CEO 95-12 -- June 1, 1995

ANTI-NEPOTISM

COUNTY COMMISSIONER'S SON SEEKING REAPPOINTMENT TO COUNTY ADVISORY COMMITTEE

To: (Name withheld at the person's request.)

SUMMARY:

Section 112.3135(2)(a), Florida Statutes (Supp. 1994), prohibits a county commission from reappointing a relative of one of its members to an uncompensated position on a county advisory board. The statute, as amended, acts as a disqualification to those individuals whose relatives are members of the collegial bodies making the appointments.

QUESTION:

May the son of a county commissioner be reappointed by the county commission to serve in an uncompensated position on a county advisory board?

Your question is answered in the negative.

In your letter of inquiry and in a telephone conversation with our staff, you relate that in 1994 you were appointed for a one-year term to the Manatee County Environmental Lands Management and Acquisition Committee by the Manatee County Commission, on which your father serves, and that he abstained from voting on your appointment. You are now interested in being reappointed to the Committee and question whether you are eligible for reappointment given the statutory changes to the Anti-Nepotism Law, Section 112.3135(2)(a), Florida Statutes (Supp. 1994).

We previously had opined that public officials could not appoint their relatives to uncompensated positions on advisory boards, even where the relative of the appointee abstained from voting on the appointment and did not otherwise advocate the appointment. See CEO 92-50 and the opinions cited therein. However, this interpretation was struck down by the Florida Supreme Court in City of Miami Beach v. Galbut, 626 So. 2d 192 (1993), where the Court construed Section 112.3135(2)(a), Florida Statutes, to prohibit only affirmative acts on the part of the public official/relative. Thus, the Court opined that Mr. Galbut was eligible for reappointment to the city zoning board of adjustment as long as his city commissioner father-in-law abstained from voting and in no way advocated his reappointment.

After the Court's decision in Galbut, the Legislature revisited Section 112.3135(2)(a), Florida Statutes, and amended it during the 1994 legislative session to read as follows:

> 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 or exercising jurisdiction or control over the agency, who is a relative of the individual or if such appointment, employment, promotion, or advancement is made by a collegial body of which a relative of the individual is a member. However, this subsection shall not apply to appointments to boards other than those with land-planning or zoning responsibilities in those municipalities with less than 35,000 population. [Section 112.3135(2)(a), Florida Statutes (Supp. 1994)] [e.s.]

As it now reads, Section 112.3135(2)(a) prohibits a collegial body from appointing a relative of one of its members to a position in the agency, unless the appointment is to a board without land-planning or zoning responsibilities in a municipality with less than 35,000 population.

This newly-created exemption would not apply to your situation for several reasons. First, the appointing authority is a county, not a municipality. Secondly, the 35,000 population figure is exceeded in Manatee County. Finally, it appears from our review of County Resolution 92-149, which created the Manatee County Environmental Lands Management and Acquisition Committee, that the Committee does possess some, albeit limited, land-planning responsibilities. For each of the foregoing reasons, the exemption is not applicable.

Based upon the statutory language now contained in Section 112.3135(2)(a), we are of the view that your reappointment to the Manatee County Environmental Lands Management and Acquisition Committee by the Manatee County Commission--even where your father abstains from the vote--would contravene Section 112.3135(2)(a), Florida Statutes.

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on June 1, 1995, and **RENDERED** this _____ day of June, 1995.

R. Terry Rigsby
Chairman

CEO 96-5 -- January 29, 1996

ANTI-NEPOTISM

COLLEGIAL BODY APPOINTMENTS TO ADVISORY BOARD AND ENTERPRISE ZONE DEVELOPMENT AGENCY

To: Marion J. Radson, City Attorney (Gainesville)

SUMMARY:

The State's anti-nepotism law, currently codified at Section 112.3135, Florida Statutes, prohibited the appointment of the husband of a member of the city commission/community redevelopment agency (CRA) to a position on an advisory board of the CRA. The CRA is within the member's agency (the city) or is a separate agency of the member; in either event it is an "agency" governed by the anti-nepotism law. In addition, the anti-nepotism law prohibited the appointment of the son of a city commissioner to an enterprise zone development agency. The city commission had jurisdiction or control over the appointment and over the enterprise zone development agency, or the appointment was to a position in the agency in which the city commissioner was serving. An overriding purpose of the anti-nepotism law is that individuals not be placed in public positions by their relatives or by collegial bodies on which their relatives sit. CEO 95-12 and AGO's 70-15, 73-75, 83-13, 83-81, and 85-35 are referenced.

QUESTION 1:

Was the appointment by a community redevelopment agency (CRA) of the husband of a member of the CRA to a CRA advisory board prohibited by Section 112.3135, Florida Statutes?

Your question is answered in the affirmative.

By your letter of inquiry, materials accompanying the letter, and additional written information supplied by your office to our staff, we are advised that the Community Redevelopment Agency of the City of Gainesville (CRA) created three advisory boards, one for each of the redevelopment areas in the City, and appointed the members of each board. One of these appointments, you advise, was bestowed upon the husband of CRA member Paula DeLaney, with the CRA member abstaining from the vote on her husband's appointment.

Pursuant to Section 163.357(1)(b), Florida Statutes, the City Commission, by resolution, declared itself to be the CRA, you advise. Further, you maintain that under Section 163.357(1)(b), the CRA is "separate, distinct, and independent" from the City Commission.

You question whether the appointment was prohibited by Section 112.3135, and focus on the issue of whether or not the CRA is an "agency" under the definition found at Section 112.3135(1)(a), Florida Statutes.

The State's anti-nepotism law, now found within the Code of Ethics for Public Officers and Employees at Section 112.3135, Florida Statutes, provides:

> (1) In this section, unless the context otherwise requires:
> (a) 'Agency' means:
> 1. A state agency, except an institution under the jurisdiction of the Division of Universities of the Department of Education;
> 2. An office, agency, or other establishment in the legislative branch;
> 3. An office, agency, or other establishment in the judicial branch;
> 4. A county;
> 5. A city; and
> 6. Any other political subdivision of the state, except a district school board or community college district.
> (b) 'Collegial body' means a governmental entity marked by power or authority vested equally in each of a number of colleagues.
> (c) 'Public official' means an officer, including a member of the Legislature, the Governor, and a member of the Cabinet, or an 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, including the authority as a member of a collegial body to vote on the appointment, employment, promotion, or advancement of individuals.
> (d) 'Relative,' for purposes of this section only, with respect to a public official, means an individual who is related to the public official as father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister.
> (2)(a) 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 the official is serving or over which the official 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 or if such appointment, employment, promotion, or advancement is made by a collegial body of which a relative of

> the individual is a member. However, this subsection shall not apply to appointments to boards other than those with land-planning or zoning responsibilities in those municipalities with less than 35,000 population.
>
> (b) Mere approval of budgets shall not be sufficient to constitute 'jurisdiction or control' for the purposes of this section.
>
> (3) An agency may prescribe regulations authorizing the temporary employment, in the event of an emergency as defined in s. 252.34(3), of individuals whose employment would be otherwise prohibited by this section.
>
> (4) Legislators' relatives may be employed as pages or messengers during legislative sessions.

We find that the appointment by the CRA of the CRA member's husband was contrary to Section 112.3135. Notwithstanding that the member did not participate in the vote to appoint her husband, Section 112.3135, as amended by Chapter 94-277, Laws of Florida, plainly prohibits such appointments, and contains no exception for situations in which the collegial body member whose relative is appointed abstains from voting and otherwise does not actively participate in the appointment. Further the express language placed in Section 112.3135 by Chapter 94-277, concerning appointments of relatives of members of collegial bodies, was a response to the decision of Galbut v. City of Miami Beach, 605 So. 2d 466 (Fla. 3rd DCA 1992)[1], which held that then Section 112.3135 did not prohibit the appointment of the relative of a member of a collegial body, so long as the member abstained from voting and in no way advocated the appointment. Additionally, we find that the husband's seat on the CRA's advisory board is a position in an agency in which the CRA member is serving within the meaning of Section 112.3135.

