047 1-12

FILED
SID J. WHITE
DEC 21 1992
CLERK, SUPREME COURT
By Chief Deputy Clerk

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

PETITONER'S BRIEF ON MERITS

LAURENCE FEINGOLD
CITY ATTORNEY
JEAN K. OLIN
FIRST ASST. CITY ATTORNEY
ATTORNEYS FOR PETITIONER
CITY OF MIAMI BEACH
1700 CONVENTION CENTER DRIVE
MIAMI BEACH, FLORIDA 33139
(305) 673-7470

TABLE OF CONTENTS

TABLE OF CITATIONS ii

STATEMENT OF THE CASE AND FACTS 1

ISSUE PRESENTED FOR REVIEW 3

WHETHER THE ANTI-NEPOTISM LAW PROHIBITS 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; (3) THE RELATED CITY COMMISSIONER TAKES NO ACTION WHICH IN ANYWAY ADVOCATES THE APPOINTMENT OF THE RELATIVE.

SUMMARY OF ARGUMENT 4

ARGUMENT 5

THE ANTI-NEPOTISM LAW ABSOLUTELY PROHIBITS 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 ANYWAY ADVOCATES THE APPOINTMENT OF THE RELATIVE.

CONCLUSION 13

CERTIFICATE OF SERVICE 15

TABLE OF CITATIONS

I. **Case Law**

Baillie v. Town of Medley,
262 So. 2d 693 (Fla. 3d DCA 1972) 4, 8, 9

Board of Public Construction of Broward County v. Doran,
224 So. 2d 693 (Fla. 1969) 10

City of Miami Beach v. Berns,
245 So. 38 (Fla. 1971) 10

Galbut v. City of Miami Beach,
17 FLW D. 1504 (June 16, 1992) 7, 8

McDonalds Corp. v. Dept. of Transportation,
535 So. 2d 323 (Fla. 2d DCA 1988) 8

Morris v. Seely,
541 So. 2d 659 (Fla. 1st DCA 1989) 4, 6

State v. Hamilton,
388 So. 2d 561 (Fla. 1980) 11

State v. Llopis,
257 So. 2d 17 (Fla. 1971) 8

State ex rel. Robinson v. Keefe,
149 So. 638 (Fla. 1933) 8

Tri-State System v. Dept. of Transportation,
491 So. 2d 1192 (Fla. 1st DCA 1986) 8

II. **Statutes**

§112.3135, Florida Statutes 1, 4, 5, 7, 8, 9, 13

§286.011, Florida Statutes 10

§112.311, Florida Statutes 10, 11

§112.317, Florida Statutes 8

III. **Other Authorities**

1973 Op. Att'y. Gen. Fla. 073-335 (September 12, 1973). . 6

1977 Op. Att'y. Gen. Fla. 077-130 (December 20, 1977) . . 7

Fla. Commission on Ethics Advisory Opinion 89-53 (October 26, 1989) 7

Fla. Commission on Ethics Advisory Opinion 90-58 (September 7, 1990) 6, 7

Fla. Commission on Ethics Advisory Opinion 91-29 (June 6, 1991) 7

Fla. Commission on Ethics Advisory Opinion 92-50 (October 15, 1992) 7

Art. II, §8, Fla. Const. 11

Art. III, §18, Fla. Const. 11

STATEMENT OF THE FACTS AND THE CASE

On December 13, 1991, Eleventh Circuit Court Judge Roger Silver entered his "Order on Report of General Master and Final Judgment for Defendant, City of Miami Beach" (R. 46-48), holding that Plaintiff Russell Galbut was prohibited from being reappointed to the City of Miami Beach's Zoning Board of Adjustment pursuant to the State's Anti-Nepotism Law, §112.3135, Florida Statutes. The Court's Order adopted the General Master's recommendation, holding that Miami Beach City Commissioner Sy Eisenberg, as a member of the City of Miami Beach Commission, is a "public official" as defined by §112.3135(a)(b), Florida Statutes, in whom is vested the authority to appoint individuals to the City's Zoning Board of Adjustment, and since Galbut, as son-in-law of Eisenberg is a "relative" under §112.3135(1)(c), Florida Statutes, the State's Anti-Nepotism Law prohibits the subject appointment. The Court further held that the appointment at issue was prohibited whether or not Eisenberg abstained from voting on the issue of Galbut's appointment, as allowing the remaining six members of the City Commission to vote on the issue of Galbut's bid for Board of Adjustment membership would circumvent the law's intent.

