

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CFB 1506-04

AGENCY DKT. NO. LFB-02-006(A)

PETER P. HORVATH,

Appellant,

v.

LOCAL FINANCE BOARD,

Respondent

Joseph A. Pojanowski, III, Esq., for appellant

(Pojanowski & Trawinsky, attorneys)

Daniel P. Reynolds, Deputy Attorney General, for respondent

(Peter C. Harvey, Attorney General of New Jersey)

Record Closed: September 10, 2004 Decided: October 14, 2004

BEFORE **JEFFREY A. GERSON**, ALJ:

STATEMENT OF CASE

Peter Horvath was the Mayor of the Borough of Sussex from January of 1997 to January 2001.

On August 13, 2003, the Local Finance Board fined Mr. Horvath \$1,200 because he nominated his brother-in-law for appointment as Municipal Attorney and his daughter for appointment to the Borough's Recreation Commission. He also appointed his daughter to the Borough's Municipal Planning Board.

It is also alleged that Mr. Horvath used a Borough phone line for private business.

On October 14, 2003, Mr. Horvath appealed the Board's decision and requested an administrative hearing.

The matter was forwarded to the Office of Administrative Law on or about February 5, 2004 and was heard on August 17, 2004. The record was closed on September 10, 2004 after receipt of briefs from both sides.

FACTS

The facts in this matter are not in dispute. In January 1997, 1998, 1999, 2000, and 2001, Horvath nominated his brother-in-law for appointment to the position of Municipal Attorney. Each time, Joseph A. Pojanowski, III was confirmed by the council.

Mr. Horvath also nominated his daughter to the Borough's Board of Recreation Commissioners on five occasions as well as appointing her to the Borough's Board of Health on two occasions. The appointment of his daughter to the Planning Board, which is without council confirmation, was pursuant to the Municipal Land Use Act, *N.J.S.A. 40A:55(d)* which sets out the manner in which members of the Planning Board shall be appointed and provides for the Mayor and Council to fill the Planning Board seats.

The final charge against Mr. Horvath is that he used a telephone line installed by the Borough for the use in Borough matters for a private business purpose contrary to the Local Government Ethics Law, *N.J.S.A. 40A:9-22.5*. On or about December 31, 1997, a fax was sent from the Pinkel Funeral Home, a business in which Mr. Horvath held an interest. Submitted in evidence was a fax sent by the Mayor's daughter on funeral parlor stationery discussing Borough business. Upon being notified that the fax was sent, though contending it was done inadvertently, he compensated the Borough in the amount of \$17.35, the cost of the fax.

THE LAW

This matter comes before the Office of Administrative Law under the provision of the Local Government Ethics Law, *N.J.S.A. 40A:9-22.1 et seq.* Enacted in 1991, the Legislative findings at *N.J.S.A. 40A:9-22.2* at paragraph (e) state the following:

“It is the purpose of this Act to provide a method of assuring that standards of ethical conduct and financial disclosure requirements for local government officers and employees shall be clear, consistent, uniform in their application, and enforceable on a State wide basis, and to provide local officers or employees with advice and information concerning possible conflicts of interest which might arise in the conduct of their public duties”.

According to the Local Finance Board, Horvath violated two sections of *N.J.S.A. 40A:9-22.5* as follows:

- 3 . No local government officer or employee shall use or attempt to use his official position to secure unwarranted privileges or advantages for himself or others:
- 4 . No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonable be expected to impair his objectivity or independence of judgment.

With respect to §(c) above, it is contended that the sending of the fax violated this section in that Horvath used his official position to secure unwarranted privileges or

advantages for himself or others. Horvath admitted that his daughter inadvertently used the fax provided to him by the Borough for Borough business. The fax itself appears to be Borough business. According to the Attorney General's Office, the one time inadvertent use of the Borough's telephone line for a business purpose ". . . clearly constituted the use of his official position as Mayor of the Borough, through which he had access to and use of the Borough's telephone line, to secure an unwarranted privilege and an advantage for himself. In turn, it is clear that in so doing, he did violate *N.J.S.A. 40A:9-22.5(c)*."