As you point out, Section 163.357(1)(b) [a portion of the Community Redevelopment Act] provides that the members of the governing body of a municipality which declares itself to be a community redevelopment agency "constitute the head of a legal entity, separate, distinct, and independent from the governing body of the . . . municipality." However, assuming arguendo that language from the Community Redevelopment Act controls an issue under the anti-nepotism statute and therefore that the City Commission and the CRA are not identical entities, we are not persuaded that the language of Section 163.357(1)(b) places the CRA completely outside of, and thus not a part of, the entire political subdivision known as the City of Gainesville. The definition of "agency" contained in Section 112.3135, unlike the definition of "agency" found at Section 112.312(2), Florida Statutes, which applies to other provisions of the Code of Ethics, encompasses the entirety of a city and other political subdivisions and not merely divisions, bureaus, or parts thereof.

Also, assuming arguendo that the CRA is not at all a part of the City of Gainesville, the CRA itself can be considered an "agency" within the meaning of Section 112.3135. This is because Section 112.3135(1)(a)6 defines "agency" to mean "[a]ny other political subdivision of the state, except a district school board or community college district." Section 1.01(8), Florida Statutes, provides that "[t]he words 'public body,' 'body politic,' or 'political subdivision,' include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state," thus indicating that the Legislature views the term "political subdivision" as synonymous with "body politic." We

note that Section 163.356(1), Florida Statutes, refers to a community redevelopment agency as a "public body corporate and politic."[2]

We view Florida Department of Revenue v. Canaveral Port Authority, 642 So. 2d 1097 (Fla. 5th DCA 1994), cited in your letter of inquiry, as inapposite to our determination of what is an "agency" for anti-nepotism purposes. That case focused on the question of what is a political subdivision of the State for purposes of sovereign immunity from taxation.[3]

Accordingly, we find that the subject CRA advisory board appointment was prohibited by Section 112.3135, Florida Statutes.

QUESTION 2:

Was the appointment by a city commission of the son of a member of the city commission to an enterprise zone development agency prohibited by Section 112.3135, Florida Statutes?

This question is answered in the affirmative.

You advise us that the Gainesville City Commission adopted an ordinance creating the Gainesville Enterprise Zone Development Agency (GEZDA), pursuant to Section 290.0056, Florida Statutes, delegating to GEZDA all powers allowed under the law. In addition, you advise, the City Commission appointed members of GEZDA, including the son of City Commissioner Edward L. Jennings, Sr., with Commissioner Jennings refraining from voting on the appointment of his son. Further, the City Commission, you advise, may remove GEZDA appointees only for cause and, thus, you maintain that the City Commission does not exercise any jurisdiction or control over GEZDA.

The powers of GEZDA, you advise, include processing applications for tax incentives, providing assistance to businesses and residents within the enterprise zone, borrowing money and applying for and accepting advances, loans, grants, contributions, and other financial assistance in furtherance of enterprise zone development, making and executing contracts, procuring insurance or bonds, investing funds, and purchasing and selling stocks, bonds, and other instruments. In addition, you advise that GEZDA submits its budget to the City Commission for approval.

You recognize that Section 112.3135 prohibits a collegial body from appointing a relative of a member of the collegial body to a position in the agency in which the member of the collegial body is serving or to a position in an agency over which the collegial body exercises jurisdiction or control. Further, you frame the issue as whether GEZDA is part of the City, such that its members have been appointed to positions in the City or to positions in an agency over which the City exercises jurisdiction or control, given, as you put it, the broad powers and independent operations of GEZDA.

Based upon the reasons set forth below, we find that the appointment of the Commissioner's son was prohibited by Section 112.3135.

Our analysis begins with a discussion of the language, "a position in the agency in which the official is serving or over which the official exercises jurisdiction or control" and "serving in or exercising jurisdiction or control over the agency," contained in Section 112.3135(2)(a). We must determine whether the GEZDA position is located within the "agency" in which the Commissioner is serving. Further, we must determine whether the subject language refers to jurisdiction and control over placement and occupancy of the

position or, rather, whether it refers to other jurisdiction and control over the agency in which the position is located, and if so, whether such control over the agency exists.

Prior to the effective date of Chapter 89-67, Laws of Florida, advisory opinions under the anti-nepotism law were rendered by the Office of the Attorney General, and we have not deviated from the General's interpretation of that law in our administration of it. Discussion of the jurisdiction and control language has received no advisory opinion treatment from us and little by the General. The Attorney General apparently has viewed, in at least some opinions, the language as addressing jurisdiction and control over placement in the position, rather than addressing other jurisdiction and control over the agency in which the position is located. See AGO 73-75, a situation involving employment of a relative of a county commissioner by an agency partly funded by the county commission, which states:

> If the board of county commissioners is vested with, and actually exercises, jurisdiction or control with respect to the employment, promotion, or advancement of employees engaged in such work, [the anti-nepotism statute] is applicable and would direct that such employees so employed who are related to the degree specified shall not be paid.
>
> If the authority of the Board of County Commissioners of Holmes County is merely that of approving the budget or approving the appointment or employment made by another official vested by law with the authority to appoint or employ, then the Antinepotism Law above referred to would not be applicable.

See also AGO 83-13, AGO 83-81, and AGO 85-35, which, in citing AGO 73-75, states:

> In AGO 73-75, this office concluded that s. 116.111, F.S., prohibited the employment of a brother of a member of a board of county commissioners as a mosquito control and garbage disposal worker when the county commission actually exercised jurisdiction and control with respect to such employment and work. Thus, it is the position of this office that a board or commission within the definition of 'agency' contained in s. 116.111(1)(a), F.S., which is vested with, and actually exercises, jurisdiction or control over the employment, promotion, or advancement of employees is subject to the nepotism law, and therefore, a collegial body cannot employ, appoint, or promote a relative of a member of the governing body in question.

However, AGO 70-15 states that

> . . . the antinepotism act requires that the employing agency is one over which the civil service board 'exercises jurisdiction or control.' In that connection it is to be noted that [the anti-nepotism act] states in part: 'Mere approval of budgets shall not be sufficient to constitute "jurisdiction or control" . . . .'

Thus it appears that there is no precedent clearly interpreting whether the position in an agency/jurisdiction or control language means that the appointing authority must control appointments to the position or whether the appointing authority must control (in some other sense) the agency in which the position is located. Nevertheless, we are persuaded that the circumstances of this inquiry establish that the City Commission has jurisdiction or control over appointments to GEZDA's governing board, and that the City Commission has other jurisdiction or control over GEZDA.

The City Commission's jurisdiction or control over appointments is obvious. Further, notwithstanding that the City Commission has delegated certain powers to GEZDA, language from Chapter 290, Florida Statutes, which addresses entities such as GEZDA, indicates that the City Commission has jurisdiction or control over GEZDA:

> . . . the . . . municipality shall create a public body corporate and politic to be known as an 'enterprise zone development agency." . . . . [Section 290.0056(1), Florida Statutes.]
>
> When the governing body creates an enterprise zone development agency, that body shall, by ordinance, appoint a board of commissioners of the agency . . . . [Section 290.0056(2), Florida Statutes.]
>
> The governing body shall designate a chair and vice chair from among the commissioners [of the enterprise zone development agency.] . . . [Section 290.0056(5), Florida Statutes.]
>
> At any time after the creation of an enterprise zone development agency, the governing body of the . . . municipality may appropriate to the agency such amounts as the governing body deems necessary for the administrative expenses and overhead of the agency. [Section 290.0056(6), Florida Statutes.]
>
> The governing body may remove a commissioner for inefficiency, neglect of duty, or misconduct in office . . . . [Section 290.0056(7), Florida Statutes.]
>
> . . . contingent upon approval by such governing body, such powers and responsibilities shall be performed by the enterprise zone development agency . . . . [Section 290.0056(9), Florida Statutes.]
>
> Contingent upon approval by the governing body, the agency may invest in community investments corporations . . . . [Section 290.0056(10), Florida Statutes.]
>
> In the event that the nominated area selected by the governing body is not designated a state enterprise zone, the

> governing body may dissolve the agency after receiving notification from the department that the area was not designated as an enterprise zone. [Section 290.0056(12), Florida Statutes.]
>
> Each application for designation as an enterprise zone must be accompanied by a strategic plan adopted by the governing body of the municipality . . . . [Section 290.0057(1), Florida Statutes.]

In addition, notwithstanding that the City Commission appears to possess jurisdiction or control over both the appointments to GEZDA's board and other aspects of GEZDA's operations, our finding that the appointment was prohibited also is grounded in the overriding theme and purpose of the anti-nepotism statute--that persons not be placed in public positions by the actions of their relatives or of collegial bodies upon which their relatives sit.