Galbut appealed the Circuit Court's Order to the Third District Court of Appeal (R. 45), resulting in the District Court's June 16, 1992 opinion (R. 99-102) reversing the lower court's ruling, holding that Florida's Anti-Nepotism Law did not prohibit Galbut from being reappointed so long as Commissioner Eisenberg recused himself, and so long as Eisenberg did not in any way

advocate Galbut for appointment. Appellee's "Motion for Rehearing and Rehearing En Banc and Request for Certification of Question" filed on July 1, 1992 was disposed of by the Third District via its October 13, 1992 opinion (R. 103-105) in which it denied the City's rehearing request yet certified the following question as one of great public importance:

> WHETHER THE ANTI-NEPOTISM LAW PROHIBITS 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; (3) THE RELATED CITY COMMISSIONER TAKES NO ACTION WHICH IN ANYWAY ADVOCATES THE APPOINTMENT OF THE RELATIVE.

"Notice to Invoke Discretionary Jurisdiction" was filed by the City of Miami Beach on November 9, 1992. On November 23, 1992 this Court entered its "Order Postponing Decision on Jurisdiction and Briefing Schedule" in which the parties were directed to file briefs on the merits.

ISSUE PRESENTED FOR REVIEW

WHETHER THE ANTI-NEPOTISM LAW PROHIBITS 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; (3) THE RELATED CITY COMMISSIONER TAKES NO ACTION WHICH IN ANYWAY ADVOCATES THE APPOINTMENT OF THE RELATIVE.

SUMMARY OF ARGUMENT

The Third District erred in reversing the Circuit Court's Order and in ruling that §112.3135, Fla. Stats., Florida's Anti-Nepotism Law, did not prohibit the appointment to municipal boards of individuals related to members of the appointing body so long as such members recused themselves from voting on the appointment. Dating back to 1973, the Attorney General's Office, as well as the State Commission on Ethics and the courts, have adhered to a liberal interpretation of said the Anti-Nepotism law concluding that abstention of the related official does not and cannot resolve concerns with regards to nepotism. See Morris v. Seely, 541 So. 2d 659 (Fla. 1st DCA 1989). A statute enacted for the public benefit, such as §112.3135, Fla. Stats., should be construed liberally in favor of the public since only such interpretation will foster public confidence and belief in our elected legislators. Inasmuch as a court must avoid interpreting a statute in a way which ascribes to the legislature an intent to create an absurd result, §112.3135, Fla. Stats. must be interpreted to absolutely prohibit Galbut's appointment to the Zoning Board of Adjustment regardless of whether his father-in-law, Miami Beach City Commissioner Sy Eisenberg, abstains from the appointing vote. See Baillie v. Town of Medley, 262 So. 2d 693 (Fla. 3d DCA 1972).

ARGUMENT

THE ANTI-NEPOTISM LAW ABSOLUTELY PROHIBITS 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.

Florida's Anti-Nepotism Law, Section 112.3135(2)(a), Florida Statutes, 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 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,[1] who is a relative of the individual. (Emphasis added.)

Previous opinions by the Attorney General dating back to 1973, as well as opinions of the State Commission on Ethics and of the courts, have interpreted Florida's Anti-Nepotism Law as absolutely prohibiting relatives of members of appointing authorities from being appointed by boards or commissions on which their relatives serve, recognizing that the purpose of the statute could be circumvented if abstention by the related official was allowed.

> A board of county commissioners, which possess the sole power to hire employees, could not employ the first cousin of a member of the

---

[1]/ The City Commission exercises such jurisdiction and control over the Zoning Board of Adjustment as the Board's powers and areas of authority are regulated and determined by the Zoning Codes passed by the City Commission.

