

MINUTES

SENATE COMMITTEE ON COMMERCE

May 5, 2010
Room 548-S—Statehouse

Members Present

Senator Karin Brownlee, Chairperson
Senator Julia Lynn, Vice-chairperson
Senator Tom Holland, Ranking Member
Senator Jay Emler
Senator Oletha Faust-Goudeau
Senator Dick Kelsey
Senator Roger Reitz
Senator Jean Schodorf
Senator Susan Wagle

Staff Present

Reed Holwegner, Kansas Legislative Research Department
Jason Long, Office of the Revisor of Statutes
Mary Torrence, Office of the Revisor of Statutes
Ken Wilke, Office of the Revisor of Statutes

Wednesday, May 5, 2010

Senator Brownlee called the Committee to order at 4:20 PM on May 5, 2010, in Room 548-S of the Capitol. All members were present. The Chairperson announced that the purpose of the meeting was to reconsider the appointment of Mr. Dan Watkins made by the Senate Minority Leader to the Board of Directors to the Kansas Bioscience Authority (KBA). Previously, the Committee had recommended favorably to the Senate that Mr. Watkins be confirmed. Since then, the Senate re-referred the appointment back to the Committee. Questions had arisen regarding potential conflicts of interest if Mr. Watkins continued to represent a gaming client while serving on the KBA Board.

Chairperson Brownlee called on Mr. Jason Long, Revisor of Statutes Office, to explain the analysis that was provided to the Committee (Attachments 1 and 2). Mr. Long stated that while an initial analysis of the Kansas Expanded Lottery Act might suggest there could be a conflict of interest, those provisions needed to be analyzed in light of the state governmental ethics law. The Expanded Lottery Act, among other things, prohibits any state official from lobbying on the behalf of a gaming interest. The same Act defines a "state official" to include "any state officer or employee who is required to file a written statement of substantial interests pursuant to the state governmental

ethics law." Under the governmental ethics law, a state officer or employee does not include "any appointed member of an advisory council, commission or board, who serves without compensation other than amounts for expense allowances." Mr. Long stated that the KBA Board members serve without compensation pursuant to the KBA's bylaws.

Mr. Long further explained that while the governmental ethics law defines a state agency to include authorities of the state, there is no clear definition in the Expanded Lottery Act as to what constitutes the head of a state agency.

Chairperson Brownlee asked Mr. Long if a KBA Board member could be considered an "affiliated person" as defined by the Expanded Lottery Act. Mr. Long said no.

Senator Wagle commented that certain provisions of the Expanded Lottery Act and the state governmental ethics law may need future clarification. Senator Lynn later agreed with this sentiment.

Senator Kelsey commented that he had trouble connecting the relationship between the KBA and representing a gaming interest. Senator Holland later agreed with this sentiment.

Chairperson Brownlee drew the Committee's attention to an experience matrix that compared the various KBA Board members with various fields of expertise (Attachment 3). The Senator noted the number of Board members that lacked experience related to bioscience.

Senator Lynn stated that all state board members, not just those on the KBA Board, should be very committed to make the best decisions for their charges. She added that the Committee should be sensitive to experience drift.

Senator Holland noted that Mr. Watkins was listed on the experience matrix as the only Board member who had legal experience. He added that Mr. Watkins also has significant experience with finance which was not identified on the matrix.

Senator Wagle stated that the question before the Committee should be whether the Senate would be violating the spirit of the conflict of interest provision of the Expanded Lottery Act if Mr. Watkins was confirmed and he continued to represent gaming interests.

Senator Reitz recognized that there is a legal ambiguity; however, he found it to be an insufficient reason to decline Mr. Watkins appointment. Based upon Mr. Watkins' previous testimony to the Committee, the Senator expressed no reservations in the appointment.

Senator Reitz moved, seconded by Senator Holland, that the Committee recommend to the Senate that Daniel Watkins be confirmed to the Board of the Kansas Bioscience Authority. The motion carried on a voice vote.

The Chairperson adjourned the meeting at 4:45 PM.

