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SUPREME COURT OF FLORIDA

CITY OF MIAMI BEACH,

Petitioner,

CASE NO.: 80,780

vs.

RUSSELL GALBUT,

Respondent.

_____/

On Review of A Question Certified By
The Third District Court of Appeal

BRIEF OF AMICUS CURIAE COMMISSION ON ETHICS

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PRELIMINARY STATEMENT

The City of Miami Beach, defendant/appellee below and petitioner here, will be referred to as the City. Russell Galbut, plaintiff/appellant below and respondent here, will be referred to as Galbut. The Commission on Ethics appears before the Court as amicus curiae and will be referred to herein as the Commission.

A number of the Commission's opinions and orders have been cited in this brief. For the Court's convenience, an appendix containing copies of the opinions and orders is attached hereto.

INTEREST OF AMICUS CURIAE

The Commission, with the consent of the parties, submits its Brief as Amicus Curiae pursuant to Fla. R. App. P. 9.370.

The Commission is obliged to receive and investigate sworn complaints of violations of the Code of Ethics for Public Officers and Employees, and to render advisory opinions to public officers, employees, and candidates for public office about the applicability and interpretation of the constitutional and statutory provisions within its jurisdiction. Article II, Section 8, Florida Constitution, and Section 112.322, Florida Statutes.

One such statutory provision which the Commission has been called upon to interpret is Section 112.3135, Florida Statutes, commonly known as the Anti-Nepotism Law. Since its transfer from Section 116.111 to Section 112.3135 in 1989, the Commission has rendered ten formal advisory opinions interpreting this provision, and has investigated approximately 26 sworn complaints alleging violations of Section 112.3135, Florida Statutes. Four of the opinions the Commission rendered dealt with public officers, as members of collegial bodies, appointing relatives to unpaid positions on advisory boards. In each case, the Commission opined that Section 112.3135, Florida Statutes, prohibited such actions.

The Anti-Nepotism Law applies to virtually every level and agency of government in the state. Although the issue before the Court is relatively narrow, it appears to be one that recurs frequently and clearly is one of statewide importance, as witnessed by the number of times the issue has come before the Commission since 1989. Inasmuch as public officers and employees throughout

the state have previously sought, and will continue to seek, advice from the Commission on the application of Section 112.3135, Florida Statutes, the Court's determination in this matter could have a substantial impact upon the Commission's operational interpretation and application of Section 112.3135, Florida Statutes.

STATEMENT OF THE CASE AND FACTS

The Commission will rely upon Petitioner's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

The Commission asserts that the Third District Court of Appeal incorrectly interpreted Section 112.3135, Florida Statutes, to permit a collegial body to appoint a relative of one of its members to an unpaid position on an advisory board, as long as the member abstained from voting for his relative and did not advocate his appointment.

ARGUMENT

ISSUE

SECTION 112.3135, FLORIDA STATUTES, PROHIBITS APPOINTMENTS TO MUNICIPAL BOARDS WHERE ONE MEMBER OF THE APPOINTING AUTHORITY IS RELATED TO THE APPOINTEE.

The Third District Court of Appeal wrongly interpreted Section 112.3135, Florida Statutes, to permit a collegial body to appoint a relative of one of its members to a public position, as long as the member recused himself and did not advocate the appointment of his relative to the board. An affirmance of the lower court's decision in this matter would authorize connivance and confederation by members of appointing bodies when considering their relatives for public positions and perpetuate the type of favoritism which the Legislature sought to eradicate when it enacted the Anti-Nepotism Law.

A. The Anti-Nepotism Law should be liberally construed to protect the public's interest in appointments made by public bodies as well as to maintain the respect of the people in their government.

In holding that Section 112.3135 is penal in nature because of the penalties contained in Section 112.317, Florida Statutes, the lower court stated "that any doubt must be resolved in favor of a narrow construction so that the public official (and the official's relatives) are clearly on notice of what conduct is proscribed,"

citing State v. Llopis, 257 So.2d 17, 18-19 (Fla. 1971). However, the Commission submits that the Third District Court of Appeal's reliance on Llopis is misplaced. In Llopis, the only issue was the constitutionality (vagueness) of the statute. However, the case did not involve statutory construction. At the time of the Llopis case, violations of the Code of Ethics carried criminal penalties--the Code of Ethics was decriminalized in 1974 when the Commission was created to provide an administrative method of enforcement. Subsequently, reviewing courts which have heard vagueness challenges to various provisions of the Code of Ethics have agreed that a less stringent standard should be applied to ethical restrictions because they do not carry criminal penalties.

