

42 IAC 1-5-6 Conflict of interest; decisions and voting (IC 4-2-6-9)

42 IAC 1-5-14 Postemployment restrictions (IC 4-2-6-11)

The General Counsel for the IGC began negotiating for potential employment with GTECH Indiana, which is a subsidiary of Lottomatica, an IGC licensee. The General Counsel sought informal advice from the OIG at the time he commenced negotiations and followed up with the SEC to disclose this fact, as required by IC 4-2-6-9(b), and to request advice regarding the rule on Postemployment restrictions.

Although no relationship existed between GTECH Indiana and IGC, SEC agreed with the General Counsel that he should be removed from any matters involving GTECH or Lottomatica and approved the proposed screen pending the consent of the IGC Executive Director. SEC further found that, consistent with IC 4-33 and AO 11-I-7, the revolving door prohibition pertaining to regulatory and licensing decisions would not restrict the General Counsel since it applies to IGC commissioners, not agency staff. SEC advised the General Counsel to contact the IDOA Division of Executive Branch Lobbying to confirm any activity with GTECH Indiana would not violate the lobbying restriction of the Postemployment rule.

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No. 13-I-2

The Indiana State Ethics Commission (“Commission”) issues the following advisory opinion concerning the State Code of Ethics (“Code”) pursuant to IC 4-2-6-4(b)(1).

BACKGROUND

A state employee currently serves as the General Counsel for the Indiana Gaming Commission (“IGC”). The IGC is engaged in the regulation of casino gambling, boxing and mixed martial arts, and the enforcement of criminal gambling laws. As General Counsel, he supervises the Legal Division and acts as the ultimate legal advisor for the IGC and its internal and external affairs. Prior to serving as General Counsel, he served as a staff attorney and as Deputy General Counsel for the IGC. The General Counsel is currently engaged in discussions for potential employment with GTECH Indiana, LLC (“GTECH”) as the company’s General Counsel. GTECH will be engaged in the business of operating certain portions of the Hoosier Lottery. GTECH’s parent company, Lottomatica S.P. A. (“Lottomatica”), is an IGC licensee. The IGC makes regulatory and licensing decisions regarding Lottomatica on a periodic basis, and the General Counsel has had occasion to advise or consult with the IGC, its Executive Director, and other agency staff prior to the IGC taking action regarding Lottomatica. The last IGC regulatory matter involving Lottomatica was a possible disciplinary action that the IGC resolved on August 2, 2012. The last licensing matter involving Lottomatica was the renewal of its supplier license, which occurred on June 17, 2012.

On November 29, 2012, the General Counsel requested an Informal Advisory Opinion (“IAO”) from the Office of Inspector General (“OIG”) regarding a potential conflict of economic interest under IC 4-2-6-9. In his IAO request, the General Counsel disclosed that GTECH’s parent company, Lottomatica, has occasionally been involved in matters before the IGC several times in the past few years. The General Counsel proposed a screening mechanism to avoid violation of IC 4-2-6-9 whereby he would notify other IGC staff to exclude him from conversations regarding Lottomatica and any of its pending matters before the IGC. Furthermore, the General Counsel would screen himself from any decisions or votes regarding Lottomatica for the duration of his employment negotiations and would re-assign those tasks to the IGC Deputy General Counsel.

The OIG issued an IAO on November 30, 2012, indicating that, because he had commenced employment negotiations with GTECH, the General Counsel would be prohibited from participating in any decision or vote during the remainder of his state employment in which he or GTECH has a financial interest and advised that he should notify his agency's appointing authority and the Commission of the potential conflict of interest. The IAO also explained that the General Counsel would be subject to the Code's post-employment restrictions. Subsequently, the General Counsel has notified his agency's appointing authority of the potential conflict of interest and has requested a formal advisory opinion to address both the potential conflict of interest and potential post-employment issues.

