IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 80,780

CITY OF MIAMI BEACH, Petitioner

v.

RUSSELL GALBUT, Respondent

SEEKING DISCRETIONARY JURISDICTION REVIEW OF
QUESTION CERTIFIED BY
DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT
IN
Case No. 92-86

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE FACTS AND THE CASE

Respondent, RUSSELL GALBUT, accepts and adopts the Petitioner's statement of the facts and the case.

SUMMARY OF ARGUMENT

The Third District Court of Appeal properly determined that Florida's Anit-Nepotism Law, section 112.3135, Florida Statutes, does not prohibit the Respondent, RUSSELL GALBUT, from seeking re-appointment to the Miami Beach Zoning Board of Adjustment. The plain language of section 112.3135 proscribes only overt, affirmative action on the part of the appointing public official; it does not prohibit service by a relative if the public official recuses himself from voting and in no way advocates the appointment of his relative. The clear, specific language of the statute reflects the intent of the legislature to prescribe "restrictions against conflict of interest without creating unnecessary barriers to public service." Section 112.311(4). To read the statute expansively, as the City and the Commission suggest, would unreasonably impede the recruitment and retention by government of those best qualified to serve. See Section 112.311(2).

The anti-nepotism statute is penal in nature, and should be strictly construed. The monetary penalty that it imposes (an amount as high as $5,000) has traditionally been regarded by the courts as a form of punishment. United States v. Futura, 339 F. Supp. 162 (N.D. Fla. 1972). The City's comparison of the anti-nepotism law to the Florida Sunshine Law for purposes of liberal construction is misplaced. The Sunshine Law states that "All meetings...at which official acts are to be taken are to be declared public meetings." Section 286.011 (1), Florida Statutes. Hence, the language of that statute did not require the Court to

resort to a liberal construction in to determine that informal meetings which result in official action are within the purview of the statute. Furthermore, even a liberal construction does not justify an interpretation which would prohibit conduct not clearly proscribed by the statute and which would deny an individual the right to know in advance what conduct is proscribed. See Rush v. Dept. of Prof. Reg. Bd. of Podiatry, 448 So. 2d 26 (Fla. 1st DCA 1984).

Finally, the court below was correct in disturbing the Commission's interpretation of the anti-nepotism law. The Commission's reliance on the various cases cited on page 15 of its Amicus Curiae Brief is misplaced. Unlike the instant case, the cases cited by the Commission dealt with an agency's interpretation of a critical term where no statutory definition existed. In the case at bar, all critical terms of the anti-nepotism law are clearly defined in the statute itself. The City is urging the Court not to define a critical term, but rather to rewrite the anti-nepotism law to prohibit conduct that is not clearly proscribed by the statute. The judgment below should therefore be affirmed.

ARGUMENT AND CITATION OF AUTHORITY

FLORIDA'S ANTI-NEPOTISM LAW DOES NOT PROHIBIT THE APPOINTMENT OF A CITY COMMISSIONER'S RELATIVE TO THE CITY'S ZONING BOARD OF ADJUSTMENT WHERE (1) APPOINTMENTS ARE MADE BY A FIVE/SEVENTHS VOTE OF THE CITY COMMISSION; (2) THE RELATED CITY COMMISSIONER ABSTAINS FROM VOTING; AND (3) THE RELATED CITY COMMISSIONER TAKES NO ACTION WHICH IN ANY WAY ADVOCATES THE APPOINTMENT OF THE RELATIVE.

The Third District Court of Appeal properly held that Florida's Anti-Nepotism Law, Section 112.3135, Florida Statutes does not prohibit the Respondent, RUSSELL GALBUT ("GALBUT") from seeking re-appointment to the Miami Beach Zoning Board of Adjustment provided that his father-in-law, City Commissioner Eisenberg recuses himself from voting, and does not advocate in any way GALBUT's appointment. Section 112.3135 provides:

> A public official may not appoint, employ, promote, or advance, or advocate for appointment, employment, promotions, or advancement, in or to a position in the agency in which he is serving or 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 the agency <u>if such appointment, employment, promotion, or advancement has been advocated by a public official,</u> serving in or exercising jurisdiction or control over the agency, who is a relative of the individual. (Emphasis added).

