

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

DEPARTMENT OF AGRICULTURE AND
CONSUMER SERVICES,

Petitioner,

Case No. 20-5566

vs.

TAMPA MAID FOODS, LLC,

Respondent.

RECOMMENDED ORDER

On February 16, 2021, Administrative Law Judge Hetal Desai of the Division of Administrative Hearings (DOAH) conducted a final hearing in Tallahassee, Florida.

APPEARANCES

For Petitioner: Allan J. Charles, Esquire
Magdalena Ozarowski, Esquire
Department of Agriculture and Consumer Services
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Tallahassee, Florida 32399

For Respondent: Daniel J. Fleming, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent violated section 500.147(1), Florida Statutes (2020),¹ when it refused entry to Petitioner's inspectors unless the inspectors agreed

¹ Unless stated otherwise, all references to statutes and administrative rules are to the 2020 versions that were in effect during the conduct at issue. *Childers v. Dep't of Env'tl. Prot.*, 696 So. 2d 962, 964 (Fla. 1st DCA 1997).

to Respondent's "no camera" policy; and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On November 5, 2020, the Department of Agriculture and Consumer Services (Department or DACS) issued an Administrative Complaint against Tampa Maid Foods, LLC (Tampa Maid) seeking a \$5,000 fine and alleging the following:

1. On March 9, 2020, The Department visited Respondent's permitted facility to conduct a food inspection pursuant to section 500.147(1), Florida Statutes.
2. The inspector was denied entry to the food establishment which is a violation of Section 500.004(6), Florida Statutes.[²]

On December 28, 2020, Tampa Maid filed an Amended Petition for Formal Hearing pursuant to section 120.57(1), Florida Statutes. The Department referred this request to DOAH, where it was assigned to the undersigned and set for hearing.

A pre-hearing conference was held on February 12, 2021. The parties subsequently filed a Joint Pre-Hearing Stipulation with four stipulated facts. These facts have been incorporated in this Recommended Order, where appropriate.

A final hearing was held on February 16, 2021. The Department offered the testimony of three witnesses: Chris Hilliard, the Department's representative and Chief of the Bureau of Food Inspection, Division of Food Safety (Division); Frank Clayton Kilgore, a Division Environmental Specialist III; and Bhisham Ojha, a Division Environmental Specialist III.

² Section 500.04, Prohibited acts, prohibits the following: "(6) The refusal to permit entry or inspection, or to permit the taking of a sample, as authorized by s. 500.147."

The Department's Exhibits P1 through P3 were admitted into evidence. Tampa Maid offered the testimony of Rod Stokes, its Director of Food Safety and Quality Assurance; and James Joseph Lavelle, Vice President of Captain's Fine Foods, LLC (a competitor to Tampa Maid). Tampa Maid's Exhibits R1 through R4 were admitted into evidence.

The Transcript of the proceeding was filed with DOAH on March 10, 2021.³ The deadline for filing post-hearing submittals was March 22, 2021. The Department timely filed its Proposed Recommended Order (PRO); Tampa Maid filed its PRO on March 23, 2021. As there was no objection to Respondent's late-filed PRO, both parties' PROs have been considered.

FINDINGS OF FACT

1. Petitioner is the state agency charged with regulating food establishments pursuant to chapter 500, Florida Statutes (the Food Safety Act), and Florida Administrative Code Chapter 5K-4.

2. At all times relevant, Tampa Maid was permitted as a food establishment (Food Permit No. 28143) by the Department.⁴ Tampa Maid operates a shrimp and shellfish processing plant at 1600 Kathleen Road in Lakeland, Florida (Facility).

3. As a seafood processor, Tampa Maid is subject to the jurisdiction of the federal Food and Drug Administration (FDA), and specifically to seafood Hazard Analysis Critical Control Points (HACCP) inspections.

4. The Department contracts with the FDA to perform various types of inspections including HACCP inspections. The Department's FDA contract contemplates that (1) Department inspectors will collect information and

³ An official word index to the Transcript was submitted on March 31, 2021.

⁴ Section 500.03(p) defines "Food establishment" as "factory, food outlet, or other facility manufacturing, processing, packing, holding, or preparing food or selling food at wholesale or retail."

evidence, (2) evidence can be in the form of photographs, and (3) evidence collected is not subject to public records requests, but rather must be kept confidential.⁵ It states:

All information collected during the performance of this contract shall be considered as confidential commercial information, including the Establishment Inspection Report (EIR), FDA 483, or equivalent forms, evidence collected, and all other supporting documentation. Evidence and supporting documentation may include supplier, receiving, and distribution records, photographs, complaint records, laboratory results, and other documents collected during the performance of the contract. The Contractor shall notify the Division Technical Advisor within three (3) business days after receipt of a public records request for information obtained during the performance of the contract is received. The Contractor is not authorized to release confidential commercial information. (emphasis added).