In addition to our finding that GEZDA is an agency over which the City Commission exercises jurisdiction or control, we find that the appointment violated Section 112.3135 because the GEZDA governing board position to which the City Commissioner's son was appointed is "a position in the agency in which the [City Commissioner] is serving." While GEZDA has some powers or responsibilities separate from those of the City Commission, we do not view GEZDA as being totally outside of the political subdivision ("agency") known as the City of Gainesville.

Accordingly, we find that the anti-nepotism law also prohibited the appointment of the City Commissioner's son to GEZDA.

ORDERED by the State of Florida Commission on Ethics meeting in public session on January 25, 1996, and **RENDERED** this 29th day of January, 1996.

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William J. Rish
Chairman

[1] The decision of the District Court of Appeal, Third District, was approved by the Florida Supreme Court in City of Miami Beach v. Galbut, 626 So. 2d 192 (Fla. 1993).

[2] The Legislature's failure to expressly except community redevelopment agencies from the definition of "agency" found in Section 112.3135(1)(a)6, Florida Statutes, as it excepted district school boards and community college districts, supports the view that all other public bodies, bodies politic, or political subdivisions, including community redevelopment agencies, are included within Section 112.3135's definition of agency. A maxim of statutory construction, expressio unius est exclusio alterius (the expression of one thing is the exclusion of another), supports this reasoning.

[3] Canaveral Port Authority, supra, recognized that "Florida has 'political subdivisions' other than counties which are immune from taxation." Id., 1099. Further, the court's observation in footnote 6 of the opinion (that the definition of "political subdivision" contained in Section 1.01(8) does not control the question of immunity from taxation) buttresses our position that the State's jurisprudence concerning sovereign immunity from taxation does not control the question of what is an "agency" under the anti-nepotism law.

CEO 98-7 -- March 5, 1998

ANTI-NEPOTISM

PROMOTION OF SON-IN-LAW OF POLICE CHIEF WITHIN POLICE DEPARTMENT

To: Name Withheld at Person's Request (Miami)

SUMMARY:

Under the circumstances presented, Section 112.3135(2)(a), Florida Statutes, prohibits a City Police Chief's son-in-law from being promoted or receiving "advancements" within the Police Department, so long as he is Police Chief. However, he is not prohibited from receiving cost-of-living or other routine pay increases or maintaining his position within the Police Department under the supervision of his father-in-law, the Police Chief.

QUESTION:

Does the anti-nepotism law prohibit the promotion within the Police Department of the son-in-law of the Police Chief, where the City Manager, pursuant to the City Charter, has the power to appoint and remove employees of the City and to authorize the head of a department to appoint and remove subordinates in the department, and thus, the power to withdraw the delegation of appointment authority with respect to the Police Chief's son-in-law?

Under the circumstances presented, your question is answered in the affirmative.

Through your letter of inquiry and conversation with our staff, you ask whether the anti-nepotism law [Section 112.3135(2)(a), Florida Statutes] prohibits the son-in-law of the City's Police Chief from being promoted within the Police Department. You advise that the Police Chief has served as Police Chief since November 22, 1987. His son-in-law was hired as a police officer by the City on November 25, 1982, prior to becoming the Police Chief's son-in-law, you advise. You advise further that he was promoted to the position of Sergeant in November of 1990, and in 1996 he married the Police Chief's daughter.

You advise that during the Sergeant's tenure with the Police Department several promotional opportunities have arisen. However, he has neither applied for nor has the Police Chief recommended him for any of the higher classified positions, you write.

You also advise that pursuant to Section 4.1 of the City Charter, the City Manager acts as the administrative head of the City. Except for those positions whose appointment is controlled by the City Council, you write, the City Manager is authorized under Section 4.5(2) of the City Charter to appoint and remove employees of the City or he may authorize the head of a department or office to appoint and remove subordinates in his or her department or office.

The Police Department, you advise, also is under the direction of the City Manager.[1] However, you write that the "promotion" of an employee is not specifically mentioned in

either the City Charter or Code. With respect to the Police Department, pursuant to Section 2-238 of the City Code, the Police Chief exercises general supervision over the Department, you advise. Nevertheless, for the position of Lieutenant, you advise that pursuant to the collective bargaining agreement between the City and the Dade County Police Benevolent Association, the following promotion process currently is followed:

1. The eligibility for competing for Lieutenant is established.
2. A written exam is given.
3. Those who score a minimum of "60" participate in an oral interview panel for which a score is given.[2]
4. The two scores are added, and a promotional eligibility list is established based on high to low score.
5. City management can select any person in the top three slots on the list for promotion.

For non-bargaining unit positions above Lieutenant, i.e., Captain or Major, the Chief recommends the promotion, you advise; however, the City Manager has final selection approval.

You advise that in practice the Police Chief has been instrumental in recommending or advising the City Manager regarding promotions within his department. You also advise that, pursuant to the authority granted in the City Charter and the custom and practice of the City Manager, the Police Chief apparently has been delegated the authority to promote, advance, or recommend individuals for promotion. However, inasmuch as the power to appoint or remove an employee ultimately devolves from the City Charter and the City Manager, you suggest that the City Manager could remove the delegation of responsibility regarding possible promotional opportunities for his son-in-law from the Police Chief.

Within the Code of Ethics for Public Officers and Employees, the Anti-Nepotism Law provides in relevant part:

> RESTRICTION ON EMPLOYMENT OF RELATIVES.--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 the official is serving or over which the official 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 or if such appointment, employment, promotion, or advancement is made by a collegial body of which a relative of the individual is a member. However, this subsection shall not apply to appointments to boards other than those with land-planning or zoning responsibilities in those municipalities with less than 35,000 population. [Section 112.3135(2)(a), Florida Statutes.]

This provision prohibits a public official from promoting or advancing, or advocating the promotion or advancement of, a relative in the agency he or she serves or over which he or she exercises control. For purposes of this law, the term "relative" includes one's "son-in-law." See Section 112.3135(1)(d), Florida Statutes. In addition, you correctly note that the term "public official" is defined at Section 112.3135(1)(c), Florida Statutes, to include an officer or employee of a city who is vested with 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 in the City. Because the Police Chief possesses the delegated authority to promote or to recommend or advise the City Manager regarding promotions within his department, we find that he is a "public officer" within the meaning of Section 112.3135(1)(c).

In CEO 96-6, CEO 93-15 and CEO 90-62, we noted that prior to the 1989 transfer of the anti-nepotism law into the Code of Ethics for Public Officers and Employees, that provision (formerly Section 116.111, Florida Statutes) was interpreted by a number of Attorney General's opinions whose reasoning we essentially have adopted in issuing our opinions involving Section 112.3135. Thus, in CEO 90-62, we opined that Section 112.3135(2)(a) was not violated where a city police chief and his father both worked in the police department and where the father was employed there prior to his son's becoming chief. We noted that the Attorney General had consistently interpreted Section 116.111 not to require the discharge of a person whose relative took the higher position after the person's employment or otherwise where the prohibited relationship came into being after the person's employment. In other words, where a public official married one of his employees, the Attorney General opined that the employee was allowed to continue in the same position and to participate in routine raises, but she could not be promoted or advanced, or recommended or advocated for a promotion or advancement. See AGO's 77-36 and 73-35. Consequently, as we opined in CEO 96-6 and CEO 89-46, we are of the opinion here that no violation of Section 112.3135(2)(a) has been created by the Police Chief's son-in-law's continuing to work in the Police Department after he married the Police Chief's daughter.

We also repeatedly have stated that the anti-nepotism law addresses only appointment, employment, promotions, and advancement. As it does not address any other aspect of the supervisory authority a public official may have over a relative, it cannot be applied to prohibit an official from such actions as stationing, transferring, evaluating, or even suspending a relative. This principle also was recognized in AGO 73-397, in which it was found that a city could hire a policewoman who was the daughter of a patrolman who at times would supervise his daughter. Thus, in CEO 91-27, we found that where a police officer's first cousin was assistant city manager with no authority to employ or promote police officers at the time when the police officer was hired, the officer's hiring was not prohibited by Section 112.3135 because the officer's cousin, even as city manager with such authority, was not hiring, promoting, or advocating the hiring or promotion of the officer. See also CEO 93-15, CEO 94-26, and CEO 94-30. We adhere to that reasoning here and find that the anti-nepotism law does not prohibit the Police Chief from either supervising his son-in-law or evaluating his work.

