

213 Market Street, 9th Floor, P.O. Box 865, Harrisburg, PA 17108-0865
Tel: (717) 237-7160 ■ Fax: (717) 237-7161 ■ www.WolfBlock.com

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Alan C. Kohler
Direct Dial: (717) 237-7172
Direct Fax: (717) 237-2752
E-mail: akohler@wolfblock.com

November 3, 2008

VIA HAND DELIVERY

Mickey Kane, Secretary
Pennsylvania Gaming Control Board
5th Floor - Strawberry Square
Harrisburg, PA 17101

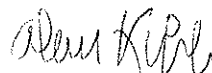
Attn: Public Comment on Regulation No. 125-93

Re: Downs Racing, L.P.'s Comments to Proposed Rulemaking
Regulation No. 125-93

Dear Ms. Kane:

Enclosed please find an original and three copies of Downs Racing, L.P.'s Comments to Proposed Rulemaking with regard to the above-reference Regulation.

Sincerely,


Alan C. Kohler
For WolfBlock LLP

ACK/kra
Enclosure

cc: Richard Sandusky (w/encl)

HAR:83433.1/MOH005-222463

**BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD**

In Re: Proposed Rulemaking -- :
58 Pa. Code Chs. 403a, 491a, 493a, : **Proposed Rulemaking**
494a, 495a, 497, 499a and 511a : **125-93**

**DOWN'S RACING, L.P.'S COMMENTS
TO PROPOSED RULEMAKING**

Down's Racing, L.P. t/d/b/a Mohegan Sun at Pocono Downs ("MSPD") submits these comments to the above-captioned Proposed Rulemaking which was published in the *Pennsylvania Bulletin* on October 4, 2008 at 38 Pa. B. 5441.

INTRODUCTION AND SUMMARY

Generally speaking, the Proposed Rulemaking before the Board is a "clean-up" rulemaking which proposed various changes to the Board's existing regulations governing the Rules of Practice and Procedure before the Board, in order to improve the technical accuracy of the Board's regulations. Most of these proposed revisions appear to be well-founded. Further, the Proposed Rulemaking includes a regulation at Section 497a.1, which is designed to allow documents to be filed via electronic transmission rather than paper submission. An electronic filing system should add efficiency to the Board's operations and reduce the costs of both parties before the Board and the Board itself in administering administrative proceedings. MSPD applauds the Board for its intention to establish an electronic filing system.

Nevertheless, MSPD's comments are focused on one proposed regulation – Section 493a.10a – which MSPD believes is ill-advised and lacks clarity and would not only significantly detract from Board efficiency, but, more importantly, would likely expose statutorily protected confidential information to illegal disclosure. The regulation attempts to switch the burden of protecting confidential information from the Board to filing parties despite

the fact that the Board's enabling statute, the Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S. § 1101 *et. seq.*, imposes on the Board an affirmative duty and an ongoing obligation to protect confidential information from improper disclosure.¹ Furthermore, the regulation results in an unjustified negative fiscal impact. Finally, the regulation includes undefined terms and is completely unclear as to its intended application. Accordingly, the Board should omit Section 493a.10a from its Final Rulemaking and maintain its existing legally compliant procedures governing protection of confidential information.

BACKGROUND

Section 493a.10a proposes to modify the Board's existing procedures governing the protection of confidential information by requiring a party seeking to protect confidential information "in pleadings and other papers" to file a "Motion to Protect Confidential Information" with legal justification for the request. Under the proposed regulation, the Board's Director of Hearings and Appeals would review the Motion to determine if confidentiality should be accorded during the associated administrative processes.

The effect of the proposed regulation would be to substantially modify the procedures utilized by the Board for MSPD's information submissions since the Board's inception, including for MSPD's slot machine license application proceedings in 2005 and 2006. These existing procedures are as follows:

1. Early in its operations, the Board promulgated a regulation now codified at 58 Pa. Code § 407a.3, which defines and details the categories of information designated as "confidential," as provided for in the Gaming Act.
2. In each submission which includes confidential information, MSPD marks or labels the protected documents/information as "confidential" or "proprietary."²

¹ 4 Pa. C.S. § § 1206(f), 1207(2).

² This procedure is included in proposed § 493a.10a(b)(2).

3. Pursuant to its statutory duties at 4 Pa. C.S. § § 1206(f) and 1207(2), the Board protects the documents/information so designated from disclosure.
4. If one or more persons requests access to protected information, as occurred in MSPD and other slot machine licensee applications proceedings, the Board will notify the affected party and direct that a motion be submitted defending the confidentiality of the documents/information so designated.
5. The Board maintains the confidentiality of the information unless and until it determines that certain documents or information are not “confidential” under 58 Pa. Code § 407a.3.

From MSPD’s perspective, these procedures have worked well in implementing the Board’s statutory duty to protect confidential information. Furthermore, they are very similar to time-tested procedures used by other Pennsylvania administrative agencies, like the Pennsylvania Public Utility Commission, for protecting confidential information.