The Third District Court of Appeal correctly noted that the statute "only reaches affirmative action by the public official to make the appointment or advocate the appointment." <u>Galbut v. City of Miami Beach</u>, 17 FLW D. 1504 (June 16, 1992). It is undisputed that there was no affirmative action taken by City Commissioner Eisenberg to promote or advocate GALBUT's appointment. (R. 51.)

By affording this penal statute its proper strict construction, the Third District's decision is consistent with the Legislative Intent and Declaration of Policy embodied in section 112.311, Florida Statutes. Section 112.311(2) provides:

> It is also essential that government attract those citizens best qualified to serve. Thus, the law against conflict of interest must be so designed as not to impede unreasonably or unnecessarily the recruitment and retention by government of those best qualified to serve. (Emphasis added).

Section 112.311(4) reiterates this intent:

> It is the intent of this act to implement these objectives of protecting the integrity of government and of facilitating the recruitment and retention of qualified personnel by prescribing restrictions against conflict of of interest without creating unnecessary barriers to public service. (Emphasis added).

GALBUT served on the Miami Beach Zoning Board of Adjustment for ten years. He is well qualified for the position, and desires to continue serving the public in this unpaid capacity. Provided that he can receive five votes of the other City Commissioners, GALBUT is entitled to reappointment, and his relative's mere presence on the City Commission should not create an "unnecessary barrier" to this service.

A. The Anti-Nepotism Law Should Be Strictly Construed As It Imposes Severe Penalties For Violations.

Section 112.317, Florida Statutes (1991) outlines the penalties for Code of Ethics violations. In pertinent part, this statute provides:

> (1) Violation of any provision of this part, including, but not limited to, any failure

> to file disclosures required by this part or violation of any standard of conduct imposed by this part, or violation of any provision of s. 8, Article II of the State Constitution, in addition to any criminal penalty or other civil penalty shall,... and may be punished by one or more of the following:
>
> (a) In the case of a public officer:
> 1. Impeachment
> 2. Removal from Office
> 3. Suspension from Office
> 4. Public Censure or Reprimand
> 5. Forfeiture of no more than one-third salary per month for no more than 12 months.
> 6. A civil penalty not to exceed $5,000.
> 7. Restitution of any pecuniary benefits received because of the violation committed. (Emphasis added).

The law is well-settled that a statute imposing a penalty, even a civil penalty, must be strictly construed. Hotel & Restaurant Comm. v. Sunny Seas No. 1, 104 So. 2d 570 (Fla. 1958); Gardinier v. Florida Dept. of Pollution Control, 300 So. 2d 75 (Fla. 1st DCA 1974); First Federal Savings and Loan Ass'n of Seminole County v. Dept. of Business Regulations, Div. of Florida Land Sales and Condominiums, 472 So. 2d 494 (Fla. 5th DCA 1985).

In the instant case, the City initially agreed that Florida's Anti-Nepotism Law should be strictly construed "in view of the serious penalties for violations thereof." (R. 15). Then, with an interesting twist of logic, the City concluded that this clearly penal statute must be strictly construed against the individual upon whom the penalties are sought to be imposed! The City has now changed its theory, and is arguing instead for a liberal construction of the statute.

In State ex rel. Robinson v. Keefe, 149 So. 2d 638 (Fla. 1933), this Court held that the predecessor Florida Anti-Nepostism Law (section 116.111, Florida Statutes) was penal in character, and therefore must be strictly construed. See also State v. Llopis, 257 So. 2d 17 (Fla. 1971);[1] Baillie v. Town of Medley, 262 So. 2d 693 (Fla. 3d DCA 1972)(relying on this Court's construction of the anti-nepotism law in Robinson, supra). The City and The Commission argue that because the statute has been "decriminalized," the various punishments set forth in section 112.311 are no longer penal. The monetary penalty, however, (here, an amount as high as $5,000) has traditionally been regarded by the courts as a form of criminal punishment. United States v. Futura, 339 F. Supp. 162 (N.D. Fla. 1972). This Court should not retreat from its previous ruling that the anti-nepotism law is penal in character, thus requiring strict construction.