In both CEO 90-62 and CEO 93-15, we referenced Slaughter v. City of Jacksonville, 338 So. 2d 902 (Fla 1st DCA 1976), which examined the question of whether a merit pay increase constituted a "promotion" or "advancement" under the terms of the anti-nepotism law. In Slaughter, the Court concluded:

> It is our view that it is only an increase in grade which elevates an employee to a higher rank or position of greater personal dignity or importance and is an advancement or promotion. [Id. at 904.]

Thus, Slaughter, whose father was the Clerk of the Circuit Court, was permitted to keep the merit pay increases he had received over the course of his employment in the Clerk's Office. Similarly, we find that no violation of Section 112.3135(2)(a) would be created were the Police Chief's son-in-law to receive across the board cost-of-living increases or merit pay increases, as long as any such increase does not constitute an increase in grade or elevation to a higher rank for the son-in-law.

However, in response to your primary question, because of the discretion inherent in the promotion process, we are of the opinion that a violation of Section 112.3135(2)(a) would be created were the Police Chief's son-in-law to be promoted following the promotion process that is currently followed pursuant to the collective bargaining agreement between the City and the Dade County Police Benevolent Association, which you describe in your letter of inquiry. The situation here appears to analogous to that described in CEO 93-16, wherein we found that the anti-nepotism law prohibited the placement of the brother-in-law of a city police captain in a police sergeant's position, where the captain was vested with the authority to recommend individuals for the position, regardless of his delegation of the authority. We found there that even though the actual hiring decision was the police chief's and not the police captain's, the police captain was the employee in whom was vested the authority to recommend persons to fill the two sergeant openings, and his temporary delegation of that authority did not divest him of it such that the anti-nepotism law would not be violated. Similarly, we find that the ad hoc removal of the authority to recommend possible promotional opportunities for the Police Chief's son-in-law does not divest the Police Chief of that authority.

Recently, in CEO 98-2, we found that the anti-nepotism law prohibits the sons of a member of the Game and Fresh Water Fish Commission (GFC) from receiving promotions and advancements, other than those which involve no discretion on the part of the Commission, its Executive Director, or other GFC personnel. In that agency, the wildlife officers were ranked for promotion to sergeant and lieutenant by test score and time in-grade, and the top applicant was always the one who got the promotion, unless the top applicant declined it. In contrast, here, the Police Department's promotional policy does not require that the eligible candidate for promotion be the top scorer; instead, it is one of the top three scorers who is either promoted or recommended for promotion by the Police Chief.

Accordingly, we find that Section 112.3135(2)(a), Florida Statutes, prohibits the Police Chief's son-in-law from being promoted or receiving "advancements" within the City's Police Department under current promotional procedures, so long as he is Police Chief. However, we also find that he is not prohibited from receiving cost-of-living or other routine pay increases or maintaining his position within the Police Department under the supervision of his father-in-law, the Police Chief.

ORDERED by the State of Florida Commission on Ethics meeting in public session on March 5,1998 and **RENDERED** this 10th day of March, 1998.

Kathy Chinoy
Chair

[1] Section 2-338 of the City Code provides that "the chief of police shall exercise general supervision over the police department and shall be responsible to the city manager for its efficiency and for the maintenance of peace and order within the city."

[2] You advise that there is no set policy regarding who sits on the interview panel. It could be the Human Resources Director and someone else from inside the City's administration, i.e., possibly the Assistant Police Chief and officers from other local police departments. You advise that the Police Chief does not sit or participate as a member of the panel.

CEO 06-13 -- August 2, 2006

ANTI-NEPOTISM

CITY CHARTER SCHOOL AUTHORITY SUBJECT TO LAW

To: Name withheld at person's request (Cape Coral)

SUMMARY:

Florida's anti-nepotism law (Section 112.3135, Florida Statutes) is applicable to prohibit employments, appointments, promotions, or advancements made or advocated by members of a municipal charter school authority board and its administrators of their respective relatives. An overriding purpose of the anti-nepotism law is that individuals not be placed in public positions by their relatives or by collegial bodies on which their relatives sit. CEO 96-5 and CEO 99-2 are referenced.

QUESTION:

Is Section 112.3135, Florida Statutes, applicable to prohibit employments, appointments, promotions, or advancements made or advocated by members of a municipal charter school authority board and its administrators of their respective relatives?

Your question is answered in the affirmative.

By your letter of inquiry and additional materials provided to our staff, we are advised that the City of Cape Coral established by ordinance the Cape Coral Charter School Authority (which exercises power through a governing Board) to manage the municipal charter schools created by the City. In addition, we are advised that charter school operations are governed by a contract (charter) between the Lee County School District and the City, but that the Authority manages and operates the charter schools for the City. Further, your inquiry discusses various attributes of the Authority and concludes that "[t]he best characterization of the Charter School Authority is that it is an independent agency of the City of Cape Coral." Also, in describing the Authority and delineating some of its powers and duties, the ordinance (within its Sec. 26-15) provides:

> A. Powers and Duties of Authority.
>
> The powers and/or duties granted by this Chapter to the Authority are declared to be public and governmental functions, exercised for public purposes, and are matters of public necessity. Any list of powers and/or duties contained herein is not meant to be exclusive, but only illustrative of the powers that may be exercised by the Authority. The Authority is a public body corporate and shall have the right and responsibility to exercise the following powers and/or duties:
> 1. Establish positions, duties, and a pay plan, and employ, pay, and provide benefits for personnel as well as establish personnel policies. All personnel shall be at will employees with no property rights whatsoever in their employment with the Board whether employed by contract or otherwise. The Board shall have no authority whatsoever to grant any property rights in employment to any person employed by the Authority and any attempt to do so shall be null and void. Authority employees are not employees of the City of Cape Coral, but they are public employees. Authority employees are subject only to the rules, regulations, policies and authority of the Cape Coral Charter School Authority.

In CEO 96-5, we considered questions very similar to yours, especially in regard to what constitutes an "agency" for purposes of Section 112.3135,[1] determining, inter alia, that a city's community redevelopment

agency (CRA) was a part of the city (an "agency" subject to the law), and determining that a city's enterprise zone development agency was an "agency" in which a city commissioner served or an "agency" over which the city commission exercised jurisdiction or control. Thus, we went on to opine in CEO 96-5 that appointments of the husband of a member of the city commission/CRA to a position on an advisory board of the CRA and of the son of a city commissioner to the enterprise zone development agency were prohibited by the law. Likewise, we find, regarding your inquiry, that the Authority is an "agency" subject to Section 112.3135. Consistent with our finding in CEO 96-5, we find in the instant matter that the Authority is an agency of the City. CEO 96-5. As was our decision in CEO 96-5, our decision herein is grounded in the overriding theme and purpose of the anti-nepotism law—that persons not be placed in public positions by the actions of their relatives or by the actions of collegial bodies upon which their relatives sit.[2]

In addition, we find that the Authority is not within the exemption from the anti-nepotism law's prohibitions found within Section 112.3135(1)(a)6 ("except a district school board"). The Lee County School District's contracting with the City via the school charter does not transform the Authority or its Board into the School District or the School Board for purposes of Section 112.3135, if for any other purpose;[3] and an exemption to a prohibition is to be narrowly construed (construed against one seeking applicability of the exemption). State v. Nourse, 340 So. 2d 966 (Fla. 3d DCA 1976).

Accordingly, we find that the Authority Board members, and Authority administrators and other personnel who come within the definition of "public official" under Section 112.3135, Florida Statutes, are subject to the prohibitions of Section 112.3135. Thus, they are prohibited from employing, appointing, promoting, or advancing, or advocating for employment, appointment, promotion, or advancement, their relatives to charter school or Authority positions.[4]

ORDERED by the State of Florida Commission on Ethics meeting in public session on July 28, 2006 and **RENDERED** this 2nd day of August, 2006.

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Norm M. Ostrau, Chairman

[1]**112.3135 Restriction on employment of relatives.**

(1) In this section, unless the context otherwise requires:

(a) Agency means:

1. A state agency, except an institution under the jurisdiction of the Division of Universities of the Department of Education;

2. An office, agency, or other establishment in the legislative branch;

3. An office, agency, or other establishment in the judicial branch;

4. A county;

5. A city; and

6. Any other political subdivision of the state, except a district school board or community college district.

(b) Collegial body means a governmental entity marked by power or authority vested equally in each of a number of colleagues.

(c) Public official means an officer, including a member of the Legislature, the Governor, and a member of the Cabinet, or an 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, including the authority as a member of a collegial body to vote on the appointment, employment, promotion, or advancement of individuals.

