STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,	)	
Petitioner,	)	
vs.	)	Case No. 09-4146
URBAN HOSPITALITY VENTURES, INC., d/b/a DECOSEY'S RESTAURANT AND LOUNGE,	)	
Respondent.	)	

RECOMMENDED ORDER

On December 1, 2009, a formal administrative hearing in this case was held by video teleconference in Tampa and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael B. Golen, Esquire
Department of Business and Professional Regulation
1940 North Monroe Street, Suite 40
Tallahassee, Florida 32399

For Respondent: Robert DeCosey, pro se
Urban Hospitality Ventures, Inc., d/b/a DeCosey's Restaurant and Lounge
2349 Lake Debra Drive, No. 617
Orlando, Florida 32835

STATEMENT OF THE ISSUES

The issues in the case are whether the allegations of the Administrative Complaint are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated October 10, 2008, the Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (Petitioner), alleged that Urban Hospitality Ventures, Inc., d/b/a DeCosey's Restaurant and Lounge (Respondent), failed to derive at least 51 percent of gross revenue from sales of food and non-alcoholic beverages during the period from April 1, 2008, to July 31, 2008. The Respondent disputed the allegation and requested an administrative hearing. On August 3, 2009, the Petitioner forwarded the request to the Division of Administrative Hearings, and the dispute was scheduled for hearing. The hearing was continued and rescheduled upon a joint motion for continuance filed by the parties.

At the hearing, the Petitioner presented the testimony of three witnesses and had Exhibits numbered 1A through 1H admitted into evidence. The Respondent testified on his own behalf.

The Transcript of the hearing was filed on December 18, 2009. On that same date, the Respondent filed a letter dated December 12, 2009, that has been treated as a Proposed

Recommended Order. The Petitioner filed a Proposed Recommended Order on December 28, 2009.

FINDINGS OF FACT

1. The Petitioner is the state agency responsible for regulation of establishments licensed for the sale of alcoholic beverages in the State of Florida.

2. Robert DeCosey is the sole owner and operator of the Respondent.

3. At all times material to this case, the Respondent held Special Restaurant License No. 63-05489, Series 4-COP/SRX.

4. Pursuant to law, the Respondent must derive at least 51 percent of his gross sales from food and non-alcoholic beverages in order to maintain the license, and the Respondent is required to maintain sufficient records to document such sales.

5. The Petitioner conducted an audit for the period of April 1, 2008, through July 31, 2008.

6. Based upon information that the Respondent provided to the auditor, the auditor estimated that 41.2 percent of the Respondent's gross revenue came from the sales of food and non-alcoholic beverages.

7. The sales information provided to the auditor by the Respondent lacked supporting documentation and was not reliable.

8. The Respondent maintained no verifiable information regarding his gross sales during the audit period. The Respondent provided no credible information regarding inventory levels, and, accordingly, the auditor was unable to calculate the Respondent's expenses. Sales prices were not provided during the audit, and, therefore, the calculation of revenue was little more than speculative.

9. At the hearing, the Respondent testified that the "business model" he utilized focused on "special events" and that he did not open the restaurant on a routine basis. He testified that food was available during the events and served buffet-style. There was no documentation to support the testimony, and it has been rejected.

10. The Respondent testified that he rented the facility during non-business hours to patrons who wanted to bring in their own food and alcoholic beverages, some of whom may have left food or alcohol behind after the private event concluded. He also testified that he opened the facility for events during which no food was available. Although the Petitioner asserted subsequent to the hearing that such practices were violations of state beverage law, the violations were not alleged in the Administrative Complaint and are outside the scope of this proceeding.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2009).

12. The Petitioner has the burden of proving by clear and convincing evidence the factual allegations set forth in the Administrative Complaint against the Respondent. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

13. Subsection 561.20(2)(a)4., Florida Statutes (2007), provides that a "special license" to sell alcoholic beverages may be issued to a restaurant of appropriate size and service capacity as long as the restaurant derives at least 51 percent of its gross revenue from the sale of food and nonalcoholic beverages.

14. Florida Administrative Code Rule 61A-3.0141 provides, in relevant part, as follows:

> 61A-3.0141 Special Restaurant Licenses.
>
> (1) Special restaurant licenses in excess of the quota limitation set forth in subsection 561.20(1), Florida Statutes, shall be issued to otherwise qualified applicants for establishments that are bona fide restaurants engaged primarily in the service of food and non-alcoholic beverages, if they qualify as special restaurant licensees as set forth in subsection (2) of

this rule. Special restaurant licensees must continually comply with each and every requirement of both subsections (2) and (3) of this rule as a condition of holding a license. Qualifying restaurants must meet the requirements of this rule in addition to any other requirements of the beverage law. The suffix “SRX” shall be made a part of the license numbers of all such licenses issued after January 1, 1958.

* * *

(3) Qualifying restaurants receiving a special restaurant license after April 18, 1972 must, in addition to continuing to comply with the requirements set forth for initial licensure, also maintain the required percentage, as set forth in paragraph (a) or (b) below, on a bi-monthly basis. Additionally, qualifying restaurants must meet at all times the following operating requirements:

(a) At least 51 percent of total gross revenues must come from retail sale on the licensed premises of food and non-alcoholic beverages. Proceeds of catering sales shall not be included in the calculation of total gross revenues. Catering sales include food or non-alcoholic beverage sales prepared by the licensee on the licensed premises for service by the licensee outside the licensed premises.

1. Qualifying restaurants must maintain separate records of all purchases and gross retail sales of food and non-alcoholic beverages and all purchases and gross retail sales of alcoholic beverages.

2. The records required in subparagraph (3)(a)1. of this rule must be maintained on the premises, or other designated place approved in writing by the division for a period of 3 years and shall be made available within 14 days upon demand by an

officer of the division. The division shall approve written requests to maintain the aforementioned records off the premises when the place to be designated is the business office, open 8 hours per work day, of a corporate officer, attorney, or accountant; the place to be designated is located in the State of Florida; and the place to be designated is precisely identified by complete mailing address.

3. Since the burden is on the holder of the special restaurant license to demonstrate compliance with the requirements for the license, the records required to be kept shall be legible, clear, and in the English language.

4. The required percentage shall be computed by adding all gross sales of food, non-alcoholic beverages, and alcoholic beverages and thereafter dividing that sum into the total of the gross sales of food plus non-alcoholic beverages. (Emphasis added)

* * *

(d) Full course meals must be available at all times when the restaurant is serving alcoholic beverages except alcoholic beverage service may continue until food service is completed to the final seating of restaurant patrons for full course meals. A full course meal as required by this rule must include the following:

1. Salad or vegetable;

2. Entree;

3. Beverage; and

4. Bread.

(e) For purposes of determining required percentages, an alcoholic beverage means the

> retail price of a serving of beer, wine, straight distilled spirits, or a mixed drink.

15. The evidence in this case clearly establishes that the Respondent violated Subsection 561.20(2)(a)4., Florida Statutes (2007), and Florida Administrative Code Rule 61A-3.0141 by failing to comply with the requirements for maintaining the license. The Respondent failed to maintain records sufficient to establish that at least 51 percent of total gross revenues were derived from retail sale on the licensed premises of food and non-alcoholic beverages.

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 Alcoholic Beverages and Tobacco, enter a final order revoking the special license held by Urban Hospitality Ventures, Inc., d/b/a DeCosey's Restaurant and Lounge.

DONE AND ENTERED this 27th day of January, 2010, 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 27th day of January, 2010.

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.