Nevertheless, without explanation, the Board is proposing to modify these procedures to require that a Motion to Protect Confidential Information be filed with each and every “pleading and other papers” subject to review and interim adjudication by the Board Staff prior to being protected, and then subsequent final adjudication by the Board. The procedure proposed by the Board is neither necessary nor reasonable, would cause an unjustified fiscal input and lacks clarity.

COMMENTS

Proposed Section 493a10a is Unreasonable, Would Result in an Unjustified Negative Fiscal Impact and Lacks Clarity

A. Unreasonable

Proposed Section 493a.10a is unreasonable in that it would be ineffective in meeting the Board’s affirmative duties and obligations to protect confidential information as assigned by the General Assembly through Sections 1206(f) and 1207(2) of the Gaming Act. Under the proposed regulation, a filing party would be required to file a Motion with each and every

“pleadings and other papers” seeking protection for confidential information. Such motion would then be reviewed and adjudicated on an interim basis by Board Staff. While the regulation may not be clear on this point, it appears that in the meantime the documents/information will not be protected. Accordingly, if a person or other party seeks production or disclosure of such information prior to a decision by the Director of Hearings and Appeals, it appears that the Board will release the information even if it subsequently turns out that the document/information justified confidential treatment. In doing so, the Board would risk violating its own enabling statute at 4 Pa. C.S. § § 1206(f) and 1207(2) and its own regulations at 58 Pa Code § 407.3. The damage caused by illegal disclosure would likely be even more acute since it can be expected that the Director of Hearings and Appeals will be flooded by Motions to Protect Confidential Information causing a lengthy time delay between filing of the Motion and completion of review and a decision.

The fact of the matter is that the proposed regulation unreasonably shifts the Board’s statutory duty and obligation to protect confidential information to filing parties, and in doing so, would expose that information to improper disclosure. In comparison, under the Board’s existing procedures confidential information is fully protected by the Board from the time of submission. As such, the proposed regulation is unreasonable and should be omitted from the Board’s Final Rulemaking.³

³ This does not mean that the Board can not implement reasonable procedures to assure reasonable access to non-confidential information. For example, relatively recently the Board issued Proposed Rulemaking 125-84 requiring the execution of Right-to-Know Law/Freedom of Information Act Releases and Proposed Rulemaking 125-86 addressing confidentiality procedures during Board slot machine license hearings. MSPD did not submit comments or otherwise oppose these rulemakings.

B. Unjustified Negative Fiscal Impact

In addition to the unreasonable impact of the proposed regulation, the regulation would cause an unjustified negative fiscal impact. Undoubtedly, the regulation would impose additional cost on both the industry (filing parties) and the Board by creating additional administrative processes which do not currently exist. MSPD routinely submits to the Board “pleadings and other papers” which include confidential information and under the proposed regulation would be required to have its attorneys prepare a legal motion for every submission. The overall cost to MSPD, and other similarly situated parties will be substantial. Furthermore, as indicated previously, the Board will likely be flooded with these Motions resulting in significant, additional administrative expenses to review and decide each Motion.

This fiscal impact is unjustified in that it does not result in any identifiable benefit. Under the Board’s existing processes, confidential information/documents are protected without the need for these Motions except in the infrequent instance a request for disclosure of a specific document or information is received. By only requiring a legal submission upon a request for disclosure, the Board not only promotes efficiency but retains full authority to determine whether a confidential designation is justified under 58 Pa. Code § 407a.3. The Board’s proposal to replace these efficient and effective procedures with inefficient procedures is unjustified and Section 493a.10a should be omitted from the Final Rulemaking.

C. Lack of Clarity

In addition to its unreasonableness and its unjustified fiscal impact, proposed Section 493a.10.a lacks clarity as to its application. For example, it is completely unclear what the Board means by “pleadings and other papers.”⁴ Furthermore, the regulation is not specific as to how

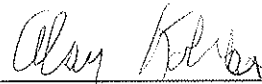
⁴ Although on its face, it would appear to mean every single submission that contains confidential information that is ever made to the Board no matter what the purpose.

designated information will be treated during the pendency of the Board Staff's review of a Motion to Protect Confidential Information. Finally, while it is clear the decision by Board Staff on Motions is interim in nature, it is unclear what procedures will govern the Board review of Board Staff Interim Orders.⁵

D. CONCLUSION

Overall, the Board's proposed regulation at Section 293a.10a is unreasonable, causes an unjustified negative fiscal impact, and lacks clarity. Accordingly, the proposed regulation should be omitted from the Final Rulemaking.

Respectfully submitted:



Alan C. Kohler, Esquire
WolfBlock, LLP
213 Market Street, 9th Fl.
Harrisburg, PA 17101
717-237-7160

Counsel for Downs Racing, L.P.

Date: November 3, 2008

⁵ It should also be noted that under current Board procedures, in litigated matters before a Board hearing examiner, processes are utilized under which the Hearing Examiner issues as a Protective Order governing the protection of confidential information. These existing processes are appropriate, but it is difficult to determine how or whether this rulemaking impacts these procedures.