(d) Relative, for purposes of this section only, with respect to a public official, means an individual who is related to the public official as father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister.

(2)(a) 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 the official is serving or over which the official 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 or if such appointment, employment, promotion, or advancement is made by a collegial body of which a relative of the individual is a member. However, this subsection shall not apply to appointments to boards other than those with land-planning or zoning responsibilities in those municipalities with less than 35,000 population. This subsection does not apply to persons serving in a volunteer capacity who provide emergency medical, firefighting, or police services. Such persons may receive, without losing their volunteer status, reimbursements for the costs of any training they get relating to the provision of volunteer emergency medical, firefighting, or police services and payment for any incidental expenses relating to those services that they provide.

(b) Mere approval of budgets shall not be sufficient to constitute jurisdiction or control for the purposes of this section.

(3) An agency may prescribe regulations authorizing the temporary employment, in the event of an emergency as defined in s. 252.34(3), of individuals whose employment would be otherwise prohibited by this section.

(4) Legislators relatives may be employed as pages or messengers during legislative sessions.

[2]Our decision herein concerns the anti-nepotism law (Section 112.3135); it does not apply to the financial disclosure laws (portions of which are codified in Section 112.3145, Florida Statutes). Therefore, via our finding herein that the Authority is an agency of the City, we do not expressly or impliedly find that Authority Board members are "local officers" required to file financial disclosure. See the letter from our financial disclosure staff dated March 14, 2006 to the City Attorney's Office advising that the members are not required to file. It is clear that officers of a government entity can be subject to provisions of the Code of Ethics other than its financial disclosure requirements without also being subject to financial disclosure. CEO 99-2 (city-operated charter school).

[3]However, we do not find that employments, appointments, promotions, or advancements of employees of the School District made or recommended by their relatives in the capacity of a "public official" of the School District are not within the exemption, even if City charter schools or the Authority contract with the School District [its sponsoring entity under Section 1002.33(5)(a)1, Florida Statutes] for the services of personnel employed by the sponsor.

[4]Please note that Authority Board members can violate the law even if they abstain from voting regarding a relative and abstain from advocacy regarding a relative (that Board collegial conduct can be "imputed" to them under the current law). See the discussion in CEO 96-5 regarding the Legislature's response to the Galbut decision by the Florida Supreme Court. Also note that potentially the law can be violated if a "public official" advocates for his or her relative, regardless of whether the public official's authority to recommend goes to the position the relative is seeking or to another position.

CEO 18-17—December 12, 2018

ANTI-NEPOTISM

GENERAL MANAGER/CHIEF EXECUTIVE OFFICER OF MUNICIPAL UTILITY BOARD SELECTING SON OF BOARD'S CHAIR FOR POSITION

To: Name withheld at person's request (Monroe County)

SUMMARY:

Under the circumstances presented here, the anti-nepotism law (Section 112.3135, Florida Statutes) will not be violated were the son of the chair of a municipal utility board to be hired to a position with the board. The board's general manager/chief executive officer, not the board, is the "public official" vested with the authority to hire for the position, and the utility board and its chair have not participated in the hiring process or advocated for the selection of the chair's son. CEO 13-7, CEO 02-11, CEO 02-3, CEO 98-2, and CEO 93-1 are referenced. [1]

QUESTION:

Would the anti-nepotism law (Section 112.3135, Florida Statutes) be violated were the general manager/chief executive officer of a municipal utility board to hire the son of the board's chair to a position?

Under the circumstances presented, your question is answered in the negative.

You write that you are inquiring on behalf of a member of the Utility Board of the City of Key West (d/b/a KEYS Energy Services) who currently is serving as the Board's Chair. You relate the Board engaged the services of an outside consultant to review its organizational structure and make recommendations on how to streamline operations. You relate that one of the consultant's recommendations was to create a new position—a Director of Legal and Regulatory Services—who would be responsible for providing legal counsel and organizational risk management, overseeing safety and compliance issues, and acting as a liaison to the Key West Emergency Operations Center. At the Board's request, the consultant also prepared a job description and a pay scale for the proposed position. You state that the Board's General Manager/Chief Executive Officer (General Manager) approved the job description for the new position and the Board approved the position's pay scale.[2]

You relate that at that point, the General Manager initiated a selection process for the new position. You state the General Manager directed that the position be posted and advertised through various channels—such as on the Board's website and in an informational blast sent to members of the Monroe County Bar Association—and, after applications were received, she reviewed them with two other Board employees as well as with the general counsel of another public utility. Ultimately, you state, the General Manager selected the son of the Board's Chair as the best-suited candidate. You relate that neither the Board's Chair nor any other Board member participated in or was consulted during the hiring process, and you emphasize the hiring decision was made by the General Manager alone. You state the General Manager made the Chair's son an offer of employment, contingent upon verifying whether the son's employment would place the Chair in violation of Section 112.3135, the anti-nepotism statute.

Section 112.3135(2)(a), Florida Statutes, provides:

> 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 the official is serving or over which the official 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 or if such appointment, employment, promotion, or advancement is made by a collegial body of which a relative of the individual is a member . . .

Section 112.3135(2)(a) prohibits a public official from appointing, employing, promoting, or advancing, or advocating for the appointment, employment, promotion, or advancement of a "relative."[3] See CEO 13-7. The statute also is triggered if the collegial body on which a public official serves appoints, employs, promotes or advances the relative of one of its members, or advocates for such an appointment, employment, promotion, or advancement, even if the member who is related abstains from the decision. See CEO 93-1. Considering this, the question here is whether the Board's Chair—or the Board on which he serves—is appointing or employing, or advocating for the appointment or employment, of his son.

Initially, we note that the legislative act creating the Board does not give it authority to become involved in the type of hiring decision raised by your scenario. When passing the enabling legislation, the Legislature did not grant the Board broad employment authority, but stated the Board "shall direct, employ, fix the compensation of and discharge all employees" only through its General Manager.[4] Moreover, Section 6 of Article V of the Board's bylaws states the General Manager "shall have the responsibility of hiring and establishing the conditions of employment for all employees of the Utility to the extent permitted by law."[5] Accordingly, pursuant to the Board's charter and bylaws, the authority to appoint or employ Board employees is vested in the General Manager/Chief Executive Officer, not in the Board.[6]

The hiring process here reflected this framework. You relate that while the Board approved the pay scale for the position in question, the General Manager and three other individuals—none of whom were Board members—reviewed the applications and the General Manager then selected the Chair's son as the best—suited candidate. Neither the Board collectively, nor the Chair personally, participated in or was consulted during the hiring process, and the authority to make the final hire rested solely with the General Manager.

We addressed a similar situation in CEO 93-1, which dealt with a county manager promoting the wife of a county commissioner to a higher pay classification within the county's solid waste department. There, we found Section 112.3135 did not apply, as the county's charter and pertinent statutory law vested authority to promote the wife with the county manager, not the county commission. While the county commission had the ability to adopt the job classification into which the commissioner's wife was promoted, it did not have the authority to promote an employee to that classification. Accordingly, we concluded that so long as the county commissioner personally—and the county commission as a collegial body—refrained from advocating for the promotion, and so long as the promotional decision was made by the county manager, alone, Section 112.3135 would not apply.

Considering CEO 93-1, as well as the fact that the hiring authority here is vested in the General Manager and not the Board, we find the Board's Chair will not be in violation of Section 112.3135 were his son to be employed as the Director for Legal and Regulatory Services, provided that neither he, nor the Board as a collegial body, advocate for his son's hiring.

In finding that the law would not be violated under these circumstances, we are aware that the public's confidence in the Board's hiring decisions might be strengthened were we to interpret the anti-nepotism provision more liberally to preclude the hiring of the Chair's son. However, Section 112.3135 is a penal statute and, as such, it is subject to strict (narrow) construction so that those covered by its prohibition will have clear notice of what conduct it proscribes. See CEO 02-11 and CEO 02-3 (Question 1). The Florida Supreme Court itself has strictly interpreted the anti-nepotism law and has definitively rejected the argument that the statute should be broadly construed, stating in City of Miami Beach v. Galbut, 626 So. 2d 192, 194 (Fla. 1993):

> the . . . position that Florida's anti-nepotism statute should be liberally interpreted for the public benefit, in accordance with past Attorney General and Ethics Commission opinions on this issue, is clearly misplaced.

While we understand the public may be concerned with a decision by the Board's General Manager to employ the son of the Board's Chair, it is not our role to rewrite or expand the prohibition in Section 112.3135

beyond that written by the Legislature.

