

May 20, 2015

Patrick McHugh, Esquire

RE: Westy's Beer Distributor, Inc.

Dear Mr. McHugh:

ISSUE: This office is in receipt of your letter, dated April 30, 2015, wherein you indicate that you represent a Pennsylvania distributor licensee. You explain that your client had a territorial agreement with a Pennsylvania manufacturer. You claim that the manufacturer terminated the agreement on thirty (30) days notice and without good cause. You assert that the Pennsylvania manufacturer's action was lawful because the manufacturer had designated itself as the primary distributor for its products.

However, you further explain that your client believes the manufacturer has cancelled other territorial agreements in a similar fashion. You add that the manufacturer paid compensation to the other distributors in the amounts of three (3) to five (5) times the distributor's annual sales from the preceding year. You state that your client was not offered any compensation. Therefore, you assert that the manufacturer has violated sections 431 and 492(18) of the Liquor Code.

OPINION: Modification, cancellation, termination, or rescission of distribution agreements is governed by sections 492(19) and 431(d) of the Liquor Code. Section 492(19) of the Liquor Code provides that:

It shall be unlawful . . . [f]or any manufacturer or any officer, agent or representative of any manufacturer to modify, cancel, terminate, rescind or not renew, without good cause, any distributing rights agreement, and in no event shall any modification, cancellation, termination, rescission or nonrenewal of any distributing rights agreement become effective for at least ninety (90) days after written notice of such modification, cancellation, termination, rescission, or intention not to renew has been served on the affected party and board by certified mail, return receipt requested, except by written consent

of the parties to the agreement. The notice shall state all the reasons for the intended modification, termination, cancellation, rescission or nonrenewal. The distributor or importing distributor holding such agreement shall have ninety (90) days in which to rectify any claimed deficiency, or challenge the alleged cause.

If the deficiency shall be rectified within ninety (90) days of notice, then the proposed modification, termination, cancellation, rescission or nonrenewal shall be null and void and without legal effect.

If the notice states as one of the reasons for the intended modification, cancellation, termination, rescission or [non]renewal that the importing distributor or distributor's equipment or warehouse requires major changes or additions, then if the distributor or importing distributor shall have taken some positive action to comply with the required changes or additions, the distributor or importing distributor shall have [been] deemed to have complied with the deficiency as set forth in the notice. The notice provisions of this section shall not apply if the reason for termination, cancellation or nonrenewal is insolvency, assignment for the benefit of creditors, bankruptcy, liquidation, fraudulent conduct in its dealings with the manufacturer, revocation or suspension for more than a thirty (30) day period of the importing distributor or distributor license.

[47 P.S. § 4-492(19)].

Section 431(d)(1) defines "good cause" as "the failure by any party to an agreement, without reasonable excuse or justification, to comply substantially with an essential, reasonable and commercially acceptable requirement imposed by the other party under the terms of an agreement." [47 P.S. § 4-431(d)(1)].

Further, section 431(d)(4) provides that:

The court of common pleas of the county wherein the licensed premises of the importing distributor or distributor are located is hereby vested with jurisdiction and power to enjoin the modification, rescission, cancellation or termination of a franchise or agreement between a manufacturer and importing distributor or distributor at the

instance of such importing distributor or distributor who is or might be adversely affected by such modification, rescission, cancellation, or termination, and in granting an injunction the court shall provide that no manufacturer shall supply the customers or territory of the importing distributor or distributor by servicing the territory or customers through other importing distributors or distributors or any other means while the injunction is in effect: Provided, however, That any injunction issued under this subsection shall require the posting of sufficient bond against damages arising from an injunction improvidently granted and a showing that the danger of irrevocable loss or damage is immediate and that during the pendency of such injunction the importing distributor or distributor shall continue to service the accounts of the manufacturer in good faith.

[47 P.S. § 4-431(d)(4)]. However, pursuant to section 4-431(d)(5) of the Liquor Code, the above “good cause” provisions do “not apply to Pennsylvania manufacturers whose principal place of business is located in Pennsylvania unless they name or constitute a distributor or importing distributor as a primary or original supplier of their products.” [47 P.S. § 4-431(d)(5)].

In your letter, you assert that you believe the termination of the agreement was lawful. Nevertheless, it is beyond this office’s authority to comment as to the lawfulness of the cancelled territorial agreement.

Regarding your assertion that a violation of section 492(18) has occurred because compensation was provided to other distributors upon termination of a territorial agreement, be advised that section 492(18) of the Liquor Code prohibits manufacturers from coercing distributors to enter into contracts or agreements and from taking any action which violates any provision of the Liquor Code. [47 P.S. § 4-492(18)]. Here, the territorial agreement is not being entered into; rather, the territorial agreement is being terminated. Therefore, the issue is whether the termination of the territorial agreement, which includes the payment of compensation to the distributor, violates section 492(18) the Liquor Code.

Whether such action is a violation of section 492(18) is a matter that should be investigated by the Pennsylvania State Police Bureau of Liquor Control Enforcement (“BLCE”). BLCE, not the Pennsylvania Liquor Control Board (“Board”), is responsible for investigating alleged violations of the Liquor Code

and enforcing the liquor laws in Pennsylvania. Therefore, this office is forwarding this matter to BLCE for its attention and possible investigation.

Please do not hesitate to contact this office should you have additional questions.

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
Jerry W. Waters, Director of Office of Regulatory Affairs
Tisha Albert, Director, Bureau of Licensing
Jeffrey Lawrence, Assistant Director, Bureau of Licensing

LCB Advisory Opinion No. 15-222