ISSUE

1. Would a conflict of interest arise for the General Counsel if he participates in any decision or vote in which he or GTECH would have a financial interest in the outcome of the matter?
2. What rules in the Code would apply to the General Counsel's intended employment opportunity with GTECH, and would his acceptance of the offered position subject him to any post-employment restrictions under IC 4-2-6-11?

RELEVANT LAW

IC 4-2-6-6

Present or former state officers, employees, and special state appointees; compensation resulting from confidential information

Sec. 6. No state officer or employee, former state officer or employee, special state appointee, or former special state appointee shall accept any compensation from any employment, transaction, or investment which was entered into or made as a result of material information of a confidential nature.

IC 4-2-6-9 (42 IAC 1-5-6)

Conflict of economic interests

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote if the state officer, employee, or special state appointee has knowledge that any of the following has a financial interest in the outcome of the matter:

- (1) The state officer, employee, or special state appointee.
- (2) A member of the immediate family of the state officer, employee, or special state appointee.
- (3) A business organization in which the state officer, employee, or special state appointee is serving as an officer, a director, a trustee, a partner, or an employee.
- (4) Any person or organization with whom the state officer, employee, or special state appointee is negotiating or has an arrangement concerning prospective employment.

(b) A state officer, an employee, or a special state appointee who identifies a potential conflict of interest shall notify the person's appointing authority and seek an advisory opinion from the commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. The commission shall:

(1) with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state officer, employee, or special state appointee seeking an advisory opinion from involvement in the matter; or

(2) make a written determination that the interest is not so substantial that the commission considers it likely to affect the integrity of the services that the state expects from the state officer, employee, or special state appointee.

(c) A written determination under subsection (b)(2) constitutes conclusive proof that it is not a violation for the state officer, employee, or special state appointee who sought an advisory opinion under this section to participate in the particular matter. A written determination under subsection (b)(2) shall be filed with the appointing authority.

IC 4-2-6-11 (42 IAC 1-5-14)

One year restriction on certain employment or representation; advisory opinion; exceptions

Sec. 11. (a) As used in this section, "particular matter" means:

- (1) an application;
- (2) a business transaction;
- (3) a claim;
- (4) a contract;
- (5) a determination;
- (6) an enforcement proceeding;
- (7) an investigation;
- (8) a judicial proceeding;
- (9) a lawsuit;
- (10) a license;
- (11) an economic development project; or
- (12) a public works project.

The term does not include the proposal or consideration of a legislative matter or the proposal, consideration, adoption, or implementation of a rule or an administrative policy or practice of general application.

(b) This subsection applies only to a person who served as a state officer, employee, or special state appointee after January 10, 2005. A former state officer, employee, or special state appointee may not accept employment or receive compensation:

- (1) as a lobbyist;
- (2) from an employer if the former state officer, employee, or special state appointee was:
 - (A) engaged in the negotiation or the administration of one (1) or more contracts with that employer on behalf of the state or an agency; and
 - (B) in a position to make a discretionary decision affecting the:
 - (i) outcome of the negotiation; or
 - (ii) nature of the administration; or
- (3) from an employer if the former state officer, employee, or special state appointee made a regulatory or licensing decision that directly applied to the employer or to a parent or subsidiary of the employer;
before the elapse of at least three hundred sixty-five (365) days after the date on which the former state officer, employee, or special state appointee ceases to be a state officer, employee, or special state appointee.

(c) A former state officer, employee, or special state appointee may not represent or assist a person in a particular matter involving the state if the former state officer, employee, or special state appointee personally and substantially participated in the matter as a state officer, employee, or special state appointee, even if the former state officer, employee, or special state appointee receives no compensation for the representation or assistance.

(d) A former state officer, employee, or special state appointee may not accept employment or compensation from an employer if the circumstances surrounding the employment or compensation would lead a reasonable person to believe that:

- (1) employment; or
- (2) compensation;

is given or had been offered for the purpose of influencing the former state officer, employee, or special state appointee in the performance of his or her duties or responsibilities while a state officer, an employee, or a special state appointee.

