IN THE SUPREME COURT OF THE STATE OF FLORIDA

THE STATE OF FLORIDA,
On The Relation Of
JAMES B. CLAYTON, Relator,

vs.

CASE NO. 83,053

BOARD OF REGENTS, a State Agency,
Respondent.
_____/

PETITION FOR WRIT OF MANDAMUS

COMES NOW the Relator, JAMES B. CLAYTON, and files this his Petition for a Writ of Mandamus against the Respondent, BOARD OF REGENTS, and as grounds therefore would state:

1. This Petition is filed pursuant to Article V, Section 3(b)(7) and (8), Florida Constitution; Fla. R. App. P. 9.100; and Fla. R. App. P. 9.030(a)(3) and is brought on the relation of the State, pursuant to Fla. R. App. P. 9.100(b), because it is not brought to enforce a private right.

JURISDICTION OF SUPREME COURT

2. Article V, Section 3(b)(8) of the Florida Constitution provides:

> The Supreme Court may issue writs of mandamus and quo warranto to state officers and state agencies.

3. Article V, Section 4(2) part of third paragraph as applicable provides:

> The Supreme Court may issue writs of mandamus and quo warranto when a state officer or board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission or other agency, is named as respondent . . .

4. The original jurisdiction of the Supreme Court is invoked to enforce a public right as opposed to a private right. Fla. R. App. P., Rule 9.100(b).

5. The Relator has no other remedy than this Petition for Writ of Mandamus. The Relator has no administrative remedy.

6. Mandamus lies to enforce a ministerial act. City of Coral Gables v. State, 44 So. 2d 298 (Fla. 1950). In the case of State ex rel Zuckerman-Vernon v. City of Miami, 306 So. 2d 173 (Fla. 4th D.C.A. 1974), the District Court said at page 175:

> Mandamus applies to legal duties of a specific imperative character as distinguished from those that are permissive or discretionary. The distinction between ministerial and judicial duties is that the duty is ministerial when the law prescribes and defines it with such precision and certainty as to leave nothing to the exercise of discretion or judgment. Where the act to be done does involve the exercise of discretion or judgment, it is a judicial or discretionary duty.

Fasenmyer v. Wainwright, 230 So.2d 129 (Fla. 1969); Green v. Walter, 161 So.2d 830 (Fla. 1964); State ex rel Glynn v. McNayr, 133 So.2d 312 (Fla. 1961); Coral Gables v. State, 44 So. 2d 298 (Fla. 1950); Somlyo v. Schott, 45 So.2d 502 (Fla. 1950).

There is no doubt that the required rescission by the Board of Regents is a ministerial act necessary to correct an illegal appointment which was made in violation of common law and against public policy. The order of this Court requiring rescission will not allow the Board of Regents an exercise of discretion, but will direct it to carry out its duty as required by common law. The ministerial duty is to simply rescind an illegal appointment to the presidency of the University of South Florida.

7. The Board of Regents is a state agency and its members are state officers. Pursuant to Florida Statutes 240.207(1), its members must be selected from "the state at large, representative of the geographical areas of the state." The Supreme Court took original jurisdiction in the case of State v. Dekle, 173 So. 2d. 452 (Fla. 1965). The Court there said that the State Canvassing Board is a state agency and the officials are state officers. As such, the Court found it had jurisdiction to enter a Writ of Mandamus and did enter such a writ commanding the State Canvassing Board to assemble, receive amended returns and recertify the results of an election.

8. The Supreme Court should take original jurisdiction because of the public's right to have this novel issue of great public interest timely settled. An expeditious order is needed in this matter to prevent the possible unnecessary expense of government planning for an improper investiture of the President of the University of South Florida and finally to avoid unnecessary litigation. The University of South Florida serves students from all of Florida and those students and the staff of the University are entitled to have the office of President settled expeditiously. The inquiry complained of in this petition is common to all of the public of Florida and the Relator's object is to procure the enforcement of a public duty by the Board of Regents, a state board.

9. The Board of Regents apparently had not been informed by its attorney that an appointment of one of its members as president of a state university is illegal. The Board of Regents was advised by the Relator, prior to the appointment, that to so appoint one of its own members was prohibited and unsustainable. In this Petition, the Relator is not questioning the ethics of any of the Board of Regents members. The Relator's contention is simply that the Board of Regents made a void appointment and this Petition for Writ of Mandamus is sought to rescind that appointment.