5. The Department trains staff to conduct various types of inspections of food establishments. The Department also issues inspectors equipment to be used to perform their duties. This includes tools such as a flashlight, probe thermometer, test strips for sanitizers, and mobile phones. The Department-issued phones have a camera to take photographs during an inspection.

6. The Department has developed the Manufactured Food Inspection Protocol (Protocol) which contains the following instructions for inspectors:

6.5 Refusal of Inspection

Notify a manager immediately if you are denied entry to any part of the establishment including being restricted from taking photographs of violative conditions, collecting samples, or if the

⁵ Chapter 500 is to be interpreted to be consistent with the FDA's rules and regulations. *See* § 500.09(3), Fla. Stat. Additionally, the Department has adopted federal regulations and other standards. Fla. Admin. Code R. 5K-4.002. Article 5.3.4 of the FDA's Investigation Operations Manual (2021) provides further instructions and guidance to inspectors of documenting conditions using photographs during inspections. *See* FDA website at: <https://www.fda.gov/media/113432/download> (last visited April 6, 2021).

establishment management or person in charge refuses to provide access to required food records; this may constitute a refusal of inspection.

* * *

7.1 FIMS Review

[Before an inspection] review recent inspection reports ... for attached files, documents, photographs, etc.

* * *

8.1.1. Signing of Non-FDACS Documents

Circumstances may arise in which a food establishment requests the [inspector] to sign documents during the inspection. Listed below are specific guidelines for these circumstances. Contact a manager if you encounter a situation not listed.

8.1.2 Proprietary Documents

Florida Statute Chapter 500.147 authorizes the Department to have access to any food establishment ... for the purposes of inspecting such establishment ... to determine whether this chapter or any rule adopted under this chapter is being violated. Documents including, but not limited to, waivers, nondisclosure, confidentiality agreements may include language that inhibits our authority to conduct the inspection. If you are asked to sign these types of documents inform the person in charge that you are not authorized to sign the documents. If they persist and /or deny you entry, contact a manager as this may constitute a refusal of inspection.

* * *

8.1.4 Sign-In and Sign-Out Rosters

All FADCS employees are authorized to sign-in and sign-out at food establishments, so far as they sign-in document does not include language that would impede the inspection.

* * *

13. Inspection Techniques and Evidence Development

Collect adequate evidence and documentation in accordance with FDACS procedures to support inspectional observations such as those listed below:

* * *

13.2 Photographs

Photographs serve as supporting evidence when documenting violative practices or conditions. Photographs should be related to conditions contributing to adulteration of the finished product. Excessive amounts of photographs are not necessary to support your documentation. Ensure photographs clearly represent the conditions observed. These photographs must be uploaded to the FIMS inspection visit.

7. As explained by Inspectors Frank Kilgore and Bhisham Ojha it is "not uncommon" for inspectors to take photographs during an inspection for various reasons. The most obvious reason is to document violative conditions. An example given at the hearing was of an inspector using a camera to take photographs of rodent droppings (which are presumably a health and safety violation in a food establishment) to show they existed inside a particular facility.

8. Another reason an inspector would take photographs would be to establish whether the product is interstate commerce. An inspector could take a photograph of the packing materials on the box in a food establishment to later determine whether it had been shipped from out of state.

9. Inspectors can also document through photographs whether a facility is operating beyond the scope of its permit or license. For example, an entity may be permitted to operate as a warehouse, but during the inspection it may be discovered that the entity is also repacking seafood or spices. A

photograph of the unlicensed activity can be included in the inspection report to establish the improper activity.

10. Finally, photographs are helpful for follow-up inspections to establish whether a violation still exists. For example, a piece of equipment may be broken or dirty in violation of safety regulations during an inspection. On the follow-up inspection, a comparison can be made to a photograph taken during the original visit to establish if it has been repaired or cleaned.

11. Inspectors are trained to take photographs during an inspection and how they can be used. As stated in the Protocol and supported by the testimony of the inspectors, an inspector must have a need for taking a picture, such as a suspected violation, and cannot take pictures for no reason.

12. In addition to instructing inspectors on how to use photographs, the Protocol advises inspectors on what types of documents they can sign as long as there are no restrictions on their ability to conduct the inspection. Although they are allowed to sign a "Sign-In/Sign-Out" sheet, they are not to sign "waivers, nondisclosure, confidentiality agreements may include language that inhibits our authority to conduct the inspection." If faced with these documents, they are to refuse to sign them; if denied entry by the entity being inspected, the inspector is instructed to contact the Department.