(e) A written advisory opinion issued by the commission certifying that:

- (1) employment of;
- (2) representation by; or
- (3) assistance from;

the former state officer, employee, or special state appointee does not violate this section is conclusive proof that a former state officer, employee, or special state appointee is not in violation of this section.

(f) Subsection (b) does not apply to a special state appointee who serves only as a member of an advisory body.

(g) An employee's or a special state appointee's state officer or appointing authority may waive application of subsection (b) or (c) in individual cases when consistent with the public interest. Waivers must be in writing and filed with the commission. The inspector general may adopt rules under I.C. 4-22-2 to establish criteria for post employment waivers.

ANALYSIS

The General Counsel's intended employment with GTECH invokes consideration of the provisions of the Code pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the General Counsel is analyzed below.

A. Confidential Information

IC 4-2-6-6 prohibits the General Counsel from accepting any compensation from any employment, transaction, or investment which was entered into or made as a result of material information of a confidential nature. The General Counsel represents that any offer of employment from GTECH would not be the result of information of a confidential nature. Accordingly, it is the opinion of the Commission that the General Counsel's acceptance of GTECH's potential employment offer would not violate IC 4-2-6-6.

B. Conflicts of Interest

IC 4-2-6-9 (a)(1) prohibits the General Counsel from participating in any decision or vote if he has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9 (a)(4)

prohibits the General Counsel from participating in any decision or vote in which a person or organization with whom he is negotiating or has an arrangement concerning prospective employment has a financial interest in the outcome of the matter. The definition of financial interest in IC 4-2-6-1(a)(11) includes, “an interest arising from employment or prospective employment for which negotiations have begun.” In Advisory Opinion 12-I-9, the Commission determined that negotiations commence for purposes of this rule as soon as an employer and state employee begin to discuss potential employment, regardless of which party initiates the communications. Employment negotiations have commenced in this case. Specifically, the General Counsel has disclosed that he and GTECH are currently engaged in discussions for the position of General Counsel following GTECH contacting him to discuss employment opportunities with the company. Because employment negotiations have commenced, a conflict of interest would arise for the General Counsel if he participates in a decision or vote in which GTECH would have a financial interest. GTECH’s parent company, Lottomatica, occasionally has matters pending before the IGC. To the extent that GTECH would have a financial interest in the outcome of those matters or any other matters involving Lottomatica, the General Counsel would be prohibited from participating in any decision or vote involving Lottomatica.

IC 4-2-6-9(b) provides that a state employee who identifies a potential conflict of interest shall notify the person's appointing authority and seek an advisory opinion from the Commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. In this case, the General Counsel requested an advisory opinion from the Commission as provided in the rule and has disclosed the potential conflict to his appointing authority.

IC 4-2-6-9(b)(1) further provides that when a potential conflict of interest arises, the Commission may, with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state employee seeking an advisory opinion from involvement in the matter. In this case, the General Counsel has indicated that he would screen himself from any discussions of these matters and would not participate in any decisions or votes concerning Lottomatica for the remainder of his state employment or until employment negotiations cease. The General Counsel also proposes assigning these matters to the IGC Deputy General Counsel. The Commission approves this proposed screening procedure on the condition that the Appointing Authority and IGC’s ethics officer both submit their written approval. To the extent that the screening procedure is approved and adopted by the IGC and the General Counsel abstains from participation in any decision or vote in which he or GTECH has a financial interest in the outcome of the matter for the remainder of his state employment, it does not appear that the General Counsel would be in violation of IC 4-2-6-9.

C. Post-employment

IC 4-2-6-11 consists of two separate limitations: a “cooling off” period and a “particular matter” restriction. The first limitation commonly referred to as the cooling off period,

would prevent the General Counsel from accepting employment for 365 days from the date that he leaves state government under various circumstances.