RELATOR'S STANDING

10. The Relator is a citizen of Florida, represents all persons in his situation as a voter and taxpayer, and has standing to bring this Petition For Writ of Mandamus against a state board.

The Court in North Palm Beach v. Cochran, 112 So. 2d. 1 (Fla. 1959), at page 5, said:

> Where the object is the enforcement of a public right the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed, and the duty in question enforced.' 14 Amer. & Eng.Enc.Law, 218 and authorities there cited. The above has been adopted by this court as being the correct rule in McConihe v. State, 17 Fla. 238, and in State v. Crawford, 28 Fla. 441, 10 So. 118 (14 L.R.A. 253).

The Petition at hand seeks settlement of law of statewide public interest.

11. Through his chief counsel, Richard Doran, the Attorney General of Florida was asked (although intervention or leave of Attorney General is not required) to bring an action in his name, but he declined, indicating a conflict.

STATEMENT OF FACTS

12. On October 6, 1993 and December 10, 1993, Betty Castor was a member of the Board of Regents. The President of the University of South

Florida had resigned and Section 240.209(3)(b), Florida Statutes, imposed a duty on the Board to appoint a president for the said university.

13. On October 6, 1993, as a member of the Board of Regents, Betty Castor was actively pursuing the Board's appointment to be President of the University of South Florida. (Relator's Exhibit 1)

14. On December 10, 1993, the Board of Regents appointed Betty Castor, one of its members, as President of the University of South Florida.

15. The Board of Regents is established as a state board by virtue of Florida Statute Chapter 240. Pursuant to Section 240.207(1), Florida Statutes, the Board consists of the Commissioner of Education and thirteen (13) citizens of the State of Florida selected from the state at large. The Board members have been appointed by the Governor and approved by the Cabinet. As a member of the Cabinet, Betty Castor has voted the approval of enough of these Board members to constitute a majority.

16. As a member of the Board of Regents, Betty Castor was appointed to and did serve on six of the twelve committees of the Board. (Relator's Exhibit 2) In addition, as a member of the Board, she had been

appointed to the Presidential Search Committees for both the University of South Florida and Florida State University.

17. Florida Statute Section 240.209(3)(b) provides that the Board shall "appoint or remove the president of each university in accordance with procedures and rules adopted by the Board of Regents." Prior to her application to become President of the University of South Florida, Betty Castor, as Board member, was responsible with the other Board members for the removal of (the statute only provides for appointment and removal) Frank Borlowski, the former President of the University of South Florida.

18. As of October 6, 1993, Board member Betty Castor had formally sought or given permission for herself, to become president of both the University of South Florida and Florida State University. She then wrote a letter to the Board Chairman asking to resign from those Presidential Search Committees because she had become a candidate for the office of president of the University of South Florida. (Relator's Exhibit 3)

19. On the same day, October 6, 1993, Betty Castor, as a member of the Board, sought the office of President of University of South Florida in a letter (with résumé and supporting materials per Board of Regents

advertised requirement) to the Chairman of the University of South Florida Presidential Search Advisory Committee. (Relator's Exhibit 1)

20. Florida Statutes, Section 20.15(3) designates the Board of Regents as the "director of the division of Universities". Florida Statutes Section 240.209(3)(b) gives the Board sovereign power to appoint presidents of each university and to "determine the compensation and other conditions of employment for each president."

21. Betty Castor, as a Board of Regents member, was responsible with the other members for the standards which were established as the advertised employment description for the University of South Florida president. (Relator's Exhibit 4). The Board caused the advertisement to be circulated through the Chronicle of Higher Education in the summer of 1993. Approximately 130 applicants responded to the ad by obtaining nominations or by sending applications (or both), including resumes and supporting materials. The Relator intends to mail a copy of this Petition to each of these applicants after the filing in this Court.

22. The Board of Regents, with Betty Castor as a member, established committees to assist the Board in selecting the president of the University of South Florida. The Board set the procedure for the

conduct of the search and selection for the president of the University of South Florida.

23. Although not physically within the meeting room of the Board of Regents at the beginning of the December 10, 1993 meeting in Tampa, Board of Regents member Betty Castor was within reach, at hand and within call of the meeting.