March 9, 2020

13. On March 9, 2020, Mr. Kilgore and Mr. Ojha visited Tampa Maid's facility to conduct an HAACP and FDA contract inspection. Mr. Kilgore was the lead inspector and was training Mr. Ojha.

14. Upon arrival, the inspectors were asked to sign a COVID protocol acknowledgment or questionnaire. When the inspectors refused to sign the document, Tampa Maid accepted their verbal answers to the COVID questions.

15. Then, as a prerequisite to entering the part of the Facility the inspectors were to inspect, Rod Stokes, Tampa Maid's Director of Food Safety and Quality Assurance, asked the inspectors to sign a ledger titled "Visitors

Register," located at a desk in the office of the Facility. The Visitors Register was located on a desk next to a large placard which stated, "FOOD DEFENSE. PLEASE SIGN IN."

16. Next to the Visitors Register and underneath the placard was a document titled, "Visitor's Information" and is copied below:

**VISITOR INFORMATION
PLEASE FOLLOW THESE RULES:**

1. SIGN IN
2. NO JEWELRY IS ALLOWED IN THE PROCESSING AREA
3. NO GUM, FOOD, OR TOBACCO IS ALLOWED IN THE PROCESSING AREA
4. HAIR NETS AND BEARD NETS MUST BE WORN IN THE PROCESSING AREA
5. HEARING PROTECTION MUST BE WORN
6. VISITOR LAB COATS AND WILL BE ISSUED
7. NO OPEN TOED SHOES ALLOWED
8. NO CAMERAS ALLOWED
9. HANDS MUST BE WASHED AND SANITIZED WHEN ENTERING THE PROCESSING AREA
10. PLEASE DO NOT TOUCH THE EQUIPMENT OR PRODUCT
11. BE CAREFUL OF MOVING EQUIPMENT, FORKLIFTS, AND WET FLOORS.
12. NO WEAPONS ALLOWED
13. REPORT ANY INTESTINAL ILLNESS OR INFECTED WOUNDS
14. ENJOY YOUR VISIT!

By signing the visitor's log you attest that you understand the above rules and agree to follow them.

The "Visitor Information" sheet included a list of 14 items typed in "ALL CAPS" including instructions (such as "sign in," "be careful of moving equipment," "do not touch the equipment," and "report any intestinal illness") and prohibitions (for jewelry, gum, food, tobacco, open-toed shoes, and weapons). The item at issue is located in the middle of the list: "8. No Cameras Allowed." At the very bottom of this document, after being instructed to "enjoy your visit," in a smaller font and not capitalized, was a conclusion that, by signing the visitor's log (presumably the same as the "Visitor's Register") a visitor was agreeing to follow the 14 listed statements.

17. Both inspectors had visited the Facility on previous occasions and both had signed the Visitors Register. Mr. Ojha claimed he did not recall the "no camera" instruction listed as number eight on the Visitor Information sheet and did not agree to it, nor did he follow the instructions. Rather, he kept the Department-issued phone, which had the camera, in his back pocket during the inspection.

18. Mr. Kilgore remembered previously signing the Visitors Register, but he did not notice the Visitor Information language. He explained that the Visitor Information sheet was not attached to the Visitors Register. If he had noticed the language, he would not have signed the ledger. He also claimed that he always kept the Department issued phone with him during inspections.

19. When the Department inspectors refused to perform the inspection without their cameras on March 9, 2020, Mr. Stokes would not allow them to proceed. Mr. Stokes did not believe the inspectors had the authority to use a camera during the inspection, and he demanded that the inspectors or the Department give him the legal basis for the Department's authority to bring cameras into a facility. Although there was a discussion between Mr. Stokes and Department staff, nothing was provided to Mr. Stokes to change his mind.

20. Ultimately, Mr. Kilgore informed Mr. Stokes that they would not conduct the inspection without their phones and that prohibiting them from entering the Facility with cameras could result in a refusal of inspection. Mr. Stokes continued to refuse to let the inspectors proceed into the Facility with their Department-issued phones.

21. No inspection took place on March 9, 2020, and there is no evidence the Tampa Maid Facility has been inspected since that time.

CONCLUSIONS OF LAW

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

23. The Department is required to prove the allegations in its Administrative Complaint by clear and convincing evidence. *See Dep't of Banking & Fin. v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987).

