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**Final agency action regarding decision below:**

**REQHRG Date hearing requested**

**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

In the Matter of the Restaurant Spirituous  
Liquor License No. 12075896, Issued to:

No. 06A-0003-LIQ

Randy D. Nations, Agent  
Clock Tower Operations LLC  
Mickey's Hangover  
4312 N. Brown Avenue  
Scottsdale, AZ 85251

**ORDER GRANTING, IN PART,  
RESPONDENT'S APPLICATION FOR  
AWARD OF ATTORNEY'S FEES AND  
OUT OF POCKET EXPENSES**

Pending before the Office of Administrative Hearings is Respondent Mickey's Hangover's October 6, 2006 Application for Award of Attorney's Fees and Out of Pocket Expenses (the "Application"), and the Department of Liquor Licenses and Control's November 1, 2006 Objection to the Application. Pursuant to the Application, Mickey's seeks an award of fees in the amount of \$42,465.00, and costs in the amount of \$12,849.44. For the reasons set forth herein, the Application is granted in part.

Background

This case presented the question of whether Mickey's Hangover ("Mickey's"), a licensee of the Arizona Department of Liquor Licenses and Control (the "Department"), was subject to discipline for acts or omissions in violation of Arizona Revised Statutes ("A.R.S.") §§ 4-205.02(G), 4-210(A)(7), 4-244(7) and/or 4-210(A)(2), and/or Arizona Administrative Code ("A.A.C.") R19-1-306. The main issue presented was whether Mickey's had derived at least 40% of its gross revenue from the sale of food between June 1, 2004 and May 31, 2005 as required under its series 12 restaurant spirituous liquor license. The parties presented evidence at a formal administrative hearing on June 28, 2006. Both parties submitted post-hearing memoranda. On August 9, 2006, the Administrative Law Judge issued an Administrative Law Judge Decision (the "Decision") that found in Mickey's favor on all counts. The Department adopted the Decision by Order dated September 6, 2006. Thereafter, Mickey's sought an award of attorney's fees and costs pursuant to A.R.S. § 41-1007.

Office of Administrative Hearings  
1400 West Washington, Suite 101  
Phoenix, Arizona 85007  
(602) 542-9826



1           The Department argues that the term “substantially justified” requires only that  
2 the Department have had a reasonable basis for its decision, and that Mickey’s motion  
3 is not well taken because (i) the audit methodology on which the Department relied has  
4 been in place for over six years, and (ii) even applying Mickey’s own sales figures, the  
5 question as to whether Mickey’s met the 40% food revenue requirement was a close  
6 one. With regard to Ms. Miller’s conduct, the Department urged that notwithstanding the  
7 finding that Ms. Miller was negatively predisposed towards Mickey’s, and that such  
8 negative predisposition infected the entire audit process, the position it had taken with  
9 regard to Mickey’s was nonetheless substantially justified because “there was no  
10 evidence to suggest that Ms. Miller treated this particular audit any different than any  
11 other.” State’s Objection, at 7.

12           The Department’s arguments are not persuasive, and, with regard to Ms. Miller,  
13 not well considered. The Administrative Law Judge first addresses the Department’s  
14 arguments regarding Ms. Miller, as the resolution of that issue is in and of itself  
15 dispositive of whether the Department’s position in this case was substantially justified.

16           The Decision states, in Finding of Fact No. 13:

17                   While Ms. Miller denied at hearing that she had any agenda with  
18 regard to the audit of Mickey’s, the Administrative Law Judge is  
19 compelled to conclude, based upon the objective evidence of  
20 record, that Ms. Miller went into the audit with the intent to find that  
21 Mickey’s did not qualify for a restaurant spirituous liquor license,  
22 and to gather evidence that would support the revocation of that  
license. As described in more detail below, Ms. Miller’s negative  
predisposition towards Mickey’s infected the entire audit process.

23 Read literally, the Department’s assertion that “there was no evidence to suggest that  
24 Ms. Miller treated [Mickey’s] audit any different than any other” implies that Ms. Miller  
25 went into *every* restaurant audit that she conducted with an intent to find that the  
26 licensee should not be allowed to retain its license. As that surely cannot be the thrust  
27 of the Department’s argument, one is left to conclude that the Department is deliberately  
28 attempting to deflect from one of the core findings of the Decision, *i.e.*, that “Ms. Miller’s  
29 negative predisposition towards Mickey’s infected the entire audit process.”  
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1 This is no small point, because the Department is vicariously responsible for Ms. Miller's  
2 actions, and thus the reasonableness of those actions bear directly on the  
3 reasonableness of the Department's position, the precise issue framed by the  
4 Application.

5 There is only one way to construe the findings and conclusions of the Decision  
6 insofar as Ms. Miller is concerned: Her actions were not reasonable and they impacted  
7 the entire audit process. Thus, sufficient grounds exist on this basis alone to conclude  
8 that the Department's position in this matter was not substantially justified.

9 Although an analysis of Ms. Miller's conduct is alone sufficient to conclude that  
10 the Department's position in this matter was not substantially justified, other grounds  
11 also exist. First, the Department appears to contend that because it has employed the  
12 cost of sale methodology for over six years to determine food sales in restaurant audits,  
13 that methodology *must* be reliable. In fact, the Department's counsel argued: "This  
14 methodology was set up by a CPA, *and was found to be the best method to ensure that*  
15 *accurate and truthful audits are being conducted.*" State's Objection, at 3 (emphasis  
16 added).