24. Immediately after Board member Castor was appointed president of the University of South Florida, the Board of Regents' Chairman directed that she come before the public and the other Board members assembled there in Tampa. Within minutes Board member Castor entered the meeting room.

25. The newly appointed President of the University of South Florida said to the Board then assembled in Tampa: "First to Chancellor Reed, Chairman of the Search Committee, to members of the Board of Regents, I'm very appreciative of the support and confidence you have shown in my candidacy and now my selection."

26. When Board member, Betty Castor, was appointed president, the Board was charged by statute with the responsibility of determining for that office conditions of employment and compensation. Betty Castor had to settle and agree with her Board the conditions of employment and

her compensation. Although no public action has been taken by the Board, Betty Castor and the Chancellor have announced that her annual salary for the office of president of the University of South Florida shall be $175,000.00.

RELIEF SOUGHT

27. The Relator requests an Alternative Writ of Mandamus directing the Respondent, Board of Regents, to rescind, as void, its actions of December 10, 1993 appointing Board member Betty Castor to the office of President of the University of South Florida, or to show cause why the Court should not make the Alternative Writ a final order.

ARGUMENT

28. Betty Castor sought appointment from the Board of Regents and the Board did appoint her on December 10, 1993, as the President of the University of South Florida, contrary to the public policy of the state and in violation of the common law.

29. The prohibition issue of a governing board appointing one of its own members to office is not one of first impression in Florida. The Florida Attorney General, in opinion 070-46, dated May 11, 1970, demonstrates that self-dealing is against public policy in the State of Florida. That opinion clearly states that boards may not appoint one of

their members to a position over which it has appointment when it stated:

> At common law, all officers who have the appointing power are disqualified for appointment to the offices or positions to which they may appoint. 67 C.J.S., Officers, Sec. 20, p. 130; 42 Am. Jur., Public Officers, Sec. 97, p. 955. The reason is for public policy rule in this respect has been variously stated: In Wood v. Whitehall, 1923, 197 N.Y.S. 789, the court said that such an appointment is against good conscience and public morals; in Hetrich v. County Commissioners of Anne Arundel County, Md. 1960, 159 A. 2d 642, 645, the prohibition was grounded on the need for impartial official action without suspicion of bias; and in Ehlinger v. Clark, Tex. 1928 8 S.W. 2d 666, the court said that the rule was based on "the obvious incompatibility of being both a member of a body making the appointment and an appointee of that body..." (emphasis added).

30. In the case of Watson v. City of New Smyrna Beach, 85 So.2d 548 (Fla. 1956), this Court held that the dealings between a city and an enterprise in which a city commissioner was interested was against public policy, even though the city commission was aware of the relationship and the dealings were honest. This Court said at page 549:

> The doctrine...that an official may not deal with himself, so to speak, are not based solely on the theory that such dealings evidence dishonesty. Let us assume that the partners (including the official) had offered the lowest bid and were equipped and

> qualified to perform the contract to the point of perfection, still the contract would be **void**. (emphasis added)

By whatever name one calls the statutory requirement on the Board when it "shall determine the compensation and other conditions of employment for each president" it requires dealings between the Board and the appointee, in this case one of its members.

31. In the case of City of Miami v. Benson, 63 So. 2d 916 (Fla. 1953), this Court, sitting en banc, held that a contract between the City of Miami and a corporation (where the corporation was to act as fiscal manager for the City on matters pertinent to a bond issue program and the corporation was also entitled to buy such bonds) was invalid as being contrary to public policy. This Court quoted, in part, the following:

> The question here is not whether the contracts in question were entered into in bad faith, or corruptly, or for the purpose of perpetrating a fraud upon the taxpayers, but rather are the contracts against public policy and, therefore, void? (at p. 919)
>
> Public policy is the cornerstone - the foundation - of all Constitutions, statutes, and juridical decisions; and its latitude and longitude, its height and depth, greater than any or all of them. If this be not true, whence came the first judicial decision on matter of public policy? There was no precedent for it, else it would not have been the first.