24. 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). The court in *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), stated that:

[C]lear 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 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. At issue is whether Tampa Maid's prohibition of the Department's inspectors to enter the Facility with their cameras violated section 500.147. This section explicitly provides that the Department be given "free access ... for the purpose of inspecting such establishment" and to ensure compliance with food safety rules:

500.147 Inspection of food establishments, food records, and vehicles.—
(1) The department or its duly authorized agent shall have *free access at all reasonable hours to any food establishment*, any food records, or any vehicle being used to transport or hold food in commerce *for the purpose of inspecting such establishment*,

records, or vehicle to determine whether this chapter or any rule adopted under this chapter is being violated; to secure a sample or a specimen of any food after paying or offering to pay for such sample; to see that all sanitary rules adopted by the department are complied with; to facilitate tracing of food products in the event of a food-borne illness outbreak or identification of an adulterated or misbranded food item; or to enforce the special-occupancy provisions of the Florida Building Code which apply to food establishments.
(emphasis added).

Statutory Interpretation

26. There is no dispute that Tampa Maid denied the inspectors entry to the Facility as long as they carried their cameras. Tampa Maid argues the use of cameras or the taking of photography is not mentioned in the Food Safety Act, and therefore, the inspectors had no authority to bring in cameras or take photographs of alleged violations under the statute. The Department asserts that it has the authority to have free access to food facilities to investigate and enforce federal and state safety regulations. It also asserts that the Food Safety Act gives the Department the right to inspect food facilities freely, without restraints or restrictions.

27. Tampa Maid is correct that the use of photography is not expressly mentioned for in the Food Safety Act. Therefore, we must determine whether the use of cameras can be otherwise interpreted from the statutory language. The general principles relating to the interpretation of statutes are summarized below:

It is well established that the construction of a statute is a question of law reviewable de novo. *Dixon v. City of Jacksonville*, 774 So. 2d 763, 765 (Fla. 1st DCA 2000). Legislative intent is the polestar that guides this Court's statutory construction analysis. *See State v. J.M.*, 824 So. 2d 105, 110 (Fla. 2002) (citation omitted). In construing a statute, th[e] Court must look to the statute's plain language. *See Fla. Dep't of Educ. v. Cooper*, 858 So.

2d 394, 395 (Fla. 1st DCA 2003); *Jackson County Hosp. Corp. v. Aldrich*, 835 So. 2d 318, 328- 29 (Fla. 1st DCA 2002); *see also State v. Rife*, 789 So. 2d 288, 292 (Fla. 2001)(noting that legislative intent is determined primarily from the language of a statute). Where the language of a statute is clear and unambiguous, it must be given its plain and ordinary meaning. *Cooper*, 858 So. 2d at 395 (citations omitted). Where a statute is ambiguous, courts may then resort to the rules of statutory construction. *BellSouth Telecomms., Inc. v. Meeks*, 863 So. 2d 287, 289 (Fla. 2003).

Bruner v. GC-GW, Inc., 880 So. 2d 1244, 1246-47 (Fla. 1st DCA 2004).

28. As an initial matter, it must be determined what is the scope of the Department's authority and the intent of the Legislature in giving the Department this authority. The Food Safety Act is intended to:

- (1) Safeguard the public health and promote the public welfare by protecting the consuming public from injury by product use and the purchasing public from injury by merchandising deceit, flowing from intrastate commerce in food;
- (2) Provide legislation which shall be uniform, as provided in this chapter, and administered so far as practicable in conformity with the provisions of, and regulations issued under the authority of, the Federal Food, Drug, and Cosmetic Act; the Agriculture Marketing Act of 1946; and likewise uniform with the Federal Trade Commission Act, to the extent that it expressly prohibits the false advertisement of food; and
- (3) Promote thereby uniformity of such state and federal laws and their administration and enforcement throughout the United States and in the several states.

§ 500.02, Fla. Stat.

29. Given the important public interest provided in section 500.02, the Legislature clearly provided the Department with inspection and investigatory authority which was intended to be broad and include, *inter*

alia, the use of evidentiary collecting devices. See *Dow Chem. Co. v. U.S.*, 476 U.S. 227 (1986); *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246, 252 (1977) ("Any administrative agency empowered to investigate complaints and allegations of wrongdoing must have a broad discretion if it is to function at all."); *Alaska State Comm'n for Human Rights v. Anderson*, 426 P.3d 956, 963 (Alaska 2018) (finding statute tasking agency with investigating discrimination and requiring it to keep investigations confidential had the authority to limit participants during investigatory interviews).