The City and the Commission further argue that the statute should be liberally interpreted because it was enacted for a public benefit. (City's Brief, at 10; Brief of Amicus Curiae, at 7). Both parties rely on City of Miami Beach v. Berns, 245 So. 2d 693 (Fla. 1971) and Board of Public Instruction v. Doran, 224 So. 2d

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[1] The Commission contends that this case does not apply because it involves a vagueness challenge rather than an issue of statutory construction. (Brief of Amicus Curiae, at 7). However, if this were the case, then the Commission's relaince on State v. Hamilton, 388 So. 2d 564 (Fla. 1980) for the proposition that a statute enacted for the public benefit should be liberally construed is equally wrong because Hamilton concerned the vagueness of the statute rather than an issue of statutory construction.

693 (Fla. 1969)[2] for this proposition. Both of these cases involved the Government in the Sunshine Law, section 286.011 (1), Florida Statutes, (1967), which provides that "All meetings of any board or commission of any state agency...at which official acts are to be taken are to be declared public meetings..." (Emphasis added). In both cases, this Court determined that the statute applied to formal, as well as informal meetings which result in official action, such as the possible castigation of personnel, acquisition and sale of real estate (See Doran, at 696), condemnation matters, personnel matters, pending litigation, or any other matter relating to city government (See Berns, at 40). However, the very language of the statute allows for such a construction, and did not require an expansive reading of the statute. In Berns, the Court noted that "[t]he intent of the act, as reflected by its language and legislative setting is absorbed into and becomes a part of the law itself." Berns, supra, at 40.

In the instant case the legislators expressed their intent in the clear and specific language of the anti-nepotism law. The language of section 112.3135 reflects the legislature's specific, twice-stated concern that the statute not unreasonably or unnecessarily impede the government's retention and recruitment of

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[2] In Doran, the defendant challenged the statute claiming that (1) the statute was so vague that it did not afford procedural due process of law, (2) it constituted "an unlawful delegation of the legislative prerogative to the judiciary, and (3) more than one topic and subject matter is contained within the statute. No real issue of statutory construction arose in Doran.

those best qualified to serve. Accordingly, the legislature designed the statute such that only overt action on the part of the related public official would prohibit service by his relative. The legislative setting also reflects this intent. The Commission notes that "[w]hen 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 of any pertinent definitions. (Brief of Amicus Curiae, at 12). If the legislature had intended for the City's creative theory of "implied advocacy" to emerge, it could have amended the statute to reflect such an intent. It did not do so; the statute quite properly proscribes overt acts of nepotism, and does not provide for guilt by association. Clearly, "the legislature is conclusively presumed to have a working knowledge of the English language and when a statute has been drafted in such a manner as to clearly convey a specific meaning, the only proper function of the Court is to effectuate this legislative intent." Florida Racing Comm'n v. McLaughlin, 102 So. 2d 574 (Fla. 1958).

Even assuming arguendo that the anti-nepotism statute is to be liberally construed because it protects the general welfare, this does not justify a construction which would prohibit conduct not clearly proscribed by the statute, and which would deny an individual the right to know in advance what conduct is proscribed. See Rush v. Dept. of Prof. Reg. Bd. of Podiatry, 448 So. 2d 26 (Fla. 1st DCA 1984).

To apply this statute in the manner advocated by the City and

the Commission would violate Due Process of Law.

> A statute must be sufficiently explict in its description of the acts, conduct or conditions required or forbidden, to prescribe the elements of an offense with reasonable certainty and make known to those to whom it applies what conduct on their part will render them liable for its penalties. Doran, at 698.