> It is difficult for any man to serve two masters. Matthew said: "No man can serve two masters; for either he will hate the one and love the other; or else he will hold to one and despise the other." That is a fundamental doctrine which the experience of many generations of men has woven into the fabric of their municipal law. It permeates the judiciary like a vein of vitalizing force. No man can be judge in his own cause, is a mere variation of the principle.
>
> The doctrine may be scoffed at by self conceited people swept off their feet by a little brief authority, or secure in the self sufficient opinion of their own rectitude, but to countenance the practice as meeting the approval of the law would be to open the way to a saturnalia of fiscal debaucheries and invite the venal corruptionist into the home of decent business. (at p. 920)

32. Clearly this Court has recognized the danger of permitting members of public bodies from self-dealing. Whether there was actual impropriety or the appearance of impropriety, the Court has held that self-dealing was contrary to public policy and any such actions were void. See cases cited above.

33. Numerous courts of other states have specifically ruled that a board may not appoint one of its members to a position for which it governs. (*Tennessee* : State ex. rel v. Thompson, 246 S.W. 2d 59 (Tenn. 1952); *New York* : Wood v. Town of Whitehall, 197 N.Y.S. 789 (N.Y. 1923);

Maryland : Hetrich v. County Commissioners of Anne Arundel County, 159 A. 2d 642 (Md. Ct. App. 1960); *Pennsylvania* : Commonwealth ex rel McCreary v. Major, 22 A. 2d 686 (Penn. 1941); *Delaware* : State ex rel Bove v. McDaniel, 157 A. 2d 463 (Del. 1960); *North Carolina* : Snipes v. City of Winston, 35 S.E. 610 (N.C. 1900); and *Texas* : Ehlinger v. Clark, 8 S.W. 2d 666 (Tex. 1928))

34. The case of State ex. rel v. Thompson, 246 S.W. 2d 59 (Tenn. 1952) is directly on point concerning this matter. There, a member from a city council was appointed as the city manager. The Court held that such an appointment was contrary to common law and public policy and was void and ineffective. The Court said at pages 61 to 63:

> It is necessary, therefore, to first determine whether the Council had the authority to appoint one of its own members its City Manager. The Charter of Paris provides that 'the Board of Commissioners shall appoint and fix the salary of the City Manager.' He holds office at the will of this Board . . .
> As heretofore stated, the statute (the Charter of Paris) expressly provides that 'the board of commissioners shall appoint and fix the salary of the city manager.' The Legislature, in enacting this statute, knew that each commissioner is a trustee charged with the utmost fidelity to his cestui que trust, the City of Paris, and that each commissioner probably could not with due fidelity mingle his personal interests and affairs with his duties as such trustee, human nature being what it

> is. Therefore, when this statute provided that the commissioners should fix the salary of the City Manager it did by necessary implication forbid the Board from appointing one of its own members to that office. No other effect can logically be given this provision of the statute . . .
> The immediately above stated necessary implication of the statute (Charter of Paris) is in accord with the common law rule on the subject. The text of 42 American Jurisprudence, page 955, Section 97, in so far as pertinent here, is this: 'So, it is contrary to public policy to permit an officer having an appointing power to use such power as a means of conferring an office upon himself, or to permit an appointing body to appoint one of its own members.'. . .
> As heretofore pointed out, the attempted appointment of Thompson to this office was illegal and void, and against public policy.

35. The common law is in force in Florida. Florida Statutes, Section 2.01. The "Common Law of England" refers not only to the common law as declared by English courts but also to the common law as declared by courts of the American states. Coleman v. Davis, 120 So. 56 (Fla. 1st DCA 1960).

36. The Delaware Supreme Court found in State ex rel Bove v. McDaniel, supra, that where two members of a city council successively resigned and the council then successively filled the vacancies and elected the resigned members to offices of mayor and president of the council, such an election was illegal and void under the common law. The

Court held that it was contrary to public policy for a Board to exercise its power of appointment by designating someone from its own body. Id. at 466.

37. In Snipes v. City of Winston, 35 S.E. 610 (N. C. 1900), the North Carolina court, in discussing this rule said "Common reasoning declares the principle to be sound, and the public is entitled to have it strictly enforced against every public official."

38. The New York Court in Wood v. Town of Whitehall, 197 N.Y.S., 789 (N.Y. 1923), at page 794, stated:

> Such appointments should be held void upon broad grounds of public policy. It is against good conscience that a board with appointing power should appoint one of its own members to office. Such practice, even when not forbidden by specific enactment, and when the vote of the appointee is not necessary to the appointment, is against public morals. It cannot but result in evil.