30. The Supreme Court's discussion in *Dow Chemical* is persuasive guidance. There, a company found in violation of the federal Clean Air Act claimed that the agency tasked with enforcing that Act had no authority to use aerial photography to implement its statutory power for conducting a site inspection. The Court held:

Congress has vested in EPA certain investigatory and enforcement authority, without spelling out precisely how this authority was to be exercised in all the myriad circumstances that might arise in monitoring matters related to clean air and water standards. *When Congress invests an agency with enforcement and investigatory authority, it is not necessary to identify explicitly each and every technique that may be used in the course of executing the statutory mission.* ... Regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted. (emphasis added).

476 U.S. at 233.

31. Although the *Dow Chemical* Court did not address whether the result would have been the same if the photograph had been taken during an in-person inspection, here Tampa Maid had no reasonable expectation of privacy since it operates and is regulated under the purview of both federal and state agencies. See *U.S. v. New England Grocers Supply Co.*, 488 F. Supp. 230, 238 (D. Mass 1980)(allowing FDA to proceed with warrantless inspections;

finding FDA had authority to conduct inspections and did not violate Fourth Amendment); *U.S. v. Gel Spice Co., Inc.*, 773 F.2d 427 (2d Cir. 1985)(denying suppression of evidence of photographs taken during FDA inspections; finding photographs taken during inspection were lawfully obtained); *U.S. v. Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371, 1375-76 (D. Del. 1972)("if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope and frequency is to be preserved, the protections afforded by a warrant would be negligible." (citations omitted)); and *Contreras v. City of Chicago*, 119 F.3d 1286, 1290 (7th Cir. 1997) (rejecting argument that inspections were unnecessary to further the regulatory scheme; noting courts are not tasked with "evaluating the necessity of each particular aspect of a regulatory scheme.").

32. As explained in *United States v. Lagrou Distribution System, Inc.*, 2004 WL 524438 (N.D. Ill. Feb. 2, 2004):

It is well established that a business owner's expectation of privacy in commercial property is significantly less than such expectation in a private home. *See New York v. Burger*, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987). Further, any expectation of privacy is even further attenuated in commercial property that is used in a "closely regulated" industry. *See id.* In a closely regulated industry, such as the food storage and shipping industry, warrantless searches do not violate the Fourth Amendment, provided that such searches are within the regulatory scheme.

Id. at *5.

33. Moreover, the Department has explicit authority to enforce health and safety regulations. The Legislature gave the Department oversight over "the administration and enforcement" of the Food Safety Act "in order to prevent fraud, harm, adulteration, misbranding, or false advertising in the

preparation, manufacture, or sale of articles of food" and "to enforce the provisions of this chapter relating to the production, manufacture, transportation, and sale of food, as well as articles entering into, and intended for use as ingredients in the preparation of, food." § 500.032, Fla. Stat. *See also* § 500.171, Fla. Stat. (giving the Department authority to bring actions to establish and "enjoin the violation or threatened violation of any provision of this chapter, or rule adopted under this chapter" by a presentation of competent and substantial evidence).

34. As stated above, the legislative intent of the Food Safety Act is to protect the public from injury that may be caused by the consumption of manufactured and processed food. As in *Dow Chemical*, it was unnecessary for the Florida Legislature to explicitly include the use of cameras, a thermometer, flashlight, pen, or paper in chapter 500 for the Department to utilize such equipment in conducting its inspections.

35. Next, a review of the Food Safety Act's plain language to assess whether it is ambiguous is warranted. Respondent is correct that the term "camera" does not appear within the Food Safety Act. As stated above, however, the Department is given the authority to "have free access ... for the purpose of inspecting," and "charged with the administration and enforcement of this chapter." Additionally, the Department is given the power to collect, report, and illustrate information in aid of investigations. Section 500.148 explicitly provides,

500.148 Reports and dissemination of information; confidentiality.—

(1)(a) Information that is deemed confidential under 21 C.F.R. s. 20.61, s. 20.62, or s. 20.88, or 5 U.S.C. s. 552(b), and that is provided to the department during a joint investigation concerning food safety or food-borne illness, as a requirement for conducting a federal-state contract or partnership activity, or for regulatory review, is

confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

(b) Such confidential and exempt information may not be disclosed except under a final determination by the appropriate federal agency that the information is no longer entitled to protection or pursuant to an order of the court.

(c) *This section does not prohibit the department from collecting, reporting, or illustrating the results of these investigations.*

(emphasis added).

36. Neither "inspect," "investigate," nor "illustrate" are defined within the Food Safety Act, or within rule chapter 5K-4. If a term is not defined in rule or statute, its common ordinary meaning applies. *See Cole Vision Corp. v. Dep't of Bus. & Prof'l Reg.*, 688 So. 2d 404, 410 (Fla. 1st DCA 1997). It is appropriate to refer to dictionary definitions when construing statutes to ascertain the plain and ordinary meaning of the words used therein. *See Debaun v. State*, 213 So. 3d 747, 751 (Fla. 2017); *Sch. Bd. of Palm Beach Cty. v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009).