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on December 7, 2018, and **RENDERED** this 12th day of December, 2018.

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Guy W. Norris, *Chair*

[1]Prior opinions of the Commission on Ethics can be viewed at www.ethics.state.fl.us.

[2]You indicate the Utility Board only approves pay scales, not job descriptions, for management positions such as the Director of Legal and Regulatory Services.

[3]The term "relative" is defined for the purpose of the anti-nepotism law in Section 112.3135(1)(d), Florida Statutes, and includes one's son.

[4]This language is included in Section 12 of the Board's charter, which, in turn, is found in Chapter 69-1191, Laws of Florida.

[5]The only exceptions in the bylaws are that the Board itself hires the General Manager and the Board Attorney, and that the Board Attorney hires the employees in the Attorney's office.

[6]Because the source of authority was based in the charter and bylaws, we do not view this as a scenario where the Board merely has delegated or attempted to delegate authority to the General Manager. See, in general, CEO 02-11, n. 7 and CEO 98-2.

CEO 19-12—July 31, 2019

APPOINTMENT OR EMPLOYMENT OF RELATIVES OF SCHOOL SUPERINTENDENTS

EFFECT OF CHAPTER 2018-005, LAWS OF FLORIDA

To: Joy Frank, Esq., Attorney for Florida Association of District School Superintendents (Tallahassee)

SUMMARY:

Advice is provided regarding the amendment to Section 1012.23(2), Florida Statutes, which became effective on July 1, 2019. While the provision's language has been extended to include district school superintendents, prohibiting them from appointing or employing a "relative," as that term is defined in Section 112.3135, Florida Statutes, to work under their direct supervision, it does not apply when a superintendent only makes a recommendation concerning the appointment or employment of a relative. Referenced are CEO 09-16, CEO 02-3, and CEO 00-17.

QUESTION:

Under the recently-added language of Section 1012.23(2), Florida Statutes, are district school superintendents prohibited not only from appointing or employing "relatives," as that term is defined in Section 112.3135, Florida Statutes, to work under their direct supervision, but also from making recommendations to appoint or employ "relatives" to work under their direct supervision?

Your question is answered in the negative.

In your letter of inquiry, you indicate you are inquiring on behalf of several district school superintendents about the applicability of language in Section 1012.23(2), Florida Statutes, which became effective (via Chapter 2018-005, Laws of Florida, HB 1279) on July 1, 2019. While Section 1012.23(2) previously prohibited only district school board members from appointing or employing "relatives," as that term is defined in Section 112.3135, Florida Statutes,[1] to work under their direct supervision, the amended language extends the prohibition to district school superintendents, stating:

> Neither the district school superintendent nor a district school board member may appoint or employ a relative, as defined in s. 112.3135, to work under the direct supervision of that district school board member or district school superintendent. The limitations of this subsection do not apply to employees appointed or employed before the election or appointment of a school board member or district school superintendent. The Commission on Ethics shall accept and investigate any alleged violations of this section pursuant to the procedures contained in ss. 112.322-112.3241.

(emphasis added).

Your question stems from the fact that, despite the language in the amendment, district school superintendents do not have authority to appoint or employ district employees, but only to make recommendations to the school board concerning appointment or employment decisions. As support, you cite Section 1012.22, Florida Statutes, which provides in part:

> PUBLIC SCHOOL PERSONNEL; POWERS AND DUTIES OF THE DISTRICT SCHOOL BOARD.--The district school board shall:

(1) Designate positions to be filled, prescribe qualifications for those positions, and provide for the appointment, compensation, promotion, suspension, and dismissal of employees as follows, subject to the requirements of this chapter:

(a) Positions, qualifications, and appointments.—

1. The district school board shall act upon written recommendations submitted by the district school superintendent for position to be filled, for minimum qualifications for personnel for the various positions, and for the persons nominated to fill such positions.

2. The district school board may reject for good cause any employee nominated.

3. If the third nomination by the district school superintendent for any positions is rejected for good cause, if the district school superintendent fails to submit a nomination for initial employment within a reasonable time as prescribed by the district school board, or if the district school superintendent fails to submit a nomination for reemployment within the time prescribed by law, the district school board may proceed on its own motion to fill such position.

4. The district school board's decision to reject a person's nomination does not give that person a right of action to sue over the rejection and may not be used as a cause of action by the nominated employee . . .[2]

Given the foregoing, you ask what effect the amended language of Section 1012.23(2) will have on district school superintendents, considering they do not have statutory authority to appoint or employ, but only to make recommendations.

Our interpretation of Section 1012.23(2) necessarily involves recognition of the general principal that, as a penal statute, it must be strictly construed, meaning any doubts as to the meaning of its terms must be construed most favorably toward a potential respondent (i.e., the person against whom it would be applied). City of Miami Beach v. Galbut, 626 So. 2d 192, 194 (Fla. 1993). Strictly construing a statute allows those covered by it to have clear notice of what it proscribes. See CEO 09-16 and CEO 02-3. It also ensures we do not usurp the role of the Legislature by impermissibly broadening a law or enlarging the terms or used in the law. See CEO 00-17.

Here, we find it reasonable that the Legislature knew of the limited role that district school superintendents play in the hiring and appointment process, a role clearly laid out in Section 1012.22. The fact that the Legislature still chose not to include language extending the prohibition in Section 1012.23(2) to situations where a district school superintendent recommends the hiring of a relative shows, to us, that it did not intend for the statute to apply in such a circumstance.[3] To interpret the statute otherwise would broaden its scope beyond the plain meaning of its language.[4] For this reason, we find the amended language in Section 1012.23(2) applies to district school superintendents only in situations where they appoint or employ a relative (as "relative" is defined in Section 112.3135) to work under their direct supervision, not in situations where they make recommendations to the district school board for the board to appoint or employ their relative.

Regarding your remaining issues, you inquire whether a district school superintendent may recommend a relative, as defined in Section 112.3135, for employment if that relative does not fall under the superintendent's direct supervision. As previously indicated, we do not interpret the amended language in Section 1012.23(2) as extending to making employment recommendations. Moreover, to the extent the statute applies to superintendents, it is only when a superintendent appoints or employs a relative to work under his or her direct supervision. So long as a person other than the superintendent will be the direct supervisor of the relative, the statute will not be triggered.

Similarly, in response to your next issue, we find that a district school superintendent will not trigger the statute if he or she recommends for employment a relative of a district school board member. Again, we do not interpret the statute's language to encompass recommendations. In addition, the amended language in Section

1012.23(2) would apply only if a superintendent appointed or employed one of his or her relatives, not when a superintendent appointed or employed a relative of another district officer or employee, such as a relative of a school board member.

Nor will the provision be triggered if a school superintendent proposes a salary increase or bonus for a teacher or school employee who happens to be a relative. As described above, we must strictly interpret Section 1012.23(2). Its language only applies to appointment or employment.

Your final issue concerns the grandfathering language included in the amendment to Section 1012.23(2), which states, in pertinent part, "[t]he limitations of this subsection do not apply to employees appointed or employed before the election or appointment of a . . . district school superintendent." You note that most school personnel are hired pursuant to an annual contract. You inquire whether the grandfathering protection will apply if a relative of a district school superintendent is employed before the superintendent was elected or appointed, and then, following the election or appointment, the relative's annual contract is renewed by the school board upon recommendation of the superintendent.

In view of our findings earlier in this opinion and the high likelihood that no particular superintendent will be faced with a potential "grandfathering" situation, we decline at this time to opine on this point. However, should a superintendent be presented with a concrete grandfathering issue in the future, do not hesitate to contact us for advice.

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on July 26, 2019, and **RENDERED** this 31st day of July, 2019.

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Kimberly B. Rezanka, *Chair*

[1]The term "relative" is defined in Section 112.3135(1)(d), Florida Statutes, to mean ". . . father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister."

[2]No other statute directly addresses the hiring process for district school employees, although Section 1001.42(5)(a), Florida Statutes, gives district school board members appointment authority over district personnel and Section 1001.51(7), Florida Statutes, states district school superintendents are responsible "for directing the work of the personnel."

[3]While the bill analyses for the amendment do not address the addition of district school superintendents with any specificity, they do state the intent of the amendment was only to prohibit superintendents "from employing or appointing a relative to work under their direct supervision."