Prepared by Reed Holwegner

Approved by Committee on:

May 28, 2010

Date

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

COMMERCE
SENATE ~~JUDICIARY~~ COMMITTEE GUEST LIST

DATE: May 8, 2010

NAME	REPRESENTING
<i>Sam Watkins</i>	—
MARK BORANYAK	Capitol Strategics
<i>Heath Demmon</i> <i>W.D. Jones</i>	Strategic Communications W.D. Jones
Jeff Bottenberg	Polsinelli & Shughart

TO: Senator Derek Schmidt
FROM: Theresa M. Kiernan, Senior Assistant Revisor of Statutes
RE: K.S.A. 74-8762
DATE: May 3, 2010

It has been brought to my attention that the statement of substantial interests filed by Mr. Dan Watkins states that he represents Penn National Gaming. Any person appointed to an office which is subject to confirmation by the Senate is required to file a written statement of substantial interests. Under K.S.A. 74-8762, a state or local official includes any state officer or employee who is required to file a written statement of substantial interests. K.S.A. 74-8762 provides that a state official cannot 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. Subsection (f) of K.S.A. 74-8762 provides that the willful violation of the section constitutes a class A misdemeanor.

If Mr. Watkins represents Penn National Gaming, my reading of the statute precludes Mr. Watkins from serving as a member of the Kansas Bioscience Authority, or serving on any other board or commission if the membership of such board or commission is subject to confirmation by the Senate, without violating K.S.A. 74-8762.

I have included below a copy of the related statutes.

46-247. Individuals required to file written statements of substantial interests; exception. The following individuals shall file written statements of substantial interests, as provided in K.S.A. 46-248 to 46-252, inclusive, and amendments thereto:

- (a) Legislators and candidates for nomination or election to the legislature.
- (b) Individuals holding an elected office in the executive branch of this state, and candidates for nomination or election to any such office.
- (c) State officers, employees and members of boards, councils and commissions under the jurisdiction of the head of any state agency who are listed as designees by the head of a state agency pursuant to K.S.A. 46-285, and amendments thereto.

(d) Individuals whose appointment to office is subject to confirmation by the senate whether

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Attachment 1

or not such individual is a state officer or employee.

(e) General counsels for state agencies irrespective of how compensated.

(f) The administrator or executive director of the education commission of the states, the interstate compact on agricultural grain marketing, the Mo-Kan metropolitan development district and agency compact, the Kansas City area transportation district and authority compact, the midwest nuclear compact, the central interstate low-level radioactive waste compact, the multistate tax compact, the Kansas-Oklahoma Arkansas river basin compact, the Kansas-Nebraska Big Blue river compact, and the multistate lottery.

(g) Private consultants under contract with any agency of the state of Kansas to evaluate bids for public contracts or to award public contracts.

(h) From and after January 1, 2003, any faculty member or other employee of a postsecondary educational institution as defined by K.S.A. 74-3201b, and amendments thereto, who provides consulting services and who, on behalf of or for the benefit of the person for which consulting services are provided:

(1) Promotes or opposes action or nonaction by any federal agency, any state agency as defined by K.S.A. 46-224, and amendments thereto, or any political subdivision of the state or any agency of such political subdivision or a representative of such state agency, political subdivision or agency; or

(2) promotes or opposes action or nonaction relating to the expenditure of public funds of the federal government, the state or political subdivision of the state or agency of the federal government, state or political subdivision of the state.

(i) Except as provided by K.S.A. 2009 Supp. 46-247a, and amendments thereto, any faculty member who receives an annual salary of \$50,000 or more, other than an adjunct faculty member, who is employed by a state education institution as defined by K.S.A. 76-711, and amendments thereto.

74-8762. Restrictions on state and local officials and affiliated persons; penalties. (a)

As used in this section:

(1) "Affiliated person" means:

(A) Any member of the immediate family of a state or local official; or

(B) any partnership, firm, corporation or limited liability company with which a state or local official is associated or in which a state or local official has an interest, or any partner, officer, director or employee thereof while the state or local official is associated with such partnership, firm, corporation or company.