39. 67 C.J.S., Sec. 23, Officers, page 269, states:

> It is contrary to the policy of the law for an officer to use his official appointing power to place himself in office, and that even in the absence of a statutory inhibition, all officers who have the appointing power are disqualified for appointment to the office to which they may appoint. Similarly, a member of an appointing board is ineligible for appointment by the board, even though his vote is not essential to a majority in favor of his appointment, and although he was not present when

the appointment was made, notwithstanding his term in the appointing body was about to expire.

40. The appointment of Board member Betty Castor to the presidency of the University of South Florida is further unlawful because the Board of which she is a member sets the conditions of employment.

41. Florida Statutes, Section 240.207 (3)(b) requires that the Board of Regents shall "appoint and remove the president of each university in accordance with procedures and rules adopted by the Board of Regents" and "determine the compensation and other conditions of employment for each president."

42. The office of the president of the University of South Florida is a public office. The legislature has assigned to it a part of the sovereignty of the State of Florida. The University of South Florida was created by Section 240.2011(5), Florida Statutes. The President of the University of South Florida is the chief executive officer of a public agency. Section 119.011(2), Florida Statutes defines agency as "any state . . . officer . . . acting on behalf of any public agency."

43. The office of president has independent duties lawfully assigned by the Board. These duties are to be exercised by the president. By virtue of the appointment, the University of South Florida president

independently performs governmental functions as a public officer. A Board member has been appointed by the Board to that public office.

44. The Board of Regents was without authority to appoint one of its own members to the office of president of the University of South Florida and the appointment of Betty Castor to such office by the Board was void.

45. In the case of Meglemery v. Weissinger, 140 Ky. 353, 131 S.W. 40, 31 L.R.A., N.S. 575 (Ky. Ct. App. 1910), supra, the Kentucky Court clearly stated that a board may not appoint one of its members when it said:

> As Meglemery was on December 31, 1909 a member of the body that appointed him to fill this place, the appointment was void for reasons of public policy that are both sound and sufficient. . .The fact that the power to fix and regulate the duties and compensation of the appointee is lodged in the body of which he is a member is one, but not the only, reason why it is against public policy to permit such a body charged with the performance of public duties to appoint one of its members to an office or place of trust and responsibility. It is of the highest importance that municipal and other bodies of public servants would be free from every kind of personal influence in making appointments that carry with them services to which the public are entitled and compensation that the public must pay. And this freedom cannot in its full and fair sense be secured when the appointee is a member of the body and has the close opportunity his association

> and relations afford to place the other members under obligations that they may feel obligated to repay. Few persons are altogether exempt from the influence that intimate business relations enable associates to obtain, and few strong enough to put aside personal considerations in dispensing public favors. And it is out of regard for this human sentiment and weakness, and the fear that the public interest will not be so well protected if appointing bodies are not required to go outside their membership in the selection of public servants, that the rule announced has been adopted, and ought to be strictly applied. (emphasis added)

46. It was not the intention of the Legislature in enacting Florida Statute Chapter 240 to permit the president of the University of South Florida to be outside of the control of the Board of Regents. As pointed out, the statute provides that the Board of Regents shall appoint and determine compensation for the University of South Florida president. Therefore, when F.S. Chapter 240 provided that the Board of Regents shall appoint and determine compensation and other conditions of employment, it did by necessary implications forbid the Board of Regents from appointing one of its own members to that office. No other effect can legally be given to that statute. This is necessarily in accord with the common law of Florida.

47. The fact that Board member, Betty Castor, was not immediately present when the appointment was made has no effect on its

illegality. In Meglemery, supra, the Kentucky Court said concerning Meglimery, whose term was about to expire and who wasn't present when his appointment was made, that:

> Nor does the fact that his term expired within a few days after his appointment, or the fact that his duties would be prescribed and his compensation allowed by a body of which he was not a member, or the fact that he was not present with the court when his appointment was made, have the effect of changing this salutary rule.

48. Although the Relator is sure that the Court is keenly aware of an individual hardship that may result to Betty Castor by this void appointment by the Board of Regents, the Court must be compelled to conclude that under a proper construction of Florida Statute Section 240.207(3)(b) and under applicable common law and public policy, the Board was without authority to appoint one of its own members to the office of president of the University of South Florida, and that the attempted appointment of Betty Castor was void; and therefore ineffective to place her in that office.