[4] In contrast to the language of Section 1012.23(2), that of Section 112.3135(2)(a), Florida Statutes, which does not apply to school districts, school boards, or school superintendents (see Opinion of the Attorney General AGO 82-48), contains a prohibition related to recommendations as well as an appointment/employment prohibition. It states a public official "may not appoint, employ, promote, or advance, or advocate for the appointment, employment promotion, or advancement" of a relative.

CEO 21-9—September 10, 2021

POST-OFFICEHOLDING RESTRICTIONS

FORMER TAXPAYERS' RIGHTS ADVOCATE REPRESENTING CLIENTS BEFORE THE DEPARTMENT OF REVENUE

NOTE: This opinion was reversed on appeal in 355 So. 3d 527 (Fla. 1st DCA 2023) (Case Number 1D21-3115)

To: Name withheld (Tallahassee)

SUMMARY:

Section 112.313(9)(a)4, Florida Statutes, will restrict the former Taxpayers' Rights Advocate from personally representing persons or entities for compensation before the Department of Revenue for two years after leaving public employment, considering that he is employed by the Department and his influence extends throughout the agency. Referenced are CEOs 19-12, 17-10, 16-13, 14-32, 14-1, 11-19, 10-22, 07-4, 03-10, 02-12, 00-11, 00-6, 00-1, and 94-20.

QUESTION:

Is the Taxpayers' Rights Advocate, prohibited by Section 112.313(9)(a)4, Florida Statutes, from representing persons or entities for compensation before the Department of Revenue for two years after leaving his position?

Your question is answered in the affirmative.

Through your letter of inquiry and correspondence with our staff, you state you are bringing this inquiry on behalf of the Taxpayers' Rights Advocate (hereinafter the Advocate), who is inquiring how the postemployment restriction in Section 112.313(9)(a)4, Florida Statutes, will apply to him once he leaves public employment.

You indicate the Advocate serves in a Senior Management Service (SMS) position, and has held that position since October 2004.[1] The Advocate's responsibilities are set out in Sections 20.21(3) and 213.018, Florida Statutes. These responsibilities include issuing an annual report to the Governor, the President of the Senate, the Speaker of the House of Representatives, and the Chief Inspector General identifying deficiencies in the Department of Revenue (hereinafter the Department) and recommending corrective actions.[2] The Advocate also is responsible for reviewing issues regarding Department actions that cannot be "resolved through normal administrative channels within the [D]epartment," as well as reviewing taxpayer complaints involving the "unsatisfactory treatment of taxpayers by employees of the [D]epartment."[3] You relate that the Advocate makes recommendations to the Department following his review of such actions, although you state the Department is not obligated to accept those recommendations. That being said, were the Advocate to determine that a Department action or proposed action would cause "irreparable loss" or "significant hardship" to a taxpayer, he is authorized by Sections 20.21(3)(b) and Section 213.018(2) to issue a Taxpayer Assistance Order temporarily suspending or staying the Department's action, although you state the Advocate has not issued such an order since 2008.

Your inquiry, though, does not so much concern the Advocate's responsibilities as it does the administrative placement of his position. It stems from legislative changes made in 2018 to the statutes concerning the Advocate. Prior to 2018, Section 20.21(3) stated the Advocate would be appointed by—and report to—the Department's Executive Director.[4] However, in 2018, the Legislature modified this language, which you state was part of an effort to give the Advocate more independence to advocate for the rights of

taxpayers and to take positions against the Department. In particular, Section 20.21(3) now states the following, with the underlined language having been added in 2018:

> The position of taxpayer rights advocate is created within the Department of Revenue. The taxpayers' rights advocate shall be appointed by the Chief Inspector General but is under the general supervision of the executive director for administrative purposes. The taxpayers' rights advocate must report to the Chief Inspector General, and may be removed from office only by the Chief Inspector General . . . .

(emphasis added).

As can be seen, the legislative changes gave the Chief Inspector General the authority to appoint and remove the Advocate, and changed the position's reporting requirement inasmuch as the Advocate now reports to the Chief Inspector General.[5] However, the portion of the statute stating the Advocate's position was housed within the Department remained unchanged, and the Legislature added new language stating the Department's Executive Director would continue supervising the Advocate for administrative purposes.[6]

Given the legislative changes to the statutes concerning the Advocate, you inquire how the postemployment restriction of Section 112.313(9)(a)4 will apply were he to leave public employment. This question hinges upon whether—following the statutory changes—the Advocate's "agency" for purposes of Section 112.313(9)(a)4 is the Department of Revenue or the Executive Office of the Governor, which houses the Office of the Chief Inspector General.

Section 112.313(9)(a)4 states:

> An agency employee, including an agency employee who was employed on July 1, 2001, in a Career Service System position that was transferred to the Selected Exempt Service System under chapter 2001-43, Laws of Florida, may not personally represent another person or entity for compensation before the agency with which he or she was employed for a period of 2 years following vacation of position, unless employed by another agency of state government.

Essentially, Section 112.313(9)(a)4 places a two-year prohibition on a former agency employee representing persons or entities before the agency "with which he or she was employed." The term "employee" is defined in Section 112.313(9)(a)2.a., Florida Statutes, to include SMS employees. As you relate that the Advocate's position is considered SMS, the two-year prohibition in Section 112.313(9)(a)(4) will apply to him once he leaves public employment. Thus, the only issue here, as you indicate, is determining the agency "by which [the Advocate is] employed" for purposes of the statute.[7]

The purpose of Section 112.313(9)(a)4, in general, is to prevent influence peddling, which occurs when former public employees use their previously-held positions to create opportunities for personal profit. See CEO 14-32 and CEO 11-19. That being said, Section 112.313(9)(a)4 is a penal statute and, accordingly, we must strictly construe its language to ensure we do not usurp the role of the Legislature by broadening its reach or enlarging the terms used within it. See CEO 19-12 and CEO 17-10. In the past, the Commission has found the "agency" of a former employee—to which the two-year prohibition extends—means only the particular agency where the employee was actually employed. See CEO 16-13, CEO 10-22, and CEO 02-12, Question 1. This reflects the language of the statute, which mentions only the "agency with which [the employee] was employed." Therefore, while a former employee may have worked with personnel from, or been involved with the subject matter of, an agency other than the one where he or she is employed, that work or involvement does not extend the prohibition's reach to that other agency. See CEO 16-13 and CEO 00-11.

Turning to the Advocate's particular situation, you emphasize that, due to the recent legislative changes, the Department of Revenue and its Executive Director have little to no influence over the Advocate's substantive decision-making. You relate that while the Advocate has chosen to have monthly meetings with the Executive Director and Department staff to review taxpayer complaints and offer recommendations, he directly reports to the Chief Inspector General. You state the Chief Inspector General alone has the ability to direct the Advocate's actions, and this allows the Advocate to take positions counter to decisions made by the Department. Regarding

the Advocate's interface with the Department, you state it mainly involves requesting leave, and matters concerning staffing, materials, and office space. You indicate this change in reporting duties shows the Legislature intended to "transfer" the Advocate's position from the Department to the Executive Office of the Governor.

However, equating the legislative changes to a "transfer" of position seems an overstatement. The Legislature could have changed the language in Section 20.21(3) stating the Advocate's position was "created within the Department of Revenue," but kept that portion of the statute intact, indicating an intent to keep the position housed within the Department. This is also reflected in the fact that while the Legislature required the Advocate to begin reporting to the Chief Inspector General, it also gave the Department's continued oversight of the position by stating the Advocate would be "under the general supervision of the [Department's] executive director for administrative purposes." And this apparent intent to maintain the position within the Department is reflected in the final bill analysis regarding the legislative changes, which stated that while the Advocate would now be appointed by the Chief Inspector General, the position would continue to be "within" the Department.[8]

Other factors also indicate the Advocate's employment continues to be with the Department rather than the Executive Office of the Governor. The State of Florida currently lists the Advocate as a salaried employee of the Department.[9] His W-2 Federal tax form for 2020 lists his address as a post office box maintained by the Department.[10] The Department continues to include the Advocate on the organizational membership list that it annually submits to the Commission on Ethics for financial disclosure purposes. And the webpage for the Office of Taxpayers' Rights Advocate continues to be maintained on the Department's website.[11]

In addition, it cannot be overlooked that the Advocate's substantive responsibilities—indeed the position's sole focus—is to review and make recommendations concerning the Department's actions and procedures. As previously mentioned, the Advocate is staffed by the Department, reviews taxpayer complaints, makes recommendations concerning how the Department's processes can be improved, and has the authority to suspend or stay Department actions, even if that authority is seldom used. And your letter of inquiry states the Advocate frequently interacts with the Department's Office of General Counsel, its Technical Assistance and Dispute Resolution Office, its Office of the Executive Director, and its General Tax Administration Program staff, demonstrating the position's influence throughout the agency.