Though no law is cited, it appears to be contended by the Local Finance Board that the one time inadvertent use of the Borough's telephone line resulted in an unwarranted privilege and an advantage to the mayor. This is characterized by the Local Finance Board as being a "clear" violation. It would be a clear violation if the statute prohibited one time inadvertent use of a fax line. How a one-time, inadvertent use can result in an unwarranted privilege and advantage was not addressed either at the hearing or in the Board's brief. Reimbursement for the fax was made on the day of its discovery. An "ethical" violation cannot be inadvertent. Horvath contended that the one time use of the fax was inadvertent and there was nothing to contradict his assertion.

The Local Finance Board contends that Horvath acted in his official capacity in appointing his relatives which resulted in a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

The purpose of the Local Government Ethics Law was to foster public trust in government, provide remedies for conflicts between private interest and public duties and to ensure standards of ethical conduct and financial disclosure requirements that

would be enforceable State wide. The Local Finance Board cites the Supreme Court in *Wyzykowski v. Rizas* 132 N.J. 509, 524-25 (1993) with regard to the types of conflicts that can arise. Four types were described in *Wyzykowski* and fell into the categories of either direct pecuniary interest, indirect pecuniary interest, a direct personal interest or an indirect personal interest. There is little doubt that N.J.S.A. 40A:9-22.5(d) was intended to prevent government officers and employees from acting in their official capacity to confer a benefit on themselves or their immediate family. Financial benefit would be obvious but there was still other benefits that could accrue to a government officer or employee as exemplified by the case of *Barrett v. Union Township Commission*, 230 N.J. Super 195, 196-197 (App. Div. 1989) in which a zoning variance was invalidated because a councilman's mother resided in the nursing home to which the variance was awarded.

The Board finds some magic in the term "personal involvement" in that Horvath appointed relatives to fill Borough positions. By focusing on the term personal involvement, the issue of a pecuniary interest, either direct or indirect, is avoided and the focus becomes either a direct or indirect personal interest.

If the Legislature intended to prevent nepotism in local government, they could have. They have in fact passed a statute preventing nepotism at the State level. See N.J.S.A. 52:14-7.1.

Part A of the above cited statute states as follows:

- 1 . A relative of the Governor shall not be employed in an office or position . . .

- 2 . A relative of the Commissioner or Head of a Principal Department in the Executive Branch of State Government shall not be employed in an office or position . . .

The statute goes onto prohibit other appointments of relatives for other State agencies and governing bodies and then in §(C) defines relatives as:

“An individual spouse or the individual’s spouses parent, child, brother, sister, aunt, uncle, niece, nephew, grandparent, grandchild, son-in-law, daughter-in-law, stepparent, stepchild, stepbrother, stepsister, half brother or half sister, whether the relative is related to the individual or the individual’s spouse by blood, marriage or adoption.”

Horvath appointed his brother-in-law to be the Borough’s attorney. He was approved five times by the Council. The Board contends that this is “personal involvement that must be reasonably expected to impair his objectivity or independence of judgment”. There would necessarily be a personal involvement with any appointment made by an appointing authority at a local level and to torture the language of the statute to extend it to the appointment of relatives not even characterized as “immediate family” by definition in the statute is an attempt to force a square peg into round hole.

Nepotism is favoritism based on kinship. *Merriam-Webster Online Dictionary*. The appointment of relatives to a government position is not unethical, nor does it create a conflict between private interest and public duties unless a direct or indirect pecuniary interest or a direct or indirect personal interest is benefited. Neither has been proven here.

ORDER

It is **ORDERED** that the case against Peter Horvath is **DISMISSED**.

I hereby **FILE** my initial decision with the **LOCAL FINANCE BOARD, DIVISION OF LOCAL GOVERNMENT SERVICES**, for consideration.

This recommended decision may be adopted, modified or rejected by the **LOCAL FINANCE BOARD, DIVISION OF LOCAL GOVERNMENT SERVICES**, which by law is authorized to make a final decision in this matter. If the Local Finance Board, Division of Local Government Services, does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **LOCAL FINANCE BOARD, DIVISION OF LOCAL GOVERNMENT SERVICES, 101 South Broad Street, PO Box 803, Trenton, New Jersey 08625-0803**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE **JEFFREY A. GERSON, ALJ**

E-mail Receipt of Initial Decision Confirmed by the Local Finance Board on:

DATE

Mailed to Parties:

DATE OFFICE OF ADMINISTRATIVE LAW

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