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April 12, 2007

OFFICIAL OPINION 2007-1

David Heath, Chairman
Indiana Alcohol and Tobacco Commission
Indiana Government Center South
Indianapolis, IN 46204

Dear Chairman Heath:

RE: Issuance of a retail beer permit to a limited liability company, one of whose members is a law enforcement officer

You have asked whether the Commission may issue a retail alcohol beverage permit to an Indiana Limited Liability Company ("LLC") restaurant owner, one of whose members is a law enforcement officer. You have also asked whether the Commission may issue a retail alcohol beverage permit to an LLC if the law enforcement officer is not a member of the applicant, but is a shareholder in a corporation that is a member of the LLC.

Brief Answer

Indiana's statutes, administrative rules and case law do not address the effect of an ownership interest by a law enforcement officer in a corporation that is a member of an LLC that applies for specific alcoholic beverage permits. While current Indiana law does not generally endorse or prohibit such ownership, the ATC should review the specific facts contained in an application to determine its legality.

The standards regarding the issue of remote ownership may be established by statute or through an administrative rule-making process.

Analysis

We understand that the applicant is seeking either a beer retailer's permit or a three-way permit, as defined in IC 7.1-1-3-47. The requirements regarding issuance of a

retailer's permit (of any type) to a limited liability company is set forth in IC 7.1-3-21-5.4 (emphasis added):

- (a) The commission shall not issue:
 - (1) an alcoholic beverage retailer's or dealer's permit of any type; or
 - (2) a liquor wholesaler's permit;to a limited liability company unless at least sixty percent (60%) of the membership interest is owned by persons who have been continuous and bona fide residents of Indiana for five (5) years. . . .

(c) Each manager and member of a limited liability company must possess all other qualifications required of an individual applicant for that particular type of permit.

Certain persons are specifically disqualified by IC 7.1-3-4-2 from holding a beer retailer's permit:

The commission shall not issue a beer retailer's permit, except as otherwise authorized in this title and subject to the other restrictions contained in this title, to the following persons:

- (4) A law enforcement officer^[1] or an officer who is not an elected officer of a municipal corporation, or governmental subdivision, or of this state, charged with any duty or function in the enforcement of this title.

Thus, a member of an LLC that has applied for an alcoholic beverage retailer's permit of any type must be qualified to hold the permit as if the application were made on the part of the individual. If a law enforcement officer is a member of the LLC applying for the permit, that person would be disqualified under IC 7.1-3-4-2 from holding a beer retailer's permit, and thus would disqualify the LLC under IC 7.1-3-21-5.4.

Indeed, I.C. 7.1-3-4-2 lists a number of other persons to whom the ATC may not issue a beer retailer's permit "except as otherwise authorized in this title". However, IC 7.1-3-21-6 lists certain exceptions (emphasis added):

The provisions of sections 4, 5, 5.2, and 5.4 of this chapter concerning retail and dealer partnerships, corporations, limited partnerships, and limited liability companies shall not apply to the issuance of

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^[1] "Law enforcement officer" is not defined in Title 7.1. The term is defined in the criminal code, at IC 35-41-1-7 as follows: "Law enforcement officer" means: (1) a police officer, sheriff, constable, marshal, prosecuting attorney, special prosecuting attorney, special deputy prosecuting attorney, or the inspector general; (2) a deputy of any of those persons; (3) an investigator for a prosecuting attorney or for the inspector general; (4) a conservation officer; or (5) an enforcement officer of the alcohol and tobacco commission.

- (10) a retail permit to an establishment:
 - (A) that is sufficiently served by adequate law enforcement at its permit location; and
 - (B) whose annual gross food sales at the permit location:
 - (i) exceed one hundred thousand dollars (\$100,000); or
 - (ii) in the case of a new application and as proved by the applicant to the local board and the commission, will exceed two hundred thousand dollars (\$200,000) by the end of the two (2) year period from the date of the issuance of the permit.

A plain reading of the above statute makes it clear that the General Assembly has determined that if an LLC applicant for a retail establishment meets certain criteria, the requirements of IC 7.1-3-21-5.4 relating to its members “shall not apply”.

We also note that IC 7.1-3-21-8 requires the disclosure of interested parties:

The commission shall not issue an alcoholic beverage permit of any type to a person unless that person has on file with the commission a verified list containing the name and address of each person who is, or will be, financially or beneficially interested in the permit and the business conducted, or to be conducted, under it. . .

However, the statutes do not specifically address the situation in which a law enforcement owner has a more remote interest in the application for a permit. Nor do the statutes specifically address whether a law enforcement officer disclosed pursuant to IC 7.1-3-21-8 disqualifies the applicant.

The specific issues regarding the remote financial interests by a law enforcement officer are not statutorily addressed, and are within the discretion of the ATC to determine. The legislature has granted the ATC, who has the expertise in the given area, authority to interpret and apply its governing statutes.

Thus, the ATC has the power to “to enforce and administer the provisions of this title and the rules and regulations of the commission,” IC 7.1-2-3-2. It is specifically authorized to “(a) hold hearings . . . ; (b) take testimony and receive evidence; [and] (c) to conduct inquiries with or without hearings”. IC 7.1-2-3-4. It has the “power to regulate or prohibit a practice, relationship, or dealing by or between permittees, which in the judgment of the commission is inimical to or a violation of a provision of this title or of a rule or regulation of the commission.” IC 7.1-2-3-22. Moreover, “in addition to the express powers enumerated in this title, the authority to exercise all powers necessary and proper to carry out the policies of this title and to promote efficient administration by the commission.” I.C. 7.1-2-3-31.

The ATC is also authorized by IC 7.1-2-3-6 to promulgate rules and regulations governing, among other things “(d) The enforcement of the provisions of this title and of the rules and regulations of the commission”. IC 7.1-2-3-7.

The ATC has yet to promulgate rules relating to remote ownership of an applicant. Internal policies followed by the ATC over the years should be given appropriate consideration as a rule promulgation process is pursued. Earlier policies, while not binding, may have resulted in actions being taken in licensure matters that may have had unforeseen consequences. That is within the regulatory discretion of the ATC, and may be addressed through the promulgation of rules.

It is our opinion that the ATC is statutorily prohibited from issuing a retail alcohol beverage permit to an Indiana Limited Liability Company (“LLC”) restaurant owner, one of whose members is a law enforcement officer. The statute does not address more remote ownership. The ATC has the authority to further regulate in this area but no rules have been promulgated that would extend the statutory requirements or prohibitions on applications for permits.

Sincerely,

A handwritten signature in black ink that reads "Stephen Carter". The signature is written in a cursive style with a large, prominent "C" at the end.

Stephen Carter
Attorney General

Susan W. Gard
Deputy Attorney General