> board even though the related member did not promote or advocate the relative's employment, did not participate in any interview with the relative, and abstained from voting on the question of the relative's employment. If any different conclusion was to be reached, the purpose and intent of the anti-nepotism law could be easily circumvented merely by allowing a commission member to abstain. If each member of a commission were allowed to abstain, the board could conceivably employ relatives of each of its members. Therefore, the Topeekeegee Yugnee Park Commission may not employ the brother-in-law of a member of the commission despite the related commission member's abstention from voting on such employment. 1973 Op. Att'y. Gen. Fla. 073-335 (September 12, 1973).
>
> [I]f abstention by the related official were allowed, the purpose of the anti-nepotism provision would be circumvented and, conceivably, the family members of all the members of the appointing body could be appointed if the relatives abstained in turn. For this reason, the prior interpretation of the Anti-Nepotism Law concludes that relatives of members of appointing authorities simply are ineligible for appointment by the boards or commissions on which their relatives serve. (Emphasis added.)

Fla. Commission on Ethics Advisory Opinion 90-58 (September 7, 1990). The above-referenced opinion of the Ethics Commission relied specifically upon Morris v. Seely, 541 So. 2d 659 (Fla. 1st DCA 1989), a case in which the First District Court of Appeal considered the plain meaning of the State's anti-nepotism law and held that the statute clearly applied to preclude a sheriff's promotion of his brother **regardless of whether the sheriff abstained from voting on such employment and otherwise played no active role in the promotion because abstention does not resolve concerns with regard to nepotism.** The Morris court, in considering

the issue of abstention, determined that concerns pertaining to nepotism cannot be resolved by delegating the decision-making power to another individual. See also Fla. Commission on Ethics Advisory Opinion 91-29 (June 6, 1991) (County Commissioner's daughter prohibited from being appointed by non-related County Commissioners to advisory board even were Commissioner/relative to abstain from vote); Fla. Commission on Ethics Advisory Opinion 90-58, supra (Anti-Nepotism Law prohibits a collegial body from appointing a relative of one of its members to serve on an advisory board); Fla. Commission on Ethics Advisory Opinion 89-53 (October 26 1989) (son of city council member may not be appointed to a non-compensated advisory board position even should the official abstain from voting on the appointment); 1977 Op. Att'y. Gen. Fla. 077-130, supra (abstention by a governing body member from voting on the employment of his relatives did not avoid violations of Florida's Anti-Nepotism Law).

Most recently, in Fla. Commission on Ethics Advisory Opinion 92-50 (October 15, 1992), it was again opined that relatives of city council members may not be reappointed to uncompensated positions on city advisory boards:

> Previous opinions interpreting §112.3135(2)(a), Fla. Stats., to prohibit the appointment of relatives of members of collegial bodies to uncompensated positions on advisory boards by the collegial body, even where the member of the appointing body abstains, are reaffirmed. See, COE 91-29, COE 90-58, COE 89-53. The decision in Galbut v. City of Miami Beach, 17 FLW D. 1504 (June 16, 1992), is in conflict with this opinion. ...we believe that our interpretation of §112.3135, Fla. Stats., is consistent with the

> legislative intent behind the Anti-Nepotism Statute. Inasmuch as an agency's determinations with regards to a statute's interpretation will receive great deference in the absence of clear error or conflict with legislative intent [Tri-State System v. Dept. of Transportation, 491 So. 2d 1192, 1193 (Fla. 1st DCA 1986)], we affirm our earlier opinions on this issue. In doing so, we acknowledge that we are in conflict with the Third District Court of Appeals' opinion in Galbut. See, McDonalds Corp. v. Dept. of Transportation, 535 So. 2d 323 (Fla. 2d DCA 1988).

The Third District agreed with Galbut in holding that since §112.3135 "is penal in nature, id. §112.317, any doubts 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. See State v. Llopis, 257 So. 2d 17, 18 - 19 (Fla. 1971)." (R. 102.) In its Appellate brief, Galbut maintained since §112.3135, Fla. Stats., is penal in character, strict construction is required, citing State ex rel. Robinson v. Keefe, 149 So. 638 (Fla. 1933) and Baillie v. Town of Medley, 262 So. 2d 693 (Fla. 3d DCA 1972). These cases, however, are distinguishable from the instant case. In Robinson, this Court held that the anti-nepotism statute did not bar the appointment of teachers since the "legislature has by other complete statutes, ...provided a special system for the appointment and tenure of employment for school teachers." Id. at 638. Conversely, no system of merit for City of Miami Beach Board of Adjustment members has been established prior to membership appointment thereon, thus reinforcing the necessity for absolute adherence to the State's

anti-nepotism statute.[2] In Baillie, the Third District Court rejected the argument that "any other political subdivision" as contained with §112.3135(1)(a)(6)'s definition of "Agency" included "towns", because to do so might render many of Florida's town or villages inoperative:

