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September 25, 2012

ATTORNEY GENERAL OPINION NO. 2012- 20

J.T. Klaus, City Attorney
City of Mulvane, Kansas
c/o Triplett, Woolf & Garretson, LLC
2959 North Rock Road, Suite 300
Wichita, Kansas 67226

Re: State Boards, Commissions and Authorities—State Lottery—Kansas Expanded Lottery Act; Restrictions on State and Local Officials and Affiliated Persons

Synopsis: K.S.A. 2011 Supp. 74-8762(b) provides that "[n]o state or local official or affiliated person shall hold, directly or indirectly, an interest in" a casino. This prohibition refers to ownership or control of a legal or equitable interest in a casino; a person does not hold an interest in a casino merely by working for or owning a stake in a company that does business with the casino.

For purposes of K.S.A. 2011 Supp. 74-8762(b), a state or local official, or affiliated person, is "employed by" a casino if the person is an "employee" of the casino, a term that does not include independent contractors or individuals who only sell goods to a casino. Cited herein: K.S.A. 2011 Supp. 74-8702; 74-8762; K.S.A. 74-8801; 74-8802; 75-4301 *et seq*; K.S.A. 2011 Supp. 75-4303a.

* * *

Dear Mr. Klaus:

As the City Attorney for the City of Mulvane, you ask for our opinion on whether a state or local official's employment by, or ownership interest in, a company that does business with a casino violates K.S.A. 2011 Supp. 74-8762(b), a provision of the Kansas Expanded Lottery Act (KELA).

K.S.A. 2011 Supp. 74-8762(b) provides, in relevant part:

> No state or local official or affiliated person shall hold, directly or indirectly, an interest in, be employed by, represent or appear for a lottery gaming facility or racetrack gaming facility, or for any lottery gaming facility manager or racetrack gaming facility manager, or any holding or intermediary company with respect thereto, in connection with any cause, application or matter.

A willful violation of this provision is a class A misdemeanor.[1] The KELA defines "lottery gaming facility" as "that portion of a building used for the purpose of operating, managing and maintaining lottery facility games."[2] A "lottery gaming facility manager" is an entity "authorized to construct and manage, or manage alone . . . a lottery gaming enterprise and lottery gaming facility."[3] For convenience, this opinion will use the word "casino" to refer to these terms.

Your request letter notes that two members of the Mulvane city council are affiliated with companies that desire to do business with the Kansas Star Casino. Specifically, one council member is the general manager of a company that would like to provide the casino with printing products and services, while another is the controlling owner of a liquor store that wishes to sell liquor to the casino. You ask whether either of the council members would (1) "hold, directly or indirectly, an interest in" or (2) "be employed by" the casino if these business transactions were to take place. We will consider these two provisions in turn.

The KELA does not specify what it means to "hold, directly or indirectly, an interest" in a casino. In Attorney General Opinion No. 2007-28, Attorney General Morrison considered this provision and opined that the word "interest" must mean "financial interest," *i.e.*, "an interest founded upon considerations of ownership, control or remuneration." You ask for further clarification, questioning whether being employed by or owning a company that does business with a casino falls within the scope of this prohibition.

As Attorney General Opinion No. 2007-28 noted, the Kansas Parimutuel Racing Act[4] (Racing Act) defines the term "financial interest" as "an interest that could result directly or indirectly in receiving a pecuniary gain or sustaining a pecuniary loss as a result of ownership or interest in a business entity or activity or as a result of a salary, gratuity or other compensation or remuneration from any person."[5] Opinion No. 2007-28 might be read as suggesting that the word "interest" in K.S.A. 2011 Supp. 74-8762(b) has the same meaning as the term "financial interest" in the Racing Act.

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[1] K.S.A. 2011 Supp. 74-8762(f).
[2] K.S.A. 2011 Supp. 74-8702(l). "[L]ottery facility games" is defined in K.S.A. 2011 Supp. 74-8702(j).
[3] K.S.A. 2011 Supp. 74-8702(o). "[L]ottery gaming enterprise" is defined in K.S.A. 2011 Supp. 74-8702(k).
[4] K.S.A. 74-8801 *et seq.*
[5] K.S.A. 74-8802(k).