(2) "State or local official" means any person who, on or after January 9, 2006, is:

(A) Any state officer or employee required to file a written statement of substantial interests pursuant to the state governmental ethics law and any other state officer or employee with responsibility for matters affecting activities or operations of any lottery gaming facility or racetrack gaming facility;

(B) the governor or any full-time professional employee of the office of the governor;

(C) any member of the legislature and any full-time professional employee of the legislature;

(D) any justice of the supreme court, judge of the court of appeals or judge of the district court;

(E) the head of any state agency, the assistant or deputy heads of any state agency, or the head of any division within a state agency; or

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(F) any member of the governing body of a city or county where a lottery gaming facility or racetrack gaming facility is located; any municipal or county judge of such city or county; any city, county or district attorney of such city or county; and any member of or attorney for the planning board or zoning board of such city or county and any professional planner or consultant regularly employed or retained by such planning board or zoning board.

(b) 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.

No state or local official or affiliated person shall represent, appear for or negotiate on behalf of any person submitting a proposal for a lottery gaming facility or racetrack gaming facility, or on behalf of 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.

(c) No state or local official or affiliated person, within five years immediately subsequent to the termination of the office or employment of the official, shall hold, directly or indirectly, an interest in, be employed by or represent, appear for or negotiate on behalf of any person submitting a proposal for a lottery gaming facility or racetrack gaming facility, or on behalf of any lottery gaming facility manager or racetrack gaming facility manager, in connection with any cause, application or matter, or on behalf of any holding or intermediary company with respect thereto, in connection with any phase of development of a lottery gaming facility or racetrack gaming facility or any other matter whatsoever related to activities or operations of a lottery gaming facility or racetrack gaming facility.

(d) No state or local official shall solicit or accept, directly or indirectly, any complimentary service or discount from any person submitting a proposal for a lottery gaming facility or racetrack gaming facility, or from any lottery gaming facility manager or racetrack gaming facility manager, which such official knows or has reason to know is other than a service or discount that is offered to members of the general public in like circumstance.

(e) No state or local official shall influence, or attempt to influence, by use of official authority, the decision of the Kansas lottery commission, lottery gaming facility review board or Kansas racing and gaming commission pursuant to this act; the investigation of a proposal for a lottery gaming facility or racetrack gaming facility pursuant to this act; or any proceeding to enforce the provisions of this act or rules and regulations of the Kansas lottery commission or Kansas racing and gaming commission. Any such attempt shall be reported promptly to the attorney general.

(f) Willful violation of this section is a class A misdemeanor.

MA MARY ANN TORRENCE, ATTORNEY
REVISOR OF STATUTES
JAMES A. WILSON III, ATTORNEY
FIRST ASSISTANT REVISOR
GORDON L. SELF, ATTORNEY
FIRST ASSISTANT REVISOR



Legal Consultation—
Legislative Committees and Legislators
Legislative Bill Drafting
Legislative Committee Staff
Secretary—
Legislative Coordinating Council
Kansas Commission on
Interstate Cooperation
Kansas Statutes Annotated
Editing and Publication
Legislative Information System

OFFICE OF REVISOR OF STATUTES
KANSAS LEGISLATURE

TO: Senator Derek Schmidt
Senator Anthony Hensley
FROM: Mary Ann Torrence, Revisor of Statutes
RE: K.S.A. 74-8762
DATE: May 7, 2010

This memorandum is to modify the memorandum, dated May 3, 2010, regarding the appointment of Mr. Dan Watkins to the board of directors of the Kansas Bioscience Authority (“Board”). The question raised is whether Mr. Watkins’ service on the Board would be a violation of K.S.A. 74-8762, which provides that a state official cannot hold an interest in, be employed by, represent or appear on behalf of a lottery gaming facility or racetrack gaming facility, or for a manager of such a facility.