Section 112.3135 states that a public official may not appoint, promote, or advocate for appointment a relative to employment within an agency over which the public official exercises jurisdiction or control. Likewise, the relative cannot be appointed, employed or promoted if the related public official advocated the appointment or promotion. The statute does not say that the mere presence of a public official on a collegial body--who recuses himself from the vote on his relative's appointment and does not advocate the appointment--is also subject to penalties. The plain and unambiguous language of the statute requires that this Court affirm the decision of the Third District Court of Appeals.

B. The Third District Court of Appeals Properly Disturbed The Administrative Interpretation Of This Statute As It Is Clearly Erroneous.

The City and the Commission rely on Morris v. Seeley, 541 So. 2d 659 (Fla. 1st DCA 1989) primarily because the First District utilized various Attorney General opinions in reaching its conclusion that a sheriff violates the anti-nepotism law even if he abstains from voting on his relative's employment.[3] However,

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[3] The City states that "...the courts have adhered to a liberal interpretation of said the [sic] Anti-Nepotism Law..." (City's Brief, at 4.) However, the courts have continually

Morris is clearly distinguishable from the instant case in that the sheriff or one of his designees was required to sign the final promotion order. The sheriff in Morris was therefore caught on the horns of a dilemma under the statute: whether he abstained or not, he was still in violation of the anti-nepotism law by virtue of the overt act he was required to perform. In the instant case, no affirmative action by Commissioner Eisenberg is required to effectuate Galbut's reappointment.[4]

The Commission also relies on various cases cited on page 15 of its Amicus Brief for the proposition that courts will not depart from the agency's interpretation of a statute unless clearly erroneous. However, each of these cases involved an agency's interpretation of a critical term or phrase in a statute where no statutory definition was provided. See PW Ventures, Inc. v. Nichols, 533 So. 2d 281 (Fla. 1988)(decision hinged on whether "to the public" meant the general public or any one individual member of the public); Florida Waterworks v. Florida Pub. Ser. Com'n, 473 So. 2d 237 (Fla. 1st DCA 1985)(determining that terms "contribution-in-aid of construction and service availabilty charges were synonymous); Natelson v. Dept. of Ins., 454 So. 2d 31 (Fla. 1st DCA 1984)(construing "lack of fitness or trustworthiness to engage in business of insurance as including conviction of

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interpreted this statute strictly. See, Robinson, Baillie, and Galbut, supra.

4. The Third District properly denied conflict certification because the facts of Morris are so clearly distinguishable from those of the case at bar.

criminal conspiracy to traffic in illicit drugs); Little Munyon Island v. Dept. of Environ. Reg., 492 So. 2d 235 (Fla. 1st DCA 1986)(agency's interpretation of "stationary" did not conflict with legislative intent when the term is not defined in the statute); Florida Power Corp. v. Dept. of Environ. Reg., 431 So. 2d 684 (Fla. 1st DCA 1985)(agency's interpretation of term "site-specific" does not conflict with statutory scheme when no definition of term is included in statute). In light of the absence of a statutory definition in these cases, it was proper for the the agency to flesh-out some parameters for purposes of applying the law and giving meaning to the statute.

By contrast, the instant case does not involve the interpretation of a critical term left undefined by the legislature. Section 112.3135 clearly sets forth the definitions of "agency," "public official," and "relative." GALBUT does not dispute that his appointment falls within the parameters of these definitions. The City and The Commission, however, are not attempting to arrive at a definition of a critical term. They are attempting to coin a new prohibition, not even vaguely alluded to by the framers of the statute, known as "implied advocacy". The Commission's interpretation of the statute must be deemed clearly erroneous, notwithstanding that the Commission conveniently rendered yet another opinion in conflict with the Third District while a Motion For Rehearing En Banc was pending. See Fla. Commission on Ethics Advisory Opinion 92-50 (October 15, 1992). "There is a distinction between the legislature's delegating to an

agency the power to say what the law is and its delegation to the agency some discretion in the operation and enforcement of the law." Florida Waterworks, supra, at 245 In attempting to stretch the anti-nepotism statute by applying it to alleged cases of winking, nodding and "implied advocacy", the Commission has gone beyond merely using some discretion in the operation and enforcement of the law.