Considering the foregoing, we find that the Advocate's "agency" for purposes of Section 112.313(9)(a)4 is the Department, as it has been and continues to be the "agency" by which he is employed. In making this finding, we are mindful that the Legislature was attempting to increase the Advocate's independence and objectivity by requiring the position to report to the Chief Inspector General. However, having responsibilities—reporting or otherwise—to an entity outside your agency does not mean you are "employed" by that other entity for the purposes of Section 112.313(9)(a)4.

For example, in CEO 00-11, we considered whether the General Counsel for the Department of Environmental Protection (DEP) was prohibited by Section 112.313(9)(a)4 from representing clients, within two years of leaving public employment, before the Board of Trustees of the Internal Improvement Trust Fund (BOT). The General Counsel's duties included participating as staff to the BOT and attending meetings before the Governor and Cabinet sitting in their capacity as the BOT. Despite the fact that the General Counsel had duties and obligations to the BOT, we emphasized the language of Section 112.313(9)(a)4 confining his "agency" to where he was employed, which was the DEP, and refused to extend that designation to the BOT, which is a separate and distinct unit of government.

Similarly, in CEO 02-12, we found a former attorney for the Agency of Health Care Administration (AHCA) was not prohibited by Section 112.313(9)(a)4 from representing clients before various Department of Health boards, despite the fact that AHCA had assigned her to handle cases before those boards. Again, despite her duties and obligations, we found her employing agency to be AHCA and, as such, the prohibition's reach was confined to AHCA alone.

And in CEO 16-13, we addressed a former commissioner and chair of the Florida Commission on Offender Review who wanted to represent clients before the Board of Executive Clemency within two years of leaving his position.[12] A portion of the responsibilities of the Commission on Offender Review was to report and provide recommendations to the Board of Executive Clemency. However, the Clemency Board was a separate and independent entity from the Commission on Offender Review. Given this separation, we concluded the former commissioner and chair could represent clients before the Clemency Board within the two-year prohibition period, despite the fact that he provided recommendations to it.

In each of these opinions, we found that reporting to or having responsibilities regarding a particular agency does not necessarily mean one is "employed" by that agency for the purposes of Section 112.313(9)(a)4. Similarly here, while the Advocate has reporting obligations to the Chief Inspector General, that does not mean he is an employee of the Governor's Office, where the Office of the Chief Inspector General is found. Instead, for the reasons stated above, his employment is with the Department and, accordingly, the two-year prohibition in Section 112.313(9)(a)4 applies to the Department, which is his "agency" for the purposes of the statute.[13]

While you raise additional arguments as to why the Advocate's "agency" is the Governor's Office instead of the Department, we do not find them persuasive. For instance, you claim the Chief Inspector General's authority to appoint and remove the Advocate means that the position has been "transferred" to the Governor's Office. However, in the context of State government, public officials often place individuals on boards and agencies other than their own. This does not mean the appointee is employed by the appointing authority. For instance, members of the Commission on Ethics are appointed by the Governor, the Speaker of the House of Representatives, and the President of the Senate, although their agency is the Commission. See Section 112.321(1), Florida Statutes. Moreover, the Commission has never found that the authority to appoint or remove is synonymous with employment. In CEO 00-1, we opined that the "agency" of the former Executive Director of the Department of Revenue was the Department, and did not suggest he would be prohibited from representing clients before the Governor and Cabinet, despite the fact that the Governor and Cabinet appointed the position. See also CEO 00-11.

You also emphasize the Department has a standing public records request to obtain a copy of the Advocate's annual report,[14] and that the Legislature has created a statutory exemption allowing the Advocate to access otherwise confidential information received by the Department.[15] You argue the Department would not need to bring a public records request, and no exemption would be necessary, if the Advocate were a Department employee. However, these considerations must be viewed alongside the language in Section 20.21(3) stating the Advocate's position is "within the Department of Revenue" and that the Department's Executive Director has "general supervision" over the position. While clearly the Advocate's position has been uniquely treated by both the Department and the Legislature, we find his employing "agency" for the purposes of Section 112.313(9)(a)4 is the Department, and he will be prohibited from representing persons or entities before it for two years after leaving his public position.[16]

Your question is answered accordingly.

ORDERED by the State of Florida Commission on Ethics meeting in public session on September 10 2021, and **RENDERED** 15th day of September, 2021.

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John Grant, *Chair*

[1]You relate the Advocate began his employment with the State of Florida in October 1988, when he began serving in a staff attorney position with the Florida Department of Health and Rehabilitative Services. You state he then accepted promotions to other agencies, and began his employment with the Department of Revenue in June 1994. Since that time, he has held a variety of positions with the Department of Revenue, including serving as the Chief Counsel for the Administrative Services section of the Office of General Counsel and as a Senior Attorney in the Office of the Taxpayer Rights Advocate.

[2]See Section 20.21(3)(c), Florida Statutes.

[3]See Section 20.21(3)(a), Florida Statutes.

[4]Section 213.018(1) reiterated this by stating the Department's Executive Director would "designate" the Advocate.

[5]Section 213.018(1) also was amended in 2018 to state the Chief Inspector General "shall appoint the taxpayers' rights advocate[.]"

[6]Similarly unchanged was language in Section 213.018 stating the Department's Executive Director would continue designating adequate staff to assist the Advocate in performing his responsibilities.

[7]Section 112.313(9)(a)6.a., Florida Statutes, contains an exemption to the application of Section 112.313(9)(a)4 for persons employed by the Legislature or another agency prior to July 1, 1989, although it is not applicable to the Advocate's situation. While you indicate the Advocate began State employment in October 1988, you state he has been promoted and employed by several different agencies since that time. We have found the exemption inapplicable in situations such as this, where a former public employee may have been employed by the State prior to July 1, 1988, but has held various positions with more than one distinct State executive or legislative branch agency since that time. *See* CEO 14-1, CEO 00-6, and CEO 94-20 (affirmed, Anderson v. Commission on Ethics, 651 So. 2d 1198 (Fla. 1st DCA 1995).

[8]This is found within the Final Bill Analysis for HB 7087 from the 2018 legislative session.

[9]*See*, https://salaries.myflorida.com.

[10]The same post office box used on the Advocate's W-2 for 2020 is included under the "Additional Contacts and Information" portion of the Department of Revenue's website (https://floridarevenue.com/pages/contact.aspx).

[11]*See,* https://floridarevenue.com/Pages/taxpayers_rights_advocate.html.

[12]CEO 16-13 concerned the application of Section 112.313(9)(a)3, Florida Statutes, which is a parallel provision to Section 112.313(9)(a)4. It prohibits members of the Legislature, appointed state officers, and statewide elected officers from personally representing other persons or entities for compensation before their former government bodies or agencies for two years after vacating office.

[13]In the past, we have recognized a separate-agency status for so-called "dotted-line" agencies that are administratively assigned to another agency. See CEO 10-22, CEO 07-4, and CEO 03-10. However, in those instances, there was statutory language emphasizing the "dotted-line" agency would operate independent from, and not be supervised by, the agency to which it was assigned. That is not the case here. Section 20.21(3) expressly states the Advocate will be subject to the supervision of the Department's Executive Director on certain matters. Moreover, unlike "dotted-line" agencies, which have a separate budget from the agency in which they are housed, the Advocate's position is considered a salaried employee of the Department.

[14]As previously indicated, Section 20.21(3)(c) requires the Advocate to furnish the annual report only to the Governor, the President of the Senate, the Speaker of the House of Representatives, and the Chief Inspector General.

[15]This exemption is found in Section 213.053(7), and states "[a]ny information received by the Department of Revenue in connection with the administration of taxes . . . shall be made available to . . . [t]he taxpayers' rights advocate or his or her authorized agent pursuant to Section 20.21(3) . . ."

[16]While we find Section 112.313(9)(a)4. prohibits the Advocate only from representing persons or entities for compensation before the Department within two years of leaving his public position, we again note the prohibition's purpose is to prevent influence peddling. Given the Advocate's close ties to the Office of the Chief Inspector General within the Executive Office of the Governor, we caution the Advocate that it may not foster public confidence in government for him to represent persons or entities for compensation before the Governor's Office within the two-year prohibition period as well.