

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner,

vs.

Case No. 16-0622

ELBIOLI ALAA, d/b/a MIAMI SUBS
GRILL,

Respondent.

_____/

RECOMMENDED ORDER

On February 29, 2016, Robert E. Meale, Administrative Law
Judge of the Division of Administrative Hearings (DOAH),
conducted the final hearing by videoconference in West Palm Beach
and Tallahassee, Florida.

APPEARANCES

For Petitioner: Charles F. Tunnickliff, Esquire
Charles Laray Dewrell, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 33299-2202

For Respondent: Mohamed Tantawi
Qualified Representative
Miami Subs Grill
1851 Broadway
Riviera Beach, Florida 33404

STATEMENT OF THE ISSUES

The issues are whether the shelves of a walk-in cooler were rusty and pitted, in violation of Food Code Rule 4-4.101.19; grease was deposited around the grease receptacle, in violation of Food Code Rule 5-501.116(B); and the employer failed, upon request, to provide evidence of employee food-handler training, as required by section 509.049(5), Florida Statutes. If any of these violations are proved, an additional issue is the penalty that should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated January 25, 2016, Petitioner alleged that its inspector conducted inspections of Respondent's restaurant located at 1851 Broadway, Riviera Beach, Florida, on October 14 and 16 and December 17, 2015. The Administrative Complaint alleges that, on each of these dates, inspections disclosed that Respondent was in violation of the two Food Code provisions and one statutory provision that are cited above. The Administrative Complaint seeks an administrative fine of \$1000 per violation.

Respondent requested a hearing by timely filing an Election of Rights on January 30, 2016.

At the hearing, each party called one witness. Petitioner offered into evidence four exhibits: Petitioner Exhibits 1

through 4. Respondent offered no exhibits into evidence. All of the exhibits were admitted into evidence.

The court reporter filed the transcript on March 21, 2016. Petitioner filed a proposed recommended order on March 30, 2016.

FINDINGS OF FACT

1. At all material times, Respondent operated a restaurant located at 1851 Broadway in Riviera Beach, Florida, as a public food service establishment under Permanent Food Service license 6009125.

2. On October 16, 2015, Petitioner's inspector conducted an inspection of Respondent's restaurant. The inspection uncovered four violations, including rusty and pitted shelves in the walk-in cooler, grease deposited around the grease receptacle, and a failure, upon request, to produce evidence of employee food-handler training. The first two violations are "basic," and the third violation is "intermediate." The inspector gave Respondent until December 15, 2015, to correct these violations.

3. On December 17, 2015, Petitioner's inspector conducted a callback inspection of Respondent's restaurant. The inspection uncovered the three violations cited in the preceding paragraph.

4. Rust on shelves used for the storage of food can cause food-borne illness. Respondent's defense that no food was placed directly on a rusty shelf does not mean that no food would ever be placed directly on a rusty shelf by a shiftless employee.

5. Greasy buildups of the amount found on inspection can attract vermin that may serve as human vectors of food-borne illness, as the vermin roam the restaurant premises. Respondent's defense that the area in question "wasn't that bad" misses the point that, if it is bad enough that it can attract vermin, it is bad enough to constitute a violation.

6. At the time of both inspections, Respondent failed to provide current training certificates of his employees because the training certificates of employees who had been employed at least 60 days had expired. Respondent's defense is that he needed more time, but the facts fail to support this claim. The three-year term of the expired certificate was enough time for an employee to obtain recertification, and Petitioner allowed Respondent an additional 60 days from the first inspection.

7. Petitioner issued a final order against Respondent within the 24 months preceding the date of the issuance of the Administrative Complaint in this case. By final order issued on September 10, 2015, Petitioner imposed an administrative fine of \$325 for three violations that were detected on February 24, 2015, and uncorrected by May 5, 2015. These violations were a failure to hold food cold at the specified temperature, failure to maintain the proper temperature within the walk-in cooler, and failure to provide hot water at the employee handwash sink and both restrooms.

CONCLUSIONS OF LAW

8. DOAH has jurisdiction. §§ 120.569 and 120.57(1), Fla. Stat. (2015).

9. The burden of proof is on Petitioner to prove the material allegations by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

10. Florida Administrative Code Rule 61C-1.001(14) defines "Food Code," as used in Florida Administrative Code Chapters 61C-1, 61C-3, and 61C-4, as chapters 4 and 5, among others, of the Food Code (2009).

11. Food Code Rule 4-4.101.19 provides: "Nonfood-contact surfaces of equipment that are exposed to splash, spillage, or other food soiling or that require frequent cleaning shall be constructed of a corrosion-resistant, nonabsorbent, and smooth material." Clearly, the shelves of the walk-in cooler do not resist corrosion, which, equally clearly, resulted from some form of splash or spillage.

12. Food Code Rule 5-501.116(B) provides: "Soiled receptacles and waste handling units for refuse, recyclables, and returnables shall be cleaned at a frequency necessary to prevent them from developing a buildup of soil or becoming attractants for insects and rodents." Clearly, the area around the grease receptacle was cleaned, if at all, at inadequate intervals.

13. Section 509.049(5) addresses employee food-handler training and provides in part:

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.

Respondent failed to provide certificates to the inspector because employees required to have current certificates did not have them.

14. Section 509.261(1) authorizes Petitioner to impose a fine of not more than \$1000 per offense or to suspend or revoke a license for any violation of chapter 509 or the rules adopted under chapter 509. Rule 61C-1.005(5)(e) provides that the two proved violations are a "second offense" due to their occurrence within 24 months of the earlier disciplinary final order. Rule 61C-1.005(6)(a)2. and (b)2. provides that the standard penalty for a second offense of a "basic" violation is a fine of \$250 to \$500, and the standard penalty for a second offense of an "intermediate" violation is a fine of \$375 to \$750.

15. In its proposed recommended order, Petitioner has sought a fine of \$300 for each of the "basic" violations and \$400 for the "intermediate" violation, for a total of \$1000. This total fine is appropriate under the rule and the

circumstances. The prior fine of \$325 had been assessed only 90 days prior to the violations proved in this case. A substantially larger fine is indicated to ensure that Respondent conforms to the statutes and rules ensuring the safety of the public consuming food at his establishment.

RECOMMENDATION

It is

RECOMMENDED that the Department of Business and Professional Regulation, Division of Hotels and Restaurants, enter a final order finding Respondent guilty of the three violations set forth above and imposing a fine of \$1000.

DONE AND ENTERED this 21st day of April, 2016, in Tallahassee, Leon County, Florida.



ROBERT E. MEALE
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 April, 2016.

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.