There is a problem with this interpretation, though. Because the Racing Act's definition of "financial interest" includes receiving "a salary, gratuity or other compensation or remuneration," it would encompass almost all forms of employment. But if K.S.A. 2011 Supp. 74-8762(b)'s prohibition on holding an "interest" in a casino includes employment with a casino, then the statute's separate prohibition on being "employed by" a casino would be superfluous. And a general rule of statutory construction cautions against interpreting a statute "in such a way that part of it becomes meaningless, useless, or surplusage."[6]

For this reason, we believe that the word "interest" in K.S.A. 2011 Supp. 74-8762(b) has a narrower meaning than the definition of "financial interest" in the Racing Act. In our opinion, to "hold . . . an interest in" a casino means to own or control a legal or equitable interest in a casino. Unlike the Racing Act's definition, this interpretation of the word "interest" leaves the statute's separate prohibition on being "employed by" a casino with real work to do. This interpretation is also fully consistent with the ordinary meaning of the statute's text — among other possibilities, "interest" can be defined as "[a] legal share in something,"[7] while the word "hold" can mean "to have possession or ownership of"[8] or "to possess by a lawful title."[9]

The rule of lenity reinforces this interpretation of the provision. As a statute that prescribes criminal penalties, K.S.A. 2011 Supp. 74-8762(b) must be strictly construed, with any ambiguity about the phrase "hold . . . an interest in" resolved in favor of the state or local officials to whom it applies.[10] This rule does not justify reading words into the statute or otherwise disregarding the clear intent of the legislature. But, as discussed above, interpreting the word "interest" to refer only to a legal or equitable interest comports with one plausible dictionary definition of the term.

And nothing in the statute's legislative history indicates that the legislature intended a different definition. The most relevant piece of legislative history is the fact that K.S.A. 2011 Supp. 74-8762(b) was modeled on a New Jersey law that explicitly defines "interest" as "the ownership or control of more than 1% of the profits of a firm, association, or partnership, or more than 1% of the stock in any corporation, which is the holder of, or an applicant for, a casino license or in any holding or intermediary company with respect thereto."[11] It is possible that the legislature intended the word "interest" in K.S.A. 2011 Supp. 74-8762(b) to bear a similar definition. But the fact that the legislature did not copy New Jersey's statutory definition of "interest" might also suggest that the legislature intended a different meaning. We simply do not know. And

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[6] *State v. Sedellos*, 279 Kan. 777, 783-84 (2005).
[7] http://www.merriam-webster.com/dictionary/interest; Black's Law Dictionary (9th ed. 2009).
[8] http://www.merriam-webster.com/dictionary/hold.
[9] Black's Law Dictionary (9th ed. 2009).
[10] *See, e.g.*, *State v. Rupnick*, 280 Kan. 720, 735 (2005).
[11] N.J.S.A. 52:13D-13(g)(2); *see* Attorney General Opinion No. 2007-28.

given this ambiguity, we must interpret the word narrowly in order to avoid stretching the limits of criminal liability beyond what was intended by the legislature.[12]

Of course, a state or local official is prohibited from holding an interest in a casino *either directly or indirectly*. And so a state or local official may not, for example, own a company that in turn holds a legal or equitable interest in a casino. But, for purposes of this statute, a person does not hold an interest in a casino merely by owning or working for a company that provides goods or services to the casino.

This discussion of what it means to hold an interest in a casino is intended as a clarification of Attorney General Opinion No. 2007-28. However, to the extent Opinion No. 2007-28 suggests that "interest" means any financial interest, as opposed to a legal or equitable interest, that opinion is withdrawn. The ultimate conclusion of Opinion No. 2007-28 — that a person does not hold an interest in a racetrack gaming facility by serving, without compensation, on the board of an organization licensee — remains unaltered.

In addition to K.S.A. 2011 Supp. 74-8762(b)'s prohibition on holding an interest in a casino, you also ask for our opinion about the meaning of the statute's prohibition on being "employed by" a casino. The KELA does not define what it means to "be employed by" a casino, and so we must give these words their ordinary meaning.[13] To "be employed by" a casino could mean to serve as an "employee" of a casino. As you note, the term "employee" has a well established legal meaning that distinguishes employees from independent contractors.[14] Alternatively, "employ" could be defined more broadly as "to use or engage the services of."[15] Employing this definition, one could argue that an independent contractor — although not an "employee" of a casino — is "employed by" a casino.[16] Neither of these interpretations of "be employed by" includes someone who only sells goods to a casino, but there is ambiguity as to whether the phrase covers serving as an independent contractor.