The Commission agrees with the argument put forward by the City in its Brief on the Merits that a more appropriate general rule of statutory construction is that a statute enacted for public benefit should be construed liberally in favor of the public, even though it contains a penal provision. Cf. Board of Public Instruction of Broward County v. Doran, 224 So.2d 693, 699 (Fla. 1969), City of Miami Beach v. Berns, 245 So.2d 38, 40 (Fla. 1971), and State v. Hamilton, 388 So.2d 561, 563 (Fla. 1980). The Commission's construction of the law at issue here constitutes a reasoned interpretation of an ethical standard of conduct that accords with the public interest. The interpretation of that provision by the Commission on Ethics, which would preclude Galbut's reappointment, should be upheld.

Moreover, with this case the Court has the opportunity to resolve an issue in the State's anti-nepotism laws first raised in

1933 by Justice Brown's concurring decision in State ex rel. Robinson v. Keefe, 149 So. 638, 111 Fla. 701 (1933). There, this Court held that the anti-nepotism law (Chapter 16088, Acts of 1933, codified as Section 116.10, Florida Statutes) did not apply to the hiring of school teachers. Justice Brown concurred, expressing the separate ground (apparently not concurred in by any of his fellow Justices) that the law applied only to employing actions by an individual and not by a board, that an individual member who took part in the board's decision might be held to have "indirectly" employed his relative in violation of the law, but, presumably, if the related board member abstained from voting on the hiring decision the relative might be employed by vote of the remaining board members.

Perhaps because the majority did not adopt Justice Brown's view of the anti-nepotism law, subsequent opinions by the Attorney General advised that the law applied to employment decisions by collegial bodies. See 1950 Op. Att'y Gen. Fla. 050-80 (October 24, 1950), anti-nepotism law applies to hirings by board of county commissioners; and 1951 Op. Att'y Gen. Fla. 051-62 (March 26, 1951), anti-nepotism law prohibits county commission from employing commissioner's relative as county prosecuting attorney.

Limiting nepotism has been extremely important to the people of Florida--more important than most of the other standards of ethical conduct now in the Code of Ethics for Public Officers and Employees. It appears that the earliest anti-nepotism law dates to 1933, long before the people of Florida adopted Article III, Section 18, Florida Constitution, which mandates that the

Legislature adopt a code of ethics for public officials and before the Legislature's 1967 adoption of the Code of Ethics for Public Officers and Employees, Chapter 112, Part III, Florida Statutes.

In a decision interpreting the early anti-nepotism law, this Court construed that provision "in the light of its obvious purpose to discourage 'nepotism'", which it defined as

> the bestowal of patronage by public officers in appointing others to offices or positions by reason of their blood or marital relationship to the appointing authority, rather than because of the merit or ability of the appointee. [State ex rel. Robinson v. Keefe, supra, at 638.]

The Court's determination in this case should similarly discourage nepotism where collegial bodies appoint relatives of their members to public positions.

The practice of nepotism is abhorrent to fair-minded citizens who believe that public office is a privilege of citizenship to which all qualified individuals may aspire and that appointments to public office and employment should not be the reward for fortuitous birth or marriage. Moreover, notwithstanding any claim by Galbut that he is exceptionally qualified to be reappointed to the City's Board of Adjustment or that his father-in-law did not advocate his appointment thereto, it has been this Commission's experience in administering Section 112.3135, Florida Statutes, that collegial appointments do indeed provide an opportunity for their members to connive and conspire to appoint each other's relatives to public office, or at least the appearance that this

may occur. For example, in Complaint No. 90-129, In re Glenn Stafford, and Complaint No. 90-130, In re Dennis Dearborn, both public officials were members of the South Daytona City Council and were alleged to have devised a procedure whereby each nominated the other's relative to a position on a municipal board. See Final Order and Public Report, Complaint No. 90-129, In re Glenn Stafford (COE 92-17, Sept. 10, 1992); and Final Order and Public Report, Complaint No. 90-130, In re Dennis Dearborn (Sept. 18, 1991) (See Appendix). Although each official denied having made a prior agreement to nominate the other's relative and a lack of evidence made it impossible to refute their claim, there is no way the public can know the truth of what occurred--whether, in fact, two officials advocated the appointment of their relative to the other or the result was simply a coincidence. Nonetheless, it is the appearance of this type of chicanery which causes people to lose faith in the government which supposedly represents their interests and which the Commission has interpreted Section 112.3135, Florida Statutes, to proscribe.

