherwise identified in subsection (6) of this rule.

12. A "high priority item" is, pursuant to rule 61C-1.001(17), an item defined in the Food Code as a "Priority Item."

Rule 61C-1.005(5) (a) defines a high priority violation as follows:

(a) "High priority violation" means a violation of a high priority item, as defined in Rule 61C-1.001, F.A.C., or a violation of Chapter 509, F.S., or Chapter 61C, F.A.C., determined by the division to pose a direct or significant threat to the public health, safety, or welfare and is not otherwise identified in subsection (6) of this rule.

13. On both inspection dates, Ms. Bures observed a large tub of seasoning, peppers and hot peppers stored on the kitchen floor. Except for circumstances not applicable to this proceeding, Food Code rule 3-305.11(A) (3) requires that food shall be protected from contamination by storing the food at least 15 cm (6 inches) above the floor. Petitioner proved by the requisite evidentiary standard that Respondent violated the cited rule.<sup>2/</sup> The testimony of Ms. Bures established that this violation is properly classified as a basic violation.

14. On both inspection dates, Ms. Bures observed water dripping onto buckets containing raw poultry in a walk-in cooler. Sheets of plastic were used as lids to cover the buckets. On both inspection dates, water was dripping on the plastic "lids." Food Code rule 3-305.12(G) prohibits the storage of food under a leaking water line. Petitioner proved by the requisite evidentiary standard that Respondent violated the cited rule.<sup>3/</sup> The testimony of Ms. Bures established that this violation is

properly classified as a basic violation.

15. On both inspection dates, Ms. Bures observed an employee handle peppers and onions after having handled raw poultry without changing gloves. Food Code rule 1-201.10 defines ready-to-eat food as food that is edible without additional preparation to achieve food safety. Peppers and onions are ready-to-eat food. Raw poultry is not ready-to-eat food. Food Code rule 3-304.15 prohibits the use of single-use gloves for the working with ready-to-eat food after having worked with raw poultry. Petitioner proved by the requisite evidentiary standard that Respondent violated Food Code rule 3-304.15. The testimony of Ms. Bures established that this violation is properly classified as a high priority violation due to the danger of contaminating ready-to-eat food.<sup>4/</sup>

16. On both inspection dates, Ms. Bures observed that Mr. Sejour's food protection manager's certificate had expired. Mr. Sejour's certificate had been issued March 10, 2009, and was valid through March 10, 2014.

17. On both inspection dates, there were six or more employees working at the subject premises. Petitioner proved that on both inspection dates, Respondent violated rule 61C-4.023(1) by failing to have a duly-licensed food protection manager on duty while six or more employees were working. The testimony of Ms. Bures established that this violation is



properly classified as an intermediate violation because of the need for a certified food protection manager with up-to-date knowledge of the rules and regulations dealing with food-borne illnesses and other risk factors to be present to prevent mistakes and to instruct employees as to proper food temperatures, proper hygiene, and methods of prevention of food-borne illnesses.

18. By "Final Order on Waiver" entered by Petitioner on May 7, 2013, Petitioner disciplined Respondent for certain violations in an unrelated proceeding for having violated rule 61C-4.023(1) by failing to have a duly-certified food protection manager on duty while six or more employees were working.

19. By "Final Order on Waiver" entered by Petitioner on April 30, 2014, Petitioner disciplined Respondent for certain violations in another unrelated proceeding for having violated rule 61C-4.023(1) by failing to have a duly-certified food protection manager on duty while six or more employees were working.

#### CONCLUSIONS OF LAW

20. DOAH has jurisdiction over the subject matter of and the parties to this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

21. Petitioner has been statutorily delegated the authority

to "carry out all of the provisions of [chapter 509] and all other laws relating to the inspection or regulation of . . . public food service establishments for the purpose of safeguarding the public health, safety, and welfare." § 509.032, Fla. Stat.

22. Section 509.261(1), Florida Statutes, provides that any public food services establishment that has operated or is operating in violation of chapter 509, or the rules promulgated thereunder, is subject to license revocation; license suspension; imposition of administrative fines not to exceed \$1,000.00 per offense; and mandatory attendance, at personal expense, at an educational program sponsored by the Hospitality Education Program (established pursuant to section 509.302).

23. Petitioner has the burden of proving by clear and convincing evidence that Respondent committed the violations as alleged and the appropriateness of any fine and penalty resulting from the alleged violations. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Dep't of Agric. & Consumer Servs., 550 So. 2d 112 (Fla. 1st DCA 1989); and Inquiry Concerning a Judge, 645 So. 2d 398 (Fla. 1994).

24. In Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court held that:

Clear and convincing evidence requires that the evidence must be found to be credible: the facts to which the witnesses testify 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.

25. Petitioner proved by clear and convincing evidence that Respondent violated Food Code rule 3-305.11(A) (3) as alleged in the Administrative Complaint by storing food on the floor. This is a basic violation.