The KELA's statutory history provides little assistance in determining which of these two definitions of "employ" the legislature intended. The text that eventually became K.S.A. 2011 Supp. 74-8762(b) first appeared in the final version of an earlier gaming bill that did not pass, 2006 Senate Bill 587. As introduced, this bill prohibited current and former state legislators and their family members from holding "any paid position with . . . any business which sells goods or services, including lobbying services, to a lottery gaming facility manager."[17] This provision was then amended in committee to prohibit a broader array of officials from "enter[ing] into any business dealing, venture or contract, including a contract for lobbying, with a lottery gaming facility manager."[18] Both the original and

[12] *See State v. Braun*, 47 Kan. App. 2d 216, 217 (2012) (discussing the purposes of the rule of lenity).
[13] *See, e.g.*, *State v. Snellings*, 294 Kan. 149, 158 (2012).
[14] *See, e.g.*, *Hartford Underwriters Ins. Co. v. Kansas Dep't of Human Res.*, 272 Kan. 265, 270 (2001).
[15] http://www.merriam-webster.com/dictionary/employ.
[16] The Kansas Supreme Court has occasionally used the word "employ" in this sense. *See, e.g.*, *Falls v. Scott*, 249 Kan. 54, 59 (1991) (referring to "one who employs an independent contractor").
[17] 2006 SB 587, As introduced.
[18] 2006 SB 587, As amended by Senate Committee.

committee versions of the bill would have clearly prohibited certain specified individuals from serving as independent contractors to a casino. On the Senate floor, however, 2006 SB 587 was amended to include the language of the current law, which is ambiguous on this point.[19] The fact that the Senate eliminated a clear prohibition on serving as an independent contractor to a casino may indicate that it did not intend for the ambiguous language it adopted to prohibit this conduct. But this is far from clear, especially given that the Senate rewrote the entire section. And, in any event, 2006 SB 587 was not enacted or even approved by the Senate, so its legislative history tells us very little about the legislature's intent in passing (in an entirely different session) 2007 Senate Bill 66, the bill that became law.[20]

The New Jersey statute on which K.S.A. 2011 Supp. 74-8762(b) was modeled is no more helpful in illuminating this provision's meaning. Unlike K.S.A. 2011 Supp. 74-8762(b), the New Jersey statute uses the phrase "hold employment with,"[21] which more clearly means to serve as an employee. Perhaps by using "be employed by" instead of "hold employment with," the legislature intended to cover a broader range of conduct, including serving as an independent contractor. This is just speculation, though. Nothing in the legislative history indicates why the legislature chose to use a slightly different formulation than the New Jersey law, and the "be employed by" language that the legislature enacted is reasonably susceptible to either of the proposed interpretations.

Although the words "be employed by" are ambiguous when read in isolation, their context helps clarify their meaning. K.S.A. 2011 Supp. 74-8762(b) also prohibits "represent[ing] or appear[ing] for" a casino "in connection with any cause, application or matter." If "employ" means "to use or engage the services of," then the statute's prohibition on being "employed by" a casino would swallow its separate prohibition on representing or appearing for a casino. After all, it is difficult to imagine how officials could "represent" a casino without the casino using them or engaging their services. Because the statute should not be interpreted in a way that would render any part of it superfluous, we believe that K.S.A. 2011 Supp. 74-8762(b) uses the phrase "be employed by" in its narrower sense, *i.e.*, to serve as an employee of. To the extent any ambiguity remains, the rule of lenity further supports this construction.

In conclusion, we opine that K.S.A. 2011 Supp. 74-8762(b)'s prohibition on "hold[ing], directly or indirectly, an interest in" a casino refers to ownership or control of a legal or equitable interest in a casino. A person does not hold an interest in a casino merely by working for or owning a stake in a company that does business with a casino. We further opine that an official or affiliated person is "employed by" a casino only if the person is an "employee" of the casino, a term that does not include independent contractors or individuals who only sell goods to a casino.

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[19] 2006 SB 587, As amended by Senate Committee of the Whole.
[20] *See* L. 2007, Ch. 110.
[21] N.J.S.A. 52:13D-17.2(b).

This opinion is strictly limited to an interpretation of K.S.A. 2011 Supp. 74-8762(b). It addresses no other provision of law, in particular the general ethics laws applicable to local government officials[22] or the certification requirements and qualifications adopted by the Kansas Racing and Gaming Commission for persons that wish to do business with a casino.[23]

Sincerely,

Derek Schmidt
Attorney General

Dwight Carswell
Assistant Attorney General

DS:AA:DC

[22] *See* K.S.A. 75-4301 *et seq*. If you require an interpretation of these provisions, we would refer you to the Kansas Governmental Ethics Commission. *See* K.S.A. 2011 Supp. 75-4303a.
[23] *See* K.S.A. 2011 Supp. 74-8751; 74-8772.