As pointed out in the previous memorandum, K.S.A. 74-8762 defines the term “state or local official” to include “any state officer or employee who is required to file a written statement of substantial interests pursuant to the state governmental ethics law.” The Kansas Expanded Lottery Act (“KELA”) does not define “state officer or employee.” However, K.S.A. 74-8762 references the state governmental ethics law. Under that law, K.S.A. 46-221, the definition of “state officer or employee” does not include “any appointed member of an advisory council, commission or board, who *serves without compensation* other than amounts for expense allowances or reimbursement of expenses as provided for in subsection (e) of K.S.A. 75-3223.” (emphasis added) The bylaws of the Kansas Bioscience Authority provide that members of the board are to serve without compensation. Under the state ethics laws Mr. Watkins, as a member

of the Board, would not be a state officer or employee for the purposes of K.S.A. 74-8762. This is consistent with opinions issued by the Kansas Governmental Ethics Commission.

Under K.S.A. 74-8762, the definition of “state or local official” also includes “the head of any state agency.” The KELA does not provide a definition of “state agency.” The state governmental ethics law provides a definition that appears relevant to K.S.A. 74-8762 given the context of that statute, which pertains to the ethics of state and local officials representing lottery or racetrack gaming facility managers. K.S.A. 46-224, defines “state agency” to include authorities of the state. Under this definition the Kansas Bioscience Authority is a state agency. It is arguable under a plain reading of K.S.A. 74-8762 that the head of such agency would be the Board. Any member of the Board, therefore, would be the head of a state agency.

It must be stated, however, that there are no court, attorney general or governmental ethics commission opinions which are on point as to the issue of what constitutes the head of a state agency. The statute is ambiguous as to which individuals would be considered the head of a state agency for purposes of the KELA. In Attorney General Opinion No. 2008-18, which addressed the scope of the application of K.S.A. 74-8762, the Attorney General stated that “to the extent that any legitimate ambiguity lingers in this statute it would likely be considered under the rule of lenity. Under this rule, penal statutes, including laws establishing criminal liability, are narrowly construed in favor of the defendant so that citizens are accorded fair notice of conduct that is criminal.”¹ Such an interpretation should be applied to the present question due to the ambiguity in the term “head of a state agency.”

For the foregoing reasons, while the Board may be considered the head of a state agency, and its members, therefore, state or local officials under K.S.A. 74-8762, there is no authority on point supporting such a conclusion, and the rules of statutory construction applicable to this type of statute do not support such a conclusion in this circumstance.

Prepared by: Jason B. Long, Assistant Revisor of Statutes

Theresa M. Kiernan, Senior Assistant Revisor of Statutes

¹Attorney General Op. No. 2008-18.

Kansas Bioscience Authority
Board of Directors Professional Experience Matrix
April 28, 2010

Appointing Authority	Appointee	Finance	Business, Manufacturing and Commercialization	Bioscience Research	Plant Biology	Health Care	Legal Affairs	Education	Government
Governor	John Carlin							X	X
	Sandra A.J. Lawrence	X				X			
Senate President	Angela Kreps		X	X				X	X
	Bill Sanford	X	X	X					
House Speaker	Dr. David Franz ⁱ			X	X				X
	Michael Borgman	X	X						
Senate Minority Leader	Daniel Watkins ⁱⁱ		X				X		X
House Minority Leader	Daniel Glickman			X	X				X
KTEC	Dr. Raymond Smilor	X	X	X				X	
Board of Regents ⁱⁱⁱ	Reginald Robinson			X				X	X
	Jerry Boettcher	X	X					X	

74-99b04 (c) *The authority shall be governed by an eleven-member board. One member of the board shall be an agricultural expert who is recognized for outstanding knowledge and leadership in the field of bioscience. Eight of the members of the board shall be representatives of the general public who are recognized for outstanding knowledge and leadership in the fields of finance, business, bioscience research, plant biotechnology, basic research, health care, legal affairs, bioscience manufacturing or product commercialization, education or government. Of the nine voting members, five must be residents of the state. The other two members of the board shall be nonvoting members with research expertise representing state universities and shall be appointed by the Kansas board of regents. Nonvoting members shall serve at the pleasure of the board of regents.*

ⁱ Agriculture Expert as Required Under KSA 74-99b04 (c)

ⁱⁱ Appointed Pending Confirmation

ⁱⁱⁱ Non-Voting Directors