37. Merriam Webster's online dictionary defines "inspect" as "to view closely in critical appraisal" or "to examine officially." *See* Definition of "inspect" at <https://www.merriamwebster.com/dictionary/inspect> (last visited April 5, 2021). The same dictionary defines "investigate" as "to observe or study by close examination of systematic inquiry." *See* Definition of "investigate" at <https://www.merriam-webster.com/dictionary/investigate> (last visited April 5, 2021). Finally, this dictionary defines "illustrate" as "to show clearly." *See* Definition of "illustrate" at <https://www.merriamwebster.com/dictionary/illustrate> (last visited April 5, 2021).

38. In the administrative law context, just as an inspector might use the internet to determine a facility's business hours, a phone to schedule an inspection, a flashlight to illuminate poorly lit areas within a facility, or a

paper and pencil to record those observations, a camera is an effective (and perhaps more accurate) tool that would be useful during an official examination or close examination of systematic inquiry. *See U.S. v. Acri Wholesale Grocery Co.*, 409 F. Supp. 529, 533 (S.D. Iowa 1976) (noting once the validity of the inspection is established, the propriety of a photographic "search" is coextensive with the validity of the inspection (citations omitted)).

39. Under Tampa Maid's interpretation of the statutory language, the Department would be precluded from using any tools not specifically mentioned in the Food Safety Act when investigating or inspecting an establishment. This interpretation conflicts with the well-established principle that interpretations of statutes that lead to absurd results should be avoided. *See Murray v. Mariner Health*, 994 So. 2d 1051 (Fla. 2008).

40. Moreover, Tampa Maid's concerns regarding the exposure of trade secrets are ill-founded. Specifically, Respondent argues that if the Department inspectors are permitted to bring into processing or manufacturing facilities to potentially take photographs, those photographs might be subject to a request for production pursuant to chapter 119, Florida Statutes, and such a production might reveal confidential business information. This hypothetical ignores the specific, and applicable public records exemptions found within both federal and state statutes and reiterated in the FDA contract. *See* §§ 500.148, 688.403, and 812.081, Fla. Stat.

41. In fact, there was no evidence at the hearing that the Department has ever revealed trade secrets obtained as part of a regulatory inspection nor asserted the inapplicability of the exemption from public records disclosure. Although Tampa Maid's concerns may be valid, there are ample statutory protections that address these concerns.

42. In summary, the undersigned finds that the use of cameras is within the Department's statutory authority to conduct free inspections and to collect and illustrate information for the enforcement of the Food Safety Act.

Necessity of Photographic Evidence

43. Tampa Maid also argues photographic evidence is not necessary for the Department to properly administer the Food Safety Act, and points to evidence that the Department's inspectors had not taken photographs of its Facility on past inspections. Although they may not always be necessary, the photographs could be evidence to support the Department's prosecution of violations of the Food Safety Act.

44. It is well known that photographs can be used as evidence of regulatory violations. *See Lamar Advertising Company-Lakeland v. Dep't of Transp.*, 2007 WL 1697095, at *2 (DOAH June 8, 2007; DOT Sept. 7, 2007) (referencing photographs taken before and after an inspection to show violation of abandoned billboard); *Dep't of Envir. Protection v. Ravan*, 2018 WL 3131988, at *2 (DOAH June 8, 2018) (finding inspector's testimony, analysis, and photographs of wetlands established the filled area consisted of wetlands and covered around 0.11 acres).

45. In fact, a lack of photographic evidence can lead to a dismissal of an administrative complaint for health and safety violations. *See Dep't of Prof. Reg., Bd. of Cosmetology v. Jyles R. Garmon d/b/a Blackmore Beauty Salon*, 1988 WL 617880, at *2 (DOAH Aug. 31, 1988; DPBR Jan. 30, 1989)(dismissing complaint where DPR failed to offer into evidence any photographs showing the conditions of the salon at the time of the inspection; finding the uncorroborated testimony of the investigator was too vague to allow disciplinary action to be taken). As such, the undersigned finds photographs are useful tools authorized under the Department's powers to investigate and prosecute potential safety violations.

46. Ironically, Tampa Maid offered photographs into evidence at the final hearing of the front desk where it kept its Visitors Register, placard, and Visitor Information list. It did this to "illustrate" the setting, which the undersigned would have otherwise had to imagine based on the testimony. The undersigned rejects the argument that Tampa Maid makes that the

Department cannot take and use similar photographs to illustrate the conditions of a food establishment during an inspection, or that such evidence is unnecessary.

