

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner,

vs.

Case No. 16-1170

TILLIE'S TWISTEE TREAT, INC.,
d/b/a TILLIE'S TWISTEE TREAT,

Respondent.

_____ /

RECOMMENDED ORDER

On May 4, 2016, an administrative hearing in this case was held by video teleconference in Orlando and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charles LaRay Dewrell, Esquire
Department of Business and
Professional Regulation
Suite 42
1940 North Monroe Street
Tallahassee, Florida 32399

For Respondent: No Appearance

STATEMENT OF THE ISSUE

The issue in this case is whether the allegations of the Amended Administrative Complaint filed by the Department of Business and Professional Regulation, Division of Hotels and

Restaurants (Petitioner), against Tillie's Twistee Treat, Inc., d/b/a Tillie's Twistee Treat (Respondent) are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By an Administrative Complaint dated February 25, 2016, the Petitioner cited the Respondent, a food service establishment in Orlando, Florida, for allegedly violating certain Food Code (Code) regulations identified therein.

The Respondent filed an Election of Rights form disputing the allegations and requesting that a formal hearing be conducted. On March 2, 2016, the Petitioner forwarded the dispute to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner presented the testimony of one witness and had Exhibits 1 through 3 admitted into evidence. The Respondent presented no witnesses or exhibits.

The Transcript of the hearing was filed on May 9, 2016.

On May 10, 2016, Kathy Collins, the apparent operator of the Respondent, filed a letter wherein she explained that she failed to attend the hearing because she entered an incorrect hearing date on her calendar. Ms. Collins stated that she went to the hearing location on May 5, 2016, where she learned that the hearing had been conducted a day earlier. Ms. Collins did

not request that the hearing be reconvened, but stated that she had never been previously cited by the Respondent and further stated, "I strongly feel that this citation was unjustified."

On May 16, 2016, the Petitioner filed a Proposed Recommended Order that has been considered in the preparation of this recommended order.

FINDINGS OF FACT

1. The Petitioner is the state agency charged with regulation of restaurants pursuant to chapter 509, Florida Statutes.

2. At all times material to this case, the Respondent was operating as a licensed food service establishment located at 16801 East Colonial Drive, Orlando, Florida, 32820. The Respondent sells an ice cream product.

3. On December 2, 2015, Maelyn Arroyo, a Sanitation and Safety Specialist employed by the Petitioner, performed an unannounced routine inspection of the Respondent, during which she observed various violations of the Code.

4. At the conclusion of the inspection, Ms. Arroyo prepared a written report documenting the Code violations she had observed.

5. Before leaving the premises, Ms. Arroyo provided a copy of the inspection report to Kathy Collins, identified on the report as the manager of the Respondent.

6. According to the inspection report, the cited code violations were to be corrected by 8:00 a.m. on December 9, 2015, at which time a "callback" inspection was scheduled to occur.

7. The purpose of the callback inspection was to determine whether the Code violations identified during the routine inspection had been corrected.

8. On December 9, 2015, Ms. Arroyo returned to the Respondent's location to conduct the callback inspection. At that time, Ms. Arroyo observed that many, but not all, of the Code violations observed during the routine inspection had been corrected.

9. At the conclusion of the callback inspection, Ms. Arroyo prepared a written report documenting the uncorrected Code violations.

10. Before leaving the premises, Ms. Arroyo provided a copy of the inspection report to an employee identified as Amanda Sanchez, who was present at the time of the inspection.

11. Ms. Arroyo also recommended that administrative charges be filed against the Respondent for the uncorrected violations.

12. The Code classifies violations as either "high priority," "intermediate," or "basic," essentially reflecting the level of threat to public health posed by a deficiency.

13. A high priority violation is one that poses a direct or significant threat of causing food borne illness to a person who consumes the product.

14. The violations cited herein are high priority violations because the failure to maintain the product at or below the required temperatures can result in bacteria growth that can cause food borne illness in persons who consume the product. The Respondent's ice cream product can be potentially hazardous if not maintained at the required temperature prior to service.

15. In relevant part, Code Section 3-501.16(A) (2) requires that potentially hazardous food must be maintained at 41 degrees Fahrenheit or less, except during preparation, cooking, or cooling.

16. At the time of the routine inspection on December 2, 2015, Ms. Arroyo determined that the temperature of chocolate ice cream mix held in the front line ice cream machine was 54 degrees, and that the temperature of vanilla ice cream mix held in the front line ice cream machine was 51 degrees.

17. Other flavors of ice cream mix tested by Ms. Arroyo apparently met temperature requirements.

18. At the time of the callback inspection on December 9, 2015, Ms. Arroyo determined that the temperature of chocolate ice cream mix held in the front line ice cream machine was 50

degrees, and that the temperature of vanilla ice cream mix held in the front line ice cream machine was 43 degrees. Ms. Arroyo also determined that the strawberry ice cream mix was 42 degrees.

19. Ms. Arroyo testified that she calibrates her thermometer on a daily basis prior to beginning her assigned inspections.

20. Ms. Arroyo testified that on December 9, 2015, she tested the calibration of the thermometer used by the Respondent to maintain the appropriate food temperatures and discovered that the Respondent's thermometer was not properly calibrated.

21. A properly calibrated thermometer should provide a temperature reading of 32 degrees when subjected to an ice water calibration test.

22. According to Ms. Arroyo, when she performed an ice water calibration test on the Respondent's thermometer, the thermometer indicated that the temperature of the water was 28 degrees. Accordingly, the Respondent's thermometer was indicating that the product being tested was four degrees lower than the actual temperature of the product.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2015).^{1/}

24. The Petitioner is the state agency charged with the regulation of food service establishments in the State of Florida. See Florida Statutes chapter 509. The Petitioner has adopted by incorporation the various provisions of the Code specifically identified in the Administrative Complaint and referenced herein. See Florida Administrative Code Rule 61C-1.001.

25. The Petitioner has the burden of proving by clear and convincing evidence the allegations set forth in the Administrative Complaint against the Respondent. Dep't of Banking and Fin. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). In this case, the burden has been met.

26. The evidence establishes that on December 2 and December 9, 2015, the Respondent offered an ice cream product for sale to the public that failed to meet the temperature requirements referenced herein.

27. The Petitioner has adopted disciplinary guidelines applicable to this case at Florida Administrative Code Rule 61C-1.005. Pursuant to rule 61C-1.005(5)(a), a high priority violation means "a violation of a high priority item. . . determined by the division to pose a direct or significant threat to the public health, safety, or welfare. . ." Rule 61C-1.005(6)(c) identifies an administrative fine of \$250 to

\$500 as the appropriate penalty for the first offense of a high priority violation.

28. The evidence established that the thermometer being used by the Respondent was not properly calibrated. There is no evidence that the Respondent was unaware of the applicable temperature requirements or that the Respondent failed to routinely test the product being held for sale. It is presumed that the Respondent's faulty thermometer was the sole cause of the non-compliance with the temperature requirement. Accordingly, the recommended penalty set forth below is the minimum penalty available within the suggested guidelines.

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 imposing a fine of \$250 against the Respondent.

DONE AND ENTERED this 20th day of May, 2016, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of May, 2016.

ENDNOTE

^{1/} All statutory references are to Florida Statutes (2015).

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.