26. Petitioner proved by clear and convincing evidence that Respondent violated Food Code rule 3-305.12(G) by storing food in a walk-in cooler under dripping water as alleged in the Administrative Complaint. This is a basic violation.

27. Petitioner proved by clear and convincing evidence that Respondent violated Food Code rule 3-304.15(A) by proving that an employee failed to change gloves when handling ready-to-eat food after having handled raw poultry as alleged in the Administrative Complaint. This is a high priority violation.

28. The Administrative Complaint charges as a separate violation that "food manager certification expired." That reference is to Mr. Sejour's certification. While Petitioner proved that Mr. Sejour's certification had expired, the gravamen of the violation is that Respondent had no certified food

protection manager on duty while six or more employees were working. Because there is no requirement that Mr. Sejour maintain his certification, no separate violation should be found for Mr. Sejour's failure to timely renew his certificate.

29. Petitioner proved by clear and convincing evidence that Respondent violated Florida Administrative Code Rule 61C-4.023(1) by failing to have a certified food protection manager on duty while six or more employees were working as alleged in the Administrative Complaint. This is an intermediate violation.

30. Accordingly, disciplinary action may be taken against Respondent pursuant to section 509.261(1).

31. Rule 6C-1.005(5)(f) contains the following definition applicable to this proceeding.

(f) "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.

32. Based on the foregoing definition, and the two prior final orders entered by Petitioner against Respondent on May 7, 2013, and April 30, 2014, it is concluded that the penalties to be assessed in this proceeding are third offenses.

33. Rule 6C-1.005(6) contains the following penalty guidelines applicable to this proceeding.

(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.

(a) Basic violation.

\* \* \*

3. 3rd and any subsequent offense -  
Administrative fine of \$350 to \$1000, license suspension, or both.

(b) Intermediate violation.

\* \* \*

3. 3rd offense - Administrative fine of \$550 to \$1,000, license suspension, or both.

(c) High priority violation.

\* \* \*

3. 3rd and any subsequent offense -  
Administrative fine of \$750 to \$1,000,  
license suspension, or both.

34. In its Proposed Recommended Order, Petitioner proposes a fine in the amount of \$400.00 for each of the two violations classified as basic violations; a fine in the amount of \$800.00 for the violation classified as high priority; and a fine in the amount of \$1,000.00 for the violation classified as intermediate. Petitioner's recommendations are reasonable and within the penalty guidelines.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that the Department of Business and Professional Regulation, Division of Hotels and Restaurants enter a final order that adopts the Findings of Fact and Conclusions of Law set forth herein.

It is FURTHER RECOMMENDED that the final order find Chef Creole Seafood, Inc., d/b/a Chef Creole guilty of violating Food Code rule 3-305.11(A) (3) as alleged in the Administrative Complaint and impose an administrative fine in the amount of \$400.00 for that basic violation.

It is FURTHER RECOMMENDED that the final order find Respondent guilty of violating Food Code rule 3-305.12(G) as alleged in the Administrative Complaint and impose an administrative fine in the amount of \$400.00 for that basic violation.

It is FURTHER RECOMMENDED that the final order find Respondent guilty of violating Food Code rule 3-304.15(A) as alleged in the Administrative Complaint and impose an administrative fine in the amount of \$800.00 for that high priority violation.

It is FURTHER RECOMMENDED that the final order find Respondent guilty of violating Florida Administrative Code Rule 61C-4.023(1) as alleged in the Administrative Complaint and

impose an administrative fine in the amount of \$1,000.00 for that intermediate violation. The total of the recommended fines is \$2,600.00.

DONE AND ENTERED this 2nd day of February, 2015, in Tallahassee, Leon County, Florida.



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CLAUDE B. ARRINGTON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 2nd day of February, 2015.

#### ENDNOTES

<sup>1/</sup> Any reference to the Florida Administrative Code is to the version of the Florida Administrative Code as of the date of the alleged violations. The term "Food Code" is defined by Florida Administrative Code Rule 61C-1.001(14). References in this Recommended Order to the Food Code are to the documents specified in that definition. Respondent is required to comply with the applicable sections of the Food Code pursuant to rule 61C-4.010(1). The references to Florida Statutes in this Recommended Order are to Florida Statutes (2014).

<sup>2/</sup> It is not necessary for Petitioner to establish that the contents of the tub had become contaminated.

<sup>3/</sup> It is not necessary for Petitioner to prove that the contents of the buckets had become contaminated.

<sup>4/</sup> Mr. Sejour testified that the "ready-to-eat" peppers and onions were to be used as part of a marinade for the poultry. Mr. Sejour argued that the employee's failure to change gloves should not be a violation because the peppers and onions were not to be used as ready-to-eat food. That argument is rejected because the peppers and onions were cut-up by an employee who did not change gloves after handling raw poultry. The employee then set aside the cut-up peppers and onions. While the end-use of the cut-up peppers and onions may have been in a marinade, the cut-up peppers and onions could easily have been served (by design or by mistake) in a ready-to-eat form (such as a garnish or part of a salad) by the employee who cut the peppers and onions or by another employee.

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.