Although the case sub judice arises in the context of an appointment to a non-compensated position on the City's Zoning Board of Adjustment, the Court's decision also will apply to appointments and employment decisions for other positions subordinate to collegial bodies, such as city and county managers, city and county attorneys, water management district executive directors, in addition to almost every conceivable appointive commission or advisory board created by local ordinance.

B. The Commission's interpretation of the Anti-Nepotism Law should be given great deference.

In 1969 the Legislature revised the anti-nepotism law, adopting a new Section 116.111, Florida Statutes. Without expressly clarifying the issue raised by Justice Brown in State ex rel. Robinson v. Keefe, supra, the 1969 act defined "public official" as

> an officer, including a member of the legislature, the governor, and a member of the cabinet, or employee of an agency in whom is vested the authority by law, rule, or regulation, or to whom the authority has been delegated, to appoint, employ, promote, or advance individuals or to recommend individuals for appointment, employment, promotion, or advancement in connection with employment in an agency. [Section 116.111(1)(b), Florida Statutes (1969).]

The 1969 act defined "relative" much as it presently exists, and adopted the following prohibition:

> A public official may not appoint, employ, promote, or advance, or advocate for appointment, employment, promotion, or advancement, in or to a position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official. An individual may not be appointed, employed, promoted, or advanced in or to a position in an agency if such appointment, employment, promotion, or advancement has been advocated by a public official, serving in or exercising jurisdiction or control over the agency, who is a relative of the individual. [Section 116.111(2)(a), Florida Statutes (1969).]

Opinions of the Attorney General subsequent to the adoption of the 1969 anti-nepotism law continued to advise that the statute prohibited a relative of one member of a collegial body from being appointed by that body, even if the related member did not participate in the vote to employ. See 1977 Op. Att'y Gen. Fla. 077-130 (Dec. 20, 1977); 1973 Op. Att'y Gen. Fla. 073-335 (Sept. 12, 1973); and 1973 Op. Att'y Gen. Fla. 073-75 (Mar. 22, 1973).

These Attorney General opinions were cited by the First District Court of Appeal in support of its decision in Morris v. Seely, 541 So.2d 659 (Fla. 1st DCA 1989), holding that a sheriff's brother was promoted in violation of the anti-nepotism law, and noting that a sheriff who appoints a relative to the position of deputy sheriff violates the anti-nepotism law even if the relative serves without compensation and the sheriff abstains from voting on such employment. Id., at p. 661, fn. 1.

When the Legislature transferred the anti-nepotism provisions into the Code of Ethics in Chapter 112, Part III, Florida Statutes, it did so without changing the operative language of the prohibition or any of the pertinent definitions. See Chapter 89-67, Laws of Florida. Since that transfer of statutory language, the Commission has consistently opined that Section 112.3135, Florida Statutes, prohibits a relative of a public official from being appointed by the collegial body on which the official serves to an unpaid position on an advisory board. The opinions of the Attorney General form the basis for the Commission's subsequent opinions interpreting this provision. Inasmuch as long-standing statutory interpretations made by officials charged with the

administration of the statutes are given great weight by the courts, Austin v. Austin, 350 So.2d 102, 104 (Fla. 1st DCA 1977), the Third District Court of Appeal improperly ignored the Commission's interpretation of Section 112.3135, Florida Statutes.

The first opinion which the Commission issued in this area was 1989 Op. Ethics Comm. 089-53 (Oct. 30, 1989), which involved the son of a city council member seeking appointment as an alternate member of the city planning commission. On the issue of whether the relative could be appointed where the official abstained on the critical vote, the Commission adopted the rationale expressed in previous opinions of the Attorney General, stating

> the official should not be able to circumvent the prohibition of the anti-nepotism law by merely abstaining from the vote on an appointment of a relative.