Estoppel

47. Florida Maid next argues the Department is estopped, or otherwise equitably barred, from using cameras because its inspectors previously agreed to Tampa Maid's "no-camera" policy by signing the Visitors Register.

48. "As a general rule, equitable estoppel will be applied against the state only in rare instances and under exceptional circumstances." *Dep't of Rev. v. Anderson*, 403 So. 2d 397, 400 (Fla. 1981). Detrimental reliance or estoppel based on a government's actions requires:

- (a) a representation as to a material fact that is contrary to a later-asserted position;
- (b) reliance on that representation; and,
- (c) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon.

Council Bros., Inc. v. City of Tallahassee, 634 So. 2d 264, 266 (Fla. 1st DCA 1994). In other words, equitable estoppel must include some positive act upon which Tampa Maid had a right to rely and did rely to its detriment. See *Hoffman v. State, Dep't of Mgmt. Servs., Div. of Ret.*, 964 So. 2d 163, 166 (Fla. 1st DCA 2007); *Wise v. Dep't of Mgmt. Servs., Div. of Ret.*, 930 So. 2d 867, 873 (Fla. 2d DCA 2006).

49. To establish equitable estoppel as a defense to the violation asserted in the Administrative Complaint, Tampa Maid must prove the elements by clear and convincing evidence. *Hoffman*, 964 So. 2d at 166.

50. Here, no evidence establishes the Department inspectors made representations or explicitly agreed not to use their cameras during their inspections. The "no camera" language was not contained in a separate

acknowledgment form signed by each guest. Neither Mr. Ojha nor Mr. Kilgore noticed the "no camera" language on the document that was located next to the ledger prior to their inspection on March 9, 2020. To the contrary, Mr. Ojha testified that even if he had agreed to the "no camera" condition by signing the Visitors Register in the past, he had taken his camera into the Facility anyway.

51. There was insufficient proof that the inspectors or the Department knowingly waived or even had the authority to waive the Department's authority to use cameras. *See Dep't of Rev. v. Anderson*, 403 So.2d 397 (Fla. 1981) (stating that equitable estoppel can be applied against the State in "rare instances and under exceptional circumstances"). As such, the Department is not estopped from insisting that their inspectors be allowed to use cameras, if necessary, during an inspection.

Unadopted Rule Challenge

52. Finally, Tampa Maid asserts that the use of cameras as described in the Protocol constitutes an unadopted rule and, thus, is unenforceable.⁶

53. Section 120.52(16), in part, defines a "Rule" as:

"Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. The term does not include:

(a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and

⁶ Tampa Maid did not bring this action as an unpromulgated rule challenge pursuant to section 120.56. However, section 120.57(1)(e) prohibits the undersigned and the Department from utilizing an unpromulgated rule or a rule that is an invalid exercise of delegated legislative authority. Furthermore, section 120.57(1)(e)2. allows an assertion that the agency has used an unpromulgated rule as a defense to an agency action.

which have no application outside the agency issuing the memorandum.

54. An unadopted rule is an agency statement that meets the definition of the term rule, as stated above, but that has not been adopted according to the requirements of section 120.54. § 120.52(20), Fla. Stat.

55. "[A]n agency interpretation of a statute which simply reiterates the legislature's statutory mandate and does not place upon the statute an interpretation that is not apparent from its literal reading ... is not an unpromulgated rule, and actions based on such an interpretation are permissible without requiring the agency to go through rulemaking." *Amerisure Mut. Ins. Co. v. Dep't of Fin. Servs.*, 156 So. 3d 520, 532 (Fla. 1st DCA 2015). In other words, if an agency statement "merely reiterates a law, or declares what is readily apparent from the text of the law ... the statement is not considered a rule." *Grabba-Leaf, LLC v. Dep't of Bus. & Prof'l Reg.*, 257 So. 3d 1205, 1207 (Fla. 1st DCA 2018).

56. As discussed above, the use of a camera during an inspection merely declares what is apparent in the Food Safety Act: the Department has the right to free access for inspections and can collect and illustrate information it discovers during these inspections for enforcement of the health and safety rules and regulations.

57. Moreover, the directions in the Protocol for an inspector to notify a manager if access is restricted, or he or she is not permitted to take photographs or samples, is an internal policy that merely directs Division staff to alert Division management of how to handle a restriction to the free access authorized by statute. Bringing a potential violation of section 500.147(1) to the attention of Division leadership is not a "rule" as defined by section 120.52(16). The direction to staff does not implement, interpret, or prescribe law or policy, nor does it describe the Division's procedural or practice requirements for enforcing the Food Safety Act upon applicants or licensees. See *Coventry First, LLC v. Ofc. of Ins. Reg.*, 38 So. 3d 200, 204-05

(Fla. 1st DCA 2010) ("In determining whether an agency statement is an unpromulgated rule, the effect of the statement must be also taken into consideration.").