The Court in State ex. rel. v. Thompson, supra, at page 62, said:

> Although we are keenly aware of an individual hardship that may result, we are compelled to conclude that both (1) under a proper construction of the statute (Charter of the City of Paris) and (2)

> under the common law, the Board of Commissioners of the City of Paris was without authority to appoint one of its own members to the office of City Manager of that City, and that the attempted appointment of Thompson was void; therefore, ineffective to place him in that office.

The language of the Tennessee statute provides "the board of commissioners shall appoint and fix the salary of the city manager" (cited at paragraph 34 herein). Comparatively, the language of Florida Statutes, Section 240.209(3)(b) provides that "the board shall appoint . . . and determine the compensation . . . of each president."

49. By virtue of Florida Statute 240.209(3)(b), the Board of Regents shall "appoint or remove the president of each university in accordance with procedures and rules adopted by the Board of Regents". The Board of Regents shall "determine the compensation and other conditions of employment for each president." By virtue of the prohibition of the common law and for reasons of public policy, the Board of Regents can't name one of its own . The said Board of Regents' act of December 10, 1993 is void.

50. In providing for the appointment of university presidents, Florida Statutes, Section 240 does not provide that the Board of Regents

may appoint one of its own members. In the case of Commonwealth v. Major, 22 A. 2d 688 (Penn. 1941) at pages 689 and 690, the Court said:

> ...under the provisions of which the Authority here under consideration was created, reveals not the slightest indication of an intention on the part of the legislature to waive this sound principle of law and morals. While it cannot be questioned that the General Assembly has the inherent power to declare the public policy of the Commonwealth and may confer upon members of Council of municipalities power to appoint themselves to membership upon Boards of Authorities and to fix their own salaries, such grant of power must be strictly construed, and unless the intention is clear, the power will be denied, because of its exceptional and extraordinary character. . .
> The legislature certainly did not intend that public officials could use their offices to appoint themselves to other public offices, fix their own compensation, contract with themselves, and audit their own accounts. . .
> Obviously the legislature was cognizant of the well-settled principal of law that unless it expressly provided that public officials could or should serve upon such Authority Boards, public policy would prohibit them from doing so.

The Pennsylvania Court also said at page 689 that:

> The power of the Court to determine what is against public policy, in a proper case is well recognized.

The Court went further by referring to the case of Mamlin v. Genoa, 17 A. 2d 407, 409 (Pa. 1941) by saying:

> It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring. There must be a positive, well-defined, universal public sentiment, deeply integrated in the customs and beliefs of the people and in their conviction of what is just and right and in the interests of the public weal. That there is "a virtual unanimity of opinion" among all reasonable men that it is against public policy for a public official to appoint himself to another public office within his gift, is beyond all question. Courts, not only of this Commonwealth, but of every other jurisdiction known to us, have uniformly held that personal interest of a public officer creates disqualification.

51. In the case of Hetrich v. County Commissioners of Anne Arundel County, 159 A. 2d 642, (Md. Ct. App. 1960) Wilde was elected commissioner. The County Business Manager resigned and the commission appointed Wilde as Acting County Manager "without pay until a permanent County Manager is appointed." The Court said at pages 644 and 645:

> The ineligibility which makes the appointment to a second office a nullity has not been limited to that created by constitution or statute. Even in the absence of these formalized prohibitions, at common law, on the ground of public policy a member of an appointing body is ineligible for appointment to a conflicting office by that body, even though his own vote is not essential to the appointment. . .

> The cases ground the public policy prohibition on the need for impartial official action, without suspicion of bias which may be against public interest. They say the appointing board cannot absolve itself of ulterior motives if it appoints one of its own, whether or not his vote was necessary to the appointment, since the opportunity improperly to influence the other members of the board is there. The necessity that public bodies be free from personal influence in making appointments to office cannot be secured when the appointee has the real opportunity his associations and relations afford to place his colleagues under obligations they may feel require repayment.