The next opinion factually similar to that of Galbut is 1990 Op. Ethics Comm. 090-58 (Sept. 7, 1990), in which the Commission opined that a city council member's spouse could not be appointed by the city council to the city's land development and regulatory agency. There, the Commission stated that

> if abstention by the related official were allowed, the purpose of the anti-nepotism provision would be circumvented and, conceivably, family members of all the members of the appointing body could be appointed if their relatives abstained in turn. For this reason, the prior interpretations of the anti-nepotism law conclude that relatives of members of appointing authorities are simply ineligible for appointment by the boards or commissions on which their relatives serve.

In 1991 Op. Ethics Comm. 091-29 (June 7, 1991) involving the appointment of a county commissioner's daughter to a position on the county economic development commission, the Commission again concluded that Section 112.3135, Florida Statutes, prohibited such appointment even where the member of the board of county commissioners abstained from the vote on her daughter's appointment.

Recently, during the period in which the City was awaiting the Third District Court of Appeal's decision on its motion for rehearing in the case below, the Commission had the opportunity to revisit its interpretation of Section 112.3135, Florida Statutes, and again concluded that the Anti-Nepotism Law prohibits relatives of city council members from being appointed to unpaid positions on city advisory boards, even where the related council member abstained from voting on the appointment. See 1992 Op. Ethics Comm. 092-50 (October 15, 1992).

While the Commission acknowledges that its formal opinions are not binding on the courts, it is of the view that its interpretation of Section 112.3135, Florida Statutes, should have been afforded great deference by the Third District Court of Appeal. Although not a party to the proceedings below, the Commission's opinions were cited by the City in its arguments to the special master and to the reviewing court.

Courts have consistently recognized that an agency is afforded wide discretion in the interpretation of a statute which it

administers and that the agency's construction thereof will not be overturned on appeal unless clearly erroneous. In PW Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988), this Court held that

> construction of a statute by the agency charged with its enforcement and interpretation is entitled to great weight. The courts will not depart from such a construction unless it is clearly unauthorized or erroneous. Id. at 283.

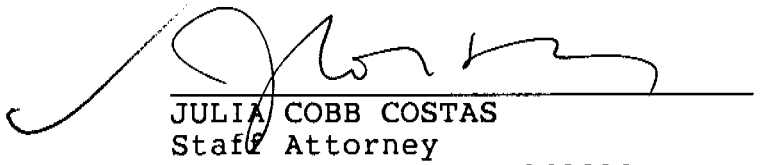
See also, Florida Waterworks v. Florida Public Service Commission, 473 So.2d 237 (Fla. 1st DCA 1985). Additionally, the reviewing court should defer to any interpretation within the range of possible interpretations. Natelson v. Department of Insurance, 454 So.2d 31 (Fla. 1st DCA 1984), pet. for rev. den., 461 So.2d 115 (Fla. 1985). The agency's interpretation does not have to be the only one or even the most desirable--it is enough if it is a permissible one. Little Munyon Island v. Department of Environmental Regulation, 492 So.2d 735,737 (Fla. 1st DCA 1986); Florida Power Corp. v. Department of Environmental Regulation, 431 So.2d 684 (Fla. 1st DCA 1983); and American Financial Security Life Insurance Company v. Department of Insurance, No. 91-03639 (Fla. 1st DCA Dec. 4, 1992).

The Commission is the statewide body whose members are appointed to "serve as the guardian of the standards of conduct for the officers and employees of the state . . . ." Section 112.320, Florida Statutes. It has the power to render advisory opinions, which are legally binding until revoked or amended. Section 112.324(3), Florida Statutes. The Commission's interpretation that Section 112.3135 precludes collegial bodies from appointing

relatives of their members to public positions is certainly within the range of permissible interpretations of the statute and should have been deferred to by the Third District Court of Appeal. The lower court evidently ignored well established authority and failed to afford the requisite deference to the Commission's interpretation in deciding Galbut's appeal.

CONCLUSION

Accordingly, the certified question should be answered in the affirmative and the Third District Court of Appeal's decision permitting Galbut's reappointment to the Board of Adjustment should be reversed.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U. S. Mail this 18th day of December, 1992 to: JEAN OLIN, First Assistant City Attorney, City of Miami Beach, 1700 Convention Center Drive, 4th Floor - Legal Department, Miami Beach, Florida 33139; and DAVID NEVEL, ESQUIRE, 1111 Lincoln Road, Suite 802, Miami Beach, Florida 33139.

Julia Cobb Costas