58. Additionally, this direction to staff easily fits within the statutory exemption for "[i]nternal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum." § 120.52(16)(a), Fla. Stat.

59. Here, the Protocol simply restates the Department's explicit authority to inspect, illustrate, and enforce safety rules and regulations, and the implicit authority of inspectors to utilize cameras and other tools to conduct inspections. Importantly, the policy does not place upon Tampa Maid, or any other licensed food establishment, an unadopted regulatory requirement.

60. Neither the use of cameras or photographs, nor the method in addressing when a food establishment prohibits cameras during an inspection, as described in the Department's Protocol, are unpromulgated rules.

Penalties

61. Tampa Maid's refusal to allow the Department's inspectors into the Facility unless they agreed to its "no-camera" policy equates to a refusal of inspection. The Department presented clear and convincing evidence that Tampa Maid committed the alleged violation of section 500.147, which requires that food establishments provide "free access ... for the purpose of inspecting such establishment."

62. With regard to the penalties that should be imposed on Tampa Maid, section 500.121(1)(a) provides:

In addition to the suspension procedures provided in s. 500.12, if applicable, *the department may impose an administrative fine in the Class II category pursuant to s. 570.971 against any ... food establishment ... that violates this chapter, which*

fine, when imposed and paid, shall be deposited by the department into the General Inspection Trust Fund. The department *may revoke or suspend the permit of any such ...* food establishment if it is satisfied that the food establishment has ... [v]iolated this chapter.

63. Section 570.971(1)(b) provides that the Department may impose a fine not to exceed \$5,000 for each violation in the Class II category.

64. Rule 5K-4.035 further explains that the minimum fine for a Tier II violation is \$500 with adjustments for relevant aggravating and mitigating factors:

Tier II. Tier II violations shall result in the issuance of a stop-sale, or stop-use order and an administrative fine of \$500 up to the statutory maximum. Aggravating factors, as defined in paragraph (6)(a) of this rule, shall warrant the adjustment of the fine upward per violation per aggravating factor and mitigating factors, as defined in paragraph(6)(b) of this rule, shall warrant the adjustment of the fine downward per violation per mitigating factor, but no fine shall exceed the statutory maximum as outlined in Section 570.971, F.S., as applicable ... For the purposes of this rule, the following violations shall be considered Tier II major violations:

* * *

f. Refusal to permit entry or inspection during operating hours as required by s. 500.147, F.S.

65. There was no evidence establishing any of the aggravating factors listed in rule 5K-4.035(6)(a).

66. Of the seven mitigating factors listed in the rule, only one is applicable: there was no evidence that Tampa Maid had any past disciplinary history. Fla. Admin. Code R. 5K-4.035(6)(b)5.

67. In addition, there was no evidence that Tampa Maid's belief that the Department was acting beyond its statutory authority was disingenuous.

Mr. Stokes attempted to resolve his concerns with the Department during the stand-off on March 9, 2020. Had the Department provided a copy of the contract with the FDA, the statutes exempting photographs collected during the inspection from public disclosure, a copy of the Protocol, or a copy of the FDA guidance regarding cameras, there may have been a different outcome. There was no evidence at the hearing that the Department made any attempt to provide any of this information to Tampa Maid before issuing the Administrative Complaint.

68. The Department seeks the maximum allowable fine of \$5,000 but fails to provide evidence of why the maximum amount is warranted. Given the totality of the circumstances, including no past disciplinary history, a fine of \$1,000 is appropriate.

69. Furthermore, suspension of Tampa Maid's Facility and processing of seafood is appropriate under section 500.12(4)(b), which provides that denial of access for an inspection is grounds for suspending "the permit until access to the food establishment is freely given by the operator."

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a Final Order be entered as follows:

1. Finding that Tampa Maid denied the Department free access to its facility in violation of section 500.147, Florida Statutes, as alleged in the Administrative Complaint, when it refused to let inspectors enter with cameras.

2. Requiring Tampa Maid to pay an administrative fine in the amount of \$1,000.

3. Suspending Tampa Maid's Food Permit (Food Permit No. 28143) until such time that access to the food establishment is freely given to the Department.

DONE AND ENTERED this 12th day of April, 2021, in Tallahassee, Leon
County, Florida.



HETAL DESAI
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of April, 2021.

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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.