

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner,

vs.

Case No. 14-5644

NEGRIL CUISINE, INC., d/b/a
BANANA HUT,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 29, 2015, 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: Charles F. Tunnickliff, Esquire
Department of Business and
Professional Regulation
Division of Hotels and Restaurants
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2022

For Respondent: Michael Brandon, pro se
Banana Hut
15308 Southwest 111 Street
Miami, Florida 33196

STATEMENT OF THE ISSUES

Whether Negril Cuisine, Inc., d/b/a Banana Hut (Respondent), committed the offenses alleged in the Administrative Complaint dated September 30, 2014, and if so, the penalties that should be imposed.

PRELIMINARY STATEMENT

Respondent is a duly licensed restaurant. On September 30, 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 September 23, 2014. Based on that inspection, Petitioner charged Respondent with violating section 509.221(7), Florida Statutes.^{1/} The alleged violation was based on the inspector's observation of live roaches in a storage closet and in the kitchen.

Respondent timely requested a formal administrative hearing to challenge the allegations of the Administrative Complaint. On November 26, 2014, the matter was referred to DOAH, and this proceeding followed.

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

Respondent presented the testimony of Michael George Brandon (Respondent's owner), Zuleima Chow (an employee of Petitioner), and Garth Vassell (an employee of Respondent). Respondent presented two sequentially numbered exhibits, both of which were admitted into evidence.

At the request of Petitioner, the undersigned took official recognition of sections 509.032(6) and 509.221(7) and Florida Administrative Code Rules 61C-1.001(14) and 61C-1.005.

A Transcript of the proceedings was filed on February 17, 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, Negril Cuisine, Inc., d/b/a Banana Hut (Respondent), has operated a restaurant known as the Banana Hut, which is located at 13740 Southwest 152nd Street, Miami, Florida (the subject premises).

2. Respondent is subject to the regulation of the Department of Business and Professional Regulation, Division of Hotels and Restaurants (Petitioner). 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/}

3. Respondent's license number is 2329056. There was no evidence that Respondent's license has been previously disciplined by Petitioner.

4. At all times relevant to this proceeding, Michael George Brandon was Respondent's owner.

5. Douglas Morgadanes is employed by Petitioner as a senior sanitation and safety specialist. Mr. Morgadanes is experienced and trained to conduct inspections of food service facilities to ensure compliance with applicable regulations. Mr. Morgadanes has been a sanitation and safety specialist employed by Petitioner for approximately 18 years. He has been designated as a senior sanitation and safety specialist for the last nine years. Mr. Morgadanes typically performs between 700 and 800 restaurant inspections each year.

6. On September 23, 2014, beginning at 9:37 a.m., Mr. Morgadanes performed a routine inspection of the subject premises (the initial inspection). The Banana Hut was open for business during the initial inspection.

7. As part of the initial inspection, Mr. Morgadanes prepared a Food Service Inspection Report (Petitioner's Exhibit 2) setting forth his findings. Mr. Morgadanes prepared this report utilizing an iPad while at the subject premises.

8. Mr. Morgadanes testified, credibly, that he asked some unidentified person from the establishment to accompany him while

he performed the initial inspection, but no one accompanied him. Garth Vassell is a cook at the subject premises. Mr. Vassell was on the premises when Mr. Morgadanes conducted the initial inspection, but he was not asked by Mr. Morgadanes to accompany him during that inspection.

9. During the course of the initial inspection, Mr. Morgadanes observed approximately ten live roaches in a storage closet and ten or more live roaches in the kitchen.

10. After the inspection, Mr. Morgadanes showed Mr. Vassell the areas where he had observed the live roaches. Mr. Morgadanes also showed Mr. Vassell a dead roach. Mr. Vassell did not observe live roaches.

11. Mr. Morgadanes telephoned his office and notified his superiors of his observations. Before Mr. Morgadanes left the premises, Petitioner entered an emergency order that suspended Respondent's licensure and closed the subject premises (the emergency order). The emergency order found that "The risk of food borne illness from a vermin infestation constitutes an immediate serious threat to public health and safety."