Although administrative interpretation is entitled to great weight and ordinarily will not be disturbed unless clearly erroneous, equally binding on this Court is the rule that highly regulatory or penal laws will not be extended by construction. Florida Industrial Com'n v. Manpower Inc. of Miami, 91 So. 2d 197 (Fla. 1956). In Manpower, this Court overturned an agency's decision that a corporation which provided various types of services for an agreed price was a 'private employment agency' within a statute providing for the licensing and regulation of such agencies. Id. at 197. In addition to a determination that a company such as Manpower, Inc. did not fall within the purview of the statute, the court was cognizant of the well-settled principal of statutory construction that "a legislature in legislating with regard to an industry or activity, must be regarded as having in mind the actual conditions to which the act will apply, that is, the needs and usages of such activity." Id. at 199. The Manpower court considered the needs and usages of private employment agencies, as well as the evils incident to those agencies against which the statute was designed to protect. One of the evils was

collusion between the agent and the employer. Id. at 199. Another evil was "Charging exhorbitant fees, or giving jobs to such applicants as contribute extra fees, presents, etc." Id. at 200, which the court stated was an abuse to which Manpower was susceptible; however, it was not likely that the company would engage in such a practice as it would soon find itself without employees, and thus out of business. Id. Consequently, the court stated, "Reluctant as we are to interfere with an administrative interpretation of an Act, we have the view that to uphold the interpretation would be to extend the Act by judicial fiat; and this, we are not authorized to do." Id.

Similarly, in the instant case, the Court must consider the needs and usages of the activities proscribed by the statute, as well as the evils against which they were designed to protect. The needs and usages of proscribing action on the part of a public official to advocate or promote the appointment of his relative to a subordinate post is to maintain the integrity of government without creating an unreasonable barrier to the service of qualified individuals. The primary evil to be protected against is public officials using their influence to obtain jobs for their relatives. As the City has already stipulated, "there is no demonstrable evidence pertaining to any collusion between Mr. Galbut and his father-in-law, Vice-Mayor Sy Eisenberg which would relate to Galbut's being appointed to the Board of Adjustment." (R.51)

The City's avowed fear that the Zoning Board will one day be

packed with relatives of Miami Beach City Commissioners, unless this honorable Court rewrites the anti-nepotism law, provides a fascinating insight into the City Attorney's dark view of human nature. The City's "implied advocacy" theory imputes an evil motive to each and every public official who would seek to properly avoid a conflict of interest by abstaining, recusing himself, or otherwise removing himself from the decision making process of a collegial body. Under the City's theory, any public official who abstains from voting due to a conflict of interest must nevertheless be expected to wink, nod and pull his ear to influence his colleagues. If the City's theory was applied uniformly to every conflict of interest (whether familial or financial), all abstentions and recusals would be rendered meaningless, and no collegial body could vote on any matter regarding which any one of its members has a conflict.

GALBUT is clearly entitled to seek reappointment to the Board of Adjustment, providing Commissioner Eisenberg abstains from voting and does not advocate the reappointment. The plea by the City and the Commission for this Court to rewrite the anti-nepotism law must be rejected. Amending statutes is not a proper judicial function, nor should the Courts create unnecessary barriers to public service. This Court should therefore affirm the decision below that the anti-nepotism law does not prohibit GALBUT from seeking reappointment to the Zoning Board providing that Commissioner Eisenberg does not vote upon or advocate said appointment.

CONCLUSION

Based on the foregoing authority and arguments, it is respectfully submitted that this Court should affirm the decision of the Third District Court of Appeal.

BY _____

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CERIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 6th day of JAN., 1993 to Laurence Feingold and Jean Olin, Attorneys for the Petitioner, City of Miami Beach, 1700 Convention Center Drive, Miami Beach, FL 33139 and Philip Claypool and Julia Cobb Costas, Attorneys for the Commission on Ethics as Amicus Curiae, Commission of Ethics, P.O. Box 6, Tallahassee, FL 32302-0006.

BY _____
David H. Nevel