

October 17, 2013

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Michael Sample
Manager
Smethport Country Club
Re: Outsourcing Food Service

Dear Mr. Sample:

ISSUE: This is in response to your e-mail dated October 1, 2013, wherein you advised that the Smethport Country Club (“the Club”) is planning a change in its food service. Presently, the Club uses its own staff to prepare and serve food; however, the Club now desires to have an outside local business use the Club’s facilities to prepare and serve food that would be sold by the Club. The Club intends to pay this food service a percentage of the gross sales. You ask whether there are any legal issues that arise from this plan.

Records of the Pennsylvania Liquor Control Board (“Board”) indicate that Smethport Country Club holds Privately-Owned Public Golf Course Restaurant Liquor License No. PGR-326 (LID 65353) for premises located at 13065 Route 59, Box 335, Smethport, Pennsylvania.

OPINION: It is permissible, under certain conditions, for a licensee to enter into an agreement with a management company to operate the food service facilities of the restaurant licensee, including a privately-owned public golf course restaurant licensee. Section 102 of the Liquor Code [47 P.S. § 1-102] defines “management company” as “any entity employed or otherwise contracted by a licensee to operate, manage or supervise all or part of the operation of the licensed premises.” The Board has traditionally permitted management companies to operate licensed premises on behalf of licensee, provided that those companies do not have an unlawful pecuniary interest in the license.

Section 461(e.1) permits the utilization of a concessionaire by a privately-owned public golf course restaurant licensee; however, you specifically indicate that sales

would be handled by the licensee. Therefore, the concessionaire concept is inapplicable to your question. [40 Pa. Code § 5.82]. Section 3.1 of the Board's Regulations [40 Pa. Code § 3.1] defines "management contract" as an "agreement between a licensee and a management company to operate, manage or supervise all or part of the operation of the licensed premises." Section 3.141 of the Board's Regulations provides the following information regarding management contracts:

- a) A licensee may contract with another person to manage its licensed premises.
- b) A management contract must reserve to the licensee the capability to direct its own business.
- c) A management contract must be in writing, and a copy shall be maintained on the licensed premises where it shall be available for inspection by the Board.
- d) A management contract may not give a pecuniary interest to a management company.

[40 Pa. Code § 3.141].

As noted above, the Liquor Code prohibits anyone other than the licensee from having a pecuniary interest in the licensed business. [47 P.S. § 4-404]. A "pecuniary interest" is defined in section 1.1 of the Board's Regulations as follows:

An interest that sounds in the attributes of proprietorship. There is a rebuttable presumption of a pecuniary interest when a person receives 10% or more of the proceeds of the licensed business or when control is exercised by one or more of the following:

- (i) Employing a majority of the employees of the licensee.
- (ii) Independently making day-to-day decisions about the operation of the business.
- (iii) Having final authority to decide how the licensed business is conducted.

[40 Pa. Code § 1.1; *see also* Appeal of E-J Westside Inn Corp., 68 Pa. Cmwlth. 323, 449 A.2d 93 (1982)].

Agreements between licensees and management companies are reviewed by the Board's Bureau of Licensing on a case-by-case basis to ensure that no unlawful pecuniary interests exist in such agreements. Provided the management relationship, as evidenced by the management agreement, is approved by the Board, the management company could then lawfully manage the food service business in part of the licensed premises as proposed, but it must be the Club, and not the management company, which sells the food to patrons.

THIS OPINION APPLIES ONLY TO THE FACTUAL SITUATION DESCRIBED HEREIN AND DOES NOT INSULATE THE LICENSEE OR OTHERS FROM CONSEQUENCES OF CONDUCT OCCURRING PRIOR TO ITS ISSUANCE. THE PROPRIETY OF THE PROPOSED CONDUCT HAS BEEN ADDRESSED ONLY UNDER THE LIQUOR CODE AND REGULATIONS. THE LAWS AND POLICIES ON WHICH THIS OPINION IS BASED ARE SUBJECT TO CHANGE BY THE LEGISLATURE OR THE PENNSYLVANIA LIQUOR CONTROL BOARD.

Very truly yours,

FAITH S. DIEHL
CHIEF COUNSEL

cc: Pennsylvania State Police,
Bureau of Liquor Control Enforcement
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