17 The evidence was contrary to the Department's argument. Robert Duskin, the  
18 CPA on whom the Department relied for its industry standards, testified at hearing that  
19 the cost of sale methodology was *not* appropriate for the type of audit conducted by the  
20 Department in this case. Decision, Finding of Fact No. 32. Further, as set forth in the  
21 Decision, the cost of sale methodology results in an estimate only, and the Department  
22 took no steps to confirm that estimate against Mickey's actual food revenue, although it  
23 could have done so. In view of these findings, the Department's position with respect to  
24 the audit methodology did not have a reasonable basis, and therefore was not  
25 substantially justified.

26 Second, the Department's argument that its position should be deemed  
27 substantially justified because Mickey's own sales figures revealed food revenues very  
28 close to the 40% requirement simply misses the point. The issue in this case was not  
29 the extent to which Mickey's own revenue calculations came close to the 40%  
30

1 requirement, as this was neither considered nor taken into account during the  
2 Department's audit. Instead, the issue is the reasonableness of the *Department's*  
3 approach. As set forth in the Decision and herein, the Department's approach was not  
4 reasonable, and thus not substantially justified.

5 Based on the foregoing, Mickey's is entitled to an award of fees and costs under  
6 A.R.S. § 41-1007.

7 Reasonable of Requested Fees and Costs

8 Citing *Wagenseller v. Scottsdale Memorial Hospital*, 147 Ariz. 370, 710 P.2d  
9 1025 (1985), Mickey's urged the following factors as relevant to the determination of  
10 whether an award of fees is reasonable:

- 11 (1) whether the unsuccessful party's claim or defense was  
12 meritorious;
- 13 (2) whether the litigation could have been avoided or settled and  
14 the successful party's efforts were completely superfluous in  
15 achieving the result;
- 16 (3) whether assessing fees against the unsuccessful party would  
17 cause an extreme hardship;
- 18 (4) whether the successful party prevailed with respect to all of the  
19 relief sought;
- 20 (5) whether the legal question presented was novel and whether  
21 such claim or defense have previously been adjudicated in this  
22 jurisdiction; and
- 23 (6) whether the award would discourage other parties with tenable  
24 claims or defenses from litigating or defending legitimate contract  
25 issues for fear of incurring liability for substantial amounts of  
26 attorney's fees.

27 Application, at 10.

28 The Administrative Law Judge finds the *Wagenseller* factors inapposite, as the  
29 question of whether a fee award in the instant case is appropriate in the first instance is  
30 governed by A.R.S. § 41-1007(A), and the *Wagenseller* factors do not add to this  
analysis. It appears that Mickey's is instead asserting the *Wagenseller* factors as

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1 criteria to be considered in determining the *amount* of fees and costs to which Mickey's  
2 is entitled. That analysis, however, is governed not by *Wagenseller* but by *Schweiger v.*  
3 *China Doll Restaurant*, 138 Ariz. 183, 673 P.2d 927 (App. 1983) and its progeny.

4 Having considered the Affidavits submitted by Joel Sannes (Lake & Cobb,  
5 P.L.C.) and Peter Schelstraete (Schelstraete Law Office), the Administrative Law Judge  
6 finds that the professional services rendered, and the hourly charges for those services,  
7 are generally reasonable. There is, however, a discernible duplication of effort due to  
8 Mickey's having engaged the services of two separate law firms, and such duplication  
9 must be taken into account in determining the overall reasonableness of the fees  
10 requested. The degree of duplication is not subject to ready or easy measure.  
11 However, the Administrative Law Judge finds that a close approximation can be  
12 reached by deducting from the fee request all hours claimed by Mr. Schelstraete on and  
13 after May 8, 2006, the date on which Lake & Cobb, Mickey's hearing counsel, began in  
14 earnest to undertake its preparation for hearing. The number of those hours (46.2),  
15 multiplied by Mr. Schelstraete's hourly rate (\$210.00), yields an adjustment in the  
16 amount of \$9,702.00.

17 With regard to Mickey's claims for costs, the Department has objected, on  
18 vagueness grounds, to the invoices for professional services submitted by Duskin &  
19 Duskin, CPA in the amount of \$4,350.00 for CPA Robert Duskin's services, and CL &  
20 Company Certified Public Accountants in the amount of \$5,000.00 for CPA Charlie  
21 Cucinello's services. Considering the services rendered by Messrs. Duskin and  
22 Cucinello, and the significance of their hearing testimony, and the relative comparability  
23 of the amounts billed by each, the Administrative Law Judge finds such costs to be  
24 reasonable.

1 Based on the foregoing,

2 **IT IS HEREBY ORDERED** that the Application is granted in part. Mickey's is  
3 awarded \$32,763.00 in fees and \$12,849.44 in costs.  
4

5 Done this day, November 13, 2006.  
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8 \_\_\_\_\_  
9 Daniel G. Martin  
10 Administrative Law Judge

11 Copy mailed this \_\_\_\_ day of November, 2006 to:

12  
13 Leesa Berens Morrison, Director  
14 Arizona Department of Liquor Licenses and Control  
15 800 W. Washington St., 5th Floor  
16 Phoenix, AZ 85007

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By \_\_\_\_\_