52. The Relator is not here questioning the ethics of the Board of Regents, individually or collectively, or of the ethics of its appointed member separately. No allegation is here made of any criminality. The Petition is simply saying that the Board made a void appointment and that this Petition for Writ of Mandamus seeks to have the Supreme Court coerce the Board to rescind it. In the case of City of Coral Gables v. State, 44 So. 2d 298 (Fla. 1950), at page 300, concerning mandamus, you said:

> It may issue to coerce the performance of official duties where officials charged by law with the performance of a duty refuse or fail to perform the same.

53. Even if Board member Castor had resigned prior to December 10, 1993, the decision of this Court should be the same. The cases cited

herein show that it is contrary to public policy and the illegality of the common law violation of a board, vested by statute with appointing power, appointing one of its members to office. The cases are from many American state courts and generally in combination cite the same cases. As this Court will observe, the cases cited are enumerated by the scores and hold universally that it is contrary to public policy and the common law to permit a board to exercise its power of appointment by appointing someone from its own body.

This point is clearly shown in the case of State v. McDaniel, 157 A. 2d 463 (Del. 1960), where two council members resigned from a city council in an attempt to be eligible for appointment by the council to successively filled vacancies of mayor and president of the council, the Court said:

> Even if we should assume, as might conceivably be the case, that under some circumstances a different construction might be given to a statute similar to the one in question, no such construction is called for here. The gyrations of the members of the Council at the meeting in producing the resignations of certain of its members and their almost immediate election to other offices for the very obvious purpose of appointing the resigning members of the appointing body to other offices placed the defendants in the same position as if they had been technically members of the Council at the time of their election. As far as they relate

> to the right of defendants to hold the respective offices to which they were allegedly appointed, the resignations and elections must be considered a nullity . . .
> We are of the opinion that under . . . the common law, the filling of vacancy in the office of Mayor by defendant McDaniel and the vacancy in the office of City Council by the Defendant Tobin were illegal and void.

54. In the case sub judice, the question also to be considered is whether the appointed Board member voted for herself. In the case of Beebe v. Board of Superintendents, 19 N.Y.S. 629 (N.Y. Sup. Ct., 1892), Anderson was a supervisor of Sullivan County. He was hired as attorney to file suits to recover on bonds. Anderson asked to be relieved, but wanted to be paid for employment services performed. A taxpayer brought suit to prevent payment. In response, the N.Y. Sup. Ct. said at page 630 that:

> But it is said that in the case before us the supervisor who was employed did not vote on the question of his own employment, or upon the audit of his bill. That does not cure the evil. The influence upon fellow members is the same. His constituents are entitled to his judgment in making contracts, to his scrutiny in passing upon accounts, and to his unbiased and disinterested efforts in both; and he cannot make the violation or neglect of the duties he owes to his constituents the means of validating an otherwise illegal act. He cannot put on and off the garb of a public official, and discharge or refuse to discharge the duties of his trust, at will, and as best subserve his private interests. he is a part of the board of supervisors.

> Its act is his act; and he cannot, as a supervisor, make a contract with himself as a private citizen.

55. In the case of Wood v. Town of Whitehall, 197 N.Y.S. 789 (N.Y. 1923) one Willis Wood brought the action which involved his right to hold office. He had been appointed police justice by the Whitehall Town Board of which he was a member. The question presented to the Court was "whether an appointment by a public board, vested with the appointing power, of one of its own members to the office to be filled, is a legal appointment, where there are sufficient votes for the appointee without his own." (Page 790) The Court went on to say at the same page that:

> There is no question raised but that plaintiff has well filled the office of police justice, to which he was appointed. He has apparently performed its duties to the satisfaction of the people of his town. This, however, should not affect the determination of the question. Such considerations cannot make an appointment legal, if it is contrary to the trend and policy of our institutions.
> It seems clear to me that it would be contrary to public policy and the general welfare to uphold such an appointment. When public officers, such as members of a town board, are vested by the Legislature with power of appointment to office, a genuine responsibility is imposed. It must be exercised impartially, with freedom from a suspicion of taint or bias which may be against the public interest. An appointing board cannot absolve itself from the charge of ulterior motives when it appoints one of its own members to an office. It cannot make any difference whether or not his own

> vote was necessary to the appointment. The opportunity improperly to influence the other members of the board is there. No one can say in a given case that the opportunity is or is not exercised. What influenced the other members to vote as they did, no one knows except themselves. Were their motives proper, based solely on the fitness of the appointee? They may have been. Were they improper, based on the promise or expectation of reciprocal favors? They may have been. No one knows, except the parties directly interested. That is the difficulty. This is the possibility, which the law should remove by determining such appointments to be illegal.