12. When Mr. Brandon arrived at the subject premises, Mr. Morgadanes had completed his initial inspection and was affixing a sign to the entry door of the subject premises that stated that the restaurant was closed.

13. Mr. Morgadanes showed Mr. Brandon the areas where he observed the live roaches and reviewed his inspection report (Petitioner's Exhibit 2) with Mr. Brandon. Mr. Brandon signed the inspection report at approximately 11:30 a.m. Mr. Morgadanes left the premises shortly thereafter.

14. At the request of Mr. Brandon, a callback inspection was conducted by Mr. Morgadanes and Zuleima Chow beginning at 3:14 p.m., on the afternoon of the initial inspection (September 23, 2014). No evidence of roaches was observed during the callback inspection.^{3/} As a result of the callback inspection, Petitioner immediately vacated its emergency order.

15. On September 30, 2014, Petitioner filed the Administrative Complaint that initiated this proceeding. Based on Mr. Morgadanes' observing live roaches during his initial inspection, Petitioner charged that Respondent violated section 509.221(7), which provides as follows:

(7) The operator of any establishment licensed under this chapter shall take effective measures to protect the establishment against the entrance and the breeding on the premises of all vermin. Any room in such establishment infested with such vermin shall be fumigated, disinfected, renovated, or other corrective action taken until the vermin are exterminated.

16. Petitioner classified the alleged violation as a "high priority" violation.

17. 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.

18. The presence in a restaurant of vermin such as roaches presents a risk to the public because such vermin can carry diseases that can be transmitted to patrons who consume food that has been contaminated by the vermin.

CONCLUSIONS OF LAW

19. 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.

20. 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.

21. Each "public food service establishment" must have a license from Petitioner prior to the commencement of operation. § 509.241, Fla. Stat. Respondent has the requisite license.

22. Section 509.261(1) 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 more proof than a "preponderance of the evidence" but less than "beyond and to the exclusion of a reasonable doubt." In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). It is an

intermediate standard. Id. For proof to be considered "clear and convincing" . . . 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.

25. Petitioner proved by clear and convincing evidence that Respondent violated section 509.221(7), as alleged in the Administrative Complaint, by failing to prevent the presence of live roaches in its premises. Because of the potential danger to the public, this is a high priority violation.

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

27. Florida Administrative Code Rule 61C-1.005(6) (o) 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.

* * *

(o) Any violation requiring an Emergency Order of Suspension or Emergency Order of Closure, as authorized by Chapter 509, F.S.

1. 1st offense--Administrative fine of \$500.

28. In its Proposed Recommended Order, Petitioner proposes a fine in the amount of \$500.00 for the high priority violation. That recommended penalty is consistent with the applicable penalty guidelines.

29. Petitioner's Proposed Recommended Order does not contain a recommendation that Respondent require an employee, at Respondent's expense, to attend an educational program sponsored by the Hospitality Education Program (established pursuant to section 509.302) as authorized by section 509.261(1).

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 Negril Cuisine, Inc., d/b/a Banana Hut guilty of violating section 509.221(7), Florida Statutes, as alleged in the Administrative Complaint and impose an administrative fine in the amount of \$500.00 for that violation.

DONE AND ENTERED this 10th day of March, 2015, in
Tallahassee, Leon County, Florida.



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 10th day of March, 2015.

ENDNOTES

^{1/} All references to Florida Statutes in this Recommended Order are to Florida Statutes (2014). All references to the Florida Administrative Code are to the version of the Florida Administrative Code as of the date of the alleged violations.

^{2/} 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).

^{3/} Based in part on the absence of roaches during the callback inspection, Mr. Brandon asserts that Mr. Morgadanes lied about the presence of live roaches during his initial inspection. That assertion is rejected. The undersigned finds the testimony of Mr. Morgadanes to be clear and convincing evidence that live roaches were present in the storage closet and the kitchen during his initial inspection.

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.