First, the General Counsel is prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. A lobbyist is defined as an individual who seeks to influence decision making of an agency and who is registered as an executive branch lobbyist under the rules adopted by the Indiana Department of Administration. The General Counsel discloses that his potential employment with GTECH may require him to represent the company before the Indiana State Lottery Commission. The General Counsel does not believe that he would engage in any activity that would require him to register as an executive branch lobbyist prior to the expiration of 365 days from the time he leaves state employment. In an abundance of caution, the General Counsel should contact the Office of Executive Branch Lobbying to ensure that his intended post-employment activities as GTECH's General Counsel would not violate the lobbying restriction and would not require him to register as an executive branch lobbyist. To the extent the General Counsel ensures compliance with this provision for the entirety of the cooling off period, he would not be in violation of this provision.

Second, the General Counsel is prohibited from accepting employment for 365 days from the last day of his state employment from an employer with whom 1) he engaged in the negotiation or administration of a contract on behalf of a state agency and 2) was in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration of the contract. Based on the information provided, the General Counsel has not negotiated or administered a contract with GTECH on behalf of the State. Accordingly, it does not appear that this restriction would apply to the General Counsel's potential employment with GTECH.

Third, the General Counsel is prohibited from accepting employment for 365 days from the last day of his state employment with an employer for whom he made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary. The General Counsel discloses that he advised and consulted with members of the gaming commission, the Executive Director, and other agency staff prior to the IGC taking action regarding Lottomatica on regulatory or licensing matters. However, he does not, as General Counsel, possess the authority to make regulatory or licensing decisions on behalf of the IGC. *See* IC 4-33-4 Powers and duties of Indiana Gaming Commission and IC 4-33-7 Licensing of Suppliers (the "commission" has the power to issue licenses and make regulatory decisions regarding gambling operators and suppliers). Because the regulating body is specifically defined as the "commission" (IC 4-33-3-1) and the General Counsel is not a member of the "commission" (IC 4-33-3-2), the General Counsel's prior activity does not constitute a "regulatory or licensing decision" under IC 4-2-6-11(b)(3). *See*: SEC Formal Advisory Opinion 11-1-7 (although the agency regulated the conduct, the person was not the regulating body).

Fourth, the General Counsel is prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer's purpose is to influence him in his official capacity as a state employee. The General Counsel represents that

GTECH's potential offer of employment would not be extended to him in an attempt to influence him in his capacity as a state employee. Accordingly, this restriction would not apply to the General Counsel's intended employment with GTECH.

Finally, the General Counsel is subject to the post-employment rule's "particular matter" prohibition in his potential post-employment. This restriction prevents him from representing or assisting a person on any of the following twelve matters if he personally and substantially participated in the matter as a state employee: 1) an application, 2) a business transaction, 3) a claim, 4) a contract, 5) a determination, 6) an enforcement proceeding, 7) an investigation, 8) a judicial proceeding, 9) a lawsuit, 10) a license, 11) an economic development project, or 12) a public works project. The particular matter restriction is not limited to 365 days but instead extends for the entire life of the matter at issue, which may be indefinite.

Although the General Counsel has not identified any particular matters in which he anticipates working on in his intended post-employment venture, he must continue to ensure compliance with this restriction.

CONCLUSION

The Commission finds that a potential conflict of interest could arise for the General Counsel if he participates in decisions(s) and/or vote(s) related to GTECH since he has begun negotiating with GTECH for prospective employment. Moreover, it is the opinion of the Commission that the screening mechanism proposed by the General Counsel is appropriate so long as written approval is provided by the Appointing Authority (see Attachment A) and the Ethics Officer (see Attachment B).

The Commission determined the cooling off provision of the rule on post-employment restrictions would not prohibit the General Counsel from accepting employment with GTECH immediately upon leaving state employment because the General Counsel did not engage in the negotiation or administration of any contract with GTECH on behalf of the IGC nor does he have the authority to make regulatory or licensing decisions relating to GTECH on behalf of the IGC. In addition, although the General Counsel did not identify any particular matters, the Commission advised that he should ensure he observes this restriction in his employment with GTECH.