The Court went on to view the facts from another aspect by saying at page 791 that:

> When the members of a board are given the appointing power, it seems necessarily implied in that power that they cannot appoint themselves. The situation is not different in principle from where the appointing power, instead of being vested in a board, is vested in a single official. The mayors of most of our cities, for example, have the power to appoint a superintendent of public works, a city attorney, and various other functionaries. It has never occurred to any one to argue that a mayor thus situated may appoint himself to these various offices, or to any one of them. How is the situation different where the appointing power is vested, not in a single individual, but in a board consisting of a half dozen individuals? Each one is a part of the board. If the board appoints one of its own members, it appoints itself, or a part of itself. It cannot be material whether the part of the board appointed

> participated in the act of appointment. It is still the act of the board, and, as the appointee is a member of it, the board appoints a part of itself, the same as if he had actively aided. His own participation cannot matter. He has as much right to assist in the appointment of his own entity as the board has to assist in the appointment of a part of its entity.

56. The Court in Wood v. Whitehall, supra, explained a situation that could exist with the Board of Regents in Florida. To extend the situation, consider if six or seven offices of presidencies of six or seven of Florida's universities came open for appointment at the same time. (FSU and USF were here open at the same time.) Consider that six or seven Board members decided they wanted to be appointed by the Board to those offices. The New York Supreme Court said in Whitehall, supra, that:

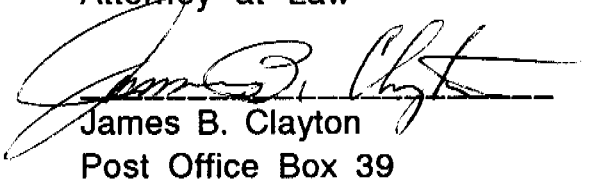
> The situation is not to be distinguished from one that would exist if the town board, consisting of six members, were vested with the duty of appointing six police justices, instead of one. Could the board, in that case, successively elect each of its six members a police justice; in each instance the one being elected not voting for himself? Absurd as that seems, it is difficult to perceive why such action would not be legal, if this appointment can be upheld simply because plaintiff did not cast the deciding vote in his own favor. That situation, repugnant to the sense of fairness of all, might arise at any time, if the sanction of the law is given to the election of this plaintiff.

CONCLUSION

The appointment of Betty Castor as President of the University of South Florida is illegal, a violation of the common law, is against public policy and morals, and is void and of no effect. The law is clear that the Board of Regents, a public board with appointing power, may not appoint one of its own members, Betty Castor, to the office of President of the University of South Florida. The Court must instruct the Board of Regents to rescind the void appointment of Betty Castor.

WHEREFORE, the Relator requests the Court take jurisdiction and issue an Alternative Writ of Mandamus directing the Respondent, Board of Regents, to rescind, as void, its action taken December 10, 1993 appointing Board member Betty Castor to the office of President of the University of South Florida, or to show cause why the Court should not make the Alternative Writ a final and absolute order.

Respectfully submitted,
JAMES B. CLAYTON
Attorney at Law



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STATE OF FLORIDA
COUNTY OF VOLUSIA

BEFORE ME, the undersigned authority, personally appeared JAMES B. CLAYTON, personally known by me, did affirm, depose and state that he has read the foregoing Petition and he affirmed that the facts and matters stated therein are true and correct.

AFFIRMED AND SUBSCRIBED before me this 18 day of January, 1994 in DeLand, Volusia County, Florida.

OFFICIAL SEAL
MARCELLE HORWATH
My Commission Expires
Sept. 9, 1995
Comm. No. CC 142006

Marcelle Horwath
NOTARY PUBLIC
State of Florida
MARCELLE HORWATH
Printed Name
My commission expires:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Mandamus has been furnished by hand delivery to the General Counsel, State University Systems of Florida, 107 W. Gaines Street, Tallahassee, Florida 32301 this 20th day of January, 1994.

JAMES B. CLAYTON

Copy of Order
mailed to
Gregg Gleason
General Counsel
325 West Gaines St., Ste. 1522
Tallahassee, Fla. 32399-1950