> ...As a practical matter, Florida contains many small hamlets and towns...In these small communities of less than three hundred voters, the probability is that many of the residents are related...within the fourth degree, either by consanguinity or by affinity...The application of [§112.3135, Fla. Stat.] to "towns" might render the municipal corporation inoperative for lack of qualified persons to serve as elected or appointed officials. The common weal would not be served.

Baillie at 697. In so ruling, the Baillie court avoided interpreting the Anti-Nepotism statute in a way which would have ascribed to the legislature an intent to create an absurd result.

Petitioner City of Miami Beach submits that the more appropriate rule of statutory construction is that a statute enacted for public benefit should be construed liberally **in favor**

---

[2]/ The District Court's order stated that "in other contexts in which an individual commissioner must recuse himself or herself because of conflict of interest, it has not been thought that the entire commission must also be recused." (R. 102.) The Third District Court has failed to recognize that in other conflict of interest situations a system of merit is clearly established in which to determine the worth of the related individual's bid for business relationship with the municipality, that being objective standards of the "product" which is at issue. Conversely, an individual related to a city commissioner who seeks employment or appointment to a municipal position lacks any ostensible merit other than the relationship itself concluding that abstention of the related public official will not resolve concerns with regards to the merit of any relative/applicant; if anything, said situations call for a heightened need requiring absolute prohibitions to said appointments.

of the public, even if it contains a penal provision -- this was the rule applied by the Florida Supreme Court when construing the "government in the sunshine law" (§286.011 Fla. Stats.) in Board of Public Construction of Broward County v. Doran, 224 So. 2d 693, 669 (Fla. 1969), and in City of Miami Beach v. Berns, 245 So. 38, 40 (Fla. 1971).

In Doran, the Supreme Court noted that "one purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies." Id. at 699. The identical purpose lies behind the Code of Ethics for public officers and employees:

> It is hereby declared to be the policy of the state that no officer or employee of a state agency or of a county, city, or other political subdivision of the state, and no member of the legislature or legislative employee, shall have any interest, financial or otherwise, direct or indirect; engage in any business transaction or professional activity; or incur any obligation of any nature which is in substantial conflict with the proper discharge of his duties in the public interest. To implement this policy and strengthen the faith and confidence of the people of the state and their government, there is enacted a Code of Ethics setting forth standards of conduct required of state, county, and city officers and employees, and of officers and employees of other political subdivisions of the state, in the performance of their official duties. It is the intent of the Legislature that this code shall serve not only as a guide for the official conduct of public servants in this state, but also as a basis for discipline of those who violate the provisions of this part. (Emphasis added). §112.311(5), Fla. Stat.
>
> It is declared to be the policy of the state that public officers and employees, state and local, are agents of the people and hold their positions for the benefit of the public. They are bound to uphold the Constitution of the

> United States and the State Constitution and to perform efficiently and faithfully their duties under the laws of the federal, state, and local governments. Such officers and employees are bound to observe, in their official acts, the highest standards of ethics consistent with this code and the advisory opinions rendered with respect hereto regardless of personal considerations, recognizing that promoting the public interest and maintaining the respect of the people in their government must be of foremost concern. (Emphasis added). §112.311(6), Fla. Stat.

Similarly, the Supreme Court indicated in State v. Hamilton, 388 So. 2d 561, 563 (Fla. 1980), that the Air and Water Pollution Control Act contained in Chapter 403, Florida Statutes, should be construed liberally because it was intended to operate in the public interest. The Code of Ethics also is grounded in this policy:

> It is essential to the proper conduct and operation of government that public officials be independent and impartial and that public office not be used for private gain other than the enumeration provided by law. The public interest, therefore, requires that the law protect against conflict of interest and established standards for the conduct of elected officials and government employees in situations where conflicts may exist. (Emphasis added). §112.311(1), Fla. Stat.

The people of Florida have found it necessary to compel conflict of interest restrictions upon the public officers and employees who serve them, by adopting two constitutional provisions mandating ethics in government. See Art. II, §8, Fla. Const. and Art. III, §18, Fla. Const. The Code of Ethics which has resulted from this mandate should be construed liberally for the public benefit -- without such a reading, cronyism will flourish in the appointments

of municipal board members throughout this State.

Allowing public officials to appoint their fellow legislators' relatives to board membership will result in no more than a blind application of the law, which application will have the prime effect of granting special benefits to such relative/applicants. Under the opinion of the District Court, citizens living within the City of Miami Beach who are unrelated to City Commissioners, yet who wish to otherwise fulfill their civic duty, will be at an obvious disadvantage with regards to their opportunity to serve their community solely because of their lack of familial status. The Third District's distinction between one appointing official versus appointment by a collegial body serves of no significance whether or not Galbut is appointed by his father-in-law or by his father-in-law's fellow Commissioners, the purposes to be served by preventing relatives of public officials from being appointed to municipal boards would not be met.

As an example of the ludicrous results that would occur should the Third District's order be upheld, consider the following: pursuant to the Court's Order, Galbut (Commissioner Eisenberg's son-in-law) could be appointed to the City's Zoning Board of Adjustment if five of the remaining six City Commissioners vote to do so. Similarly, Mayor Seymour Gelber's wife could be appointed to a future vacancy on the Board of Adjustment assuming, according to the District Court, that Gelber abstained from voting and the question received approval from five out of the six non-related Commissioners. If not prohibited by law, this same pattern of

potential appointment could and very likely would occur with regards to the relatives of remaining City Commissioners Martin Shapiro, Susan Gottlieb, Neisen Kasdin, David Pearlson and Abe Resnick. The appointments would then result in a Zoning Board which functions not as the independent tribunal it now serves as, yet as a "mini-City Commission", adhering to the zoning views and preferences of the related Commissioners which appointed its members. Due to human nature, the probability exists that a Zoning Board composed entirely of relatives of the appointing Commission will follow the wishes of said Commission. In order to maintain the independence of rulings resulting from the Zoning Board it is critical that every step be taken in order to avoid even the potential for influence over these zoning decisions - consistent with the State Code of Ethics, such appearances of impropriety must be avoided at all costs. The fact that the City of Miami Beach's Zoning Board of Adjustment is the final, decision-making body regarding variances, appeals from which are taken to the appellate division of the Circuit Court, underscores the importance of preventing the City Commission members from acquiring any voice in the decisions of that body.

CONCLUSION

Section 112.3135, Florida Statutes, encompassing Florida's Anti-Nepotism Law, requires a liberal statutory construction so as to effectuate the legislative intent behind the statute's enactment. A liberal construction will avoid the ludicrous result

which will occur should the Third District's Order not be reversed, which Order would allow all relatives of public officials to be appointed to any municipal board. The stated legislative intent, as confirmed by the courts of this state as well as the Florida Attorney General's Office and State Commission on Ethics, evidences strict and absolute deterrence of cronyism in government by restricting the subject appointment regardless of whether the appointing relative abstains from the appointing vote.

The lower court's order should be reversed; accordingly, and in light of the above, Petitioner City of Miami Beach respectfully requests that the Court accept jurisdiction of this matter and in doing so answer in the affirmative the question as certified by the Third District Court of Appeals by holding that the Anti-Nepotism Law absolutely prohibits 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; (3) the related City Commissioner take no action which in anyway advocates the appointment of the relative.

Respectfully submitted,

LAURENCE FEINGOLD, City Attorney
CITY OF MIAMI BEACH
1700 Convention Center Drive
4th Floor - Legal Department
Miami Beach, Florida 33139
(305) 673-7470

By: _____
JEAN OLIN
First Asst. City Atty.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 18 day of December, 1992 to: **DAVID NEVEL, ESQUIRE**, Attorney for Respondent, 1111 Lincoln Road, Suite 802, Miami Beach, Florida 33139.

JEAN OLIN

(jko)
(a:miscliti\1bodybri.gal)