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.

_____/

RESPONSE TO PETITION FOR
WRIT OF MANDAMUS

The Board of Regents (Board) responds to Clayton's petition for writ of mandamus, and requests that the petition be denied. The Board states:

I. Jurisdiction

This court has jurisdiction to issue writs of mandamus. The Board is a state agency as contemplated by Art. V, §3(b)(8), Florida Constitution.

II. Statement of Facts

The Board agrees that the material facts are not in dispute. While she was the Commissioner of Education, and thus a member of the Board, Betty Castor was appointed to the presidency of the University of South Florida (USF). Castor did not participate in the vote on her appointment. She has since resigned as Commissioner of Education, effective December 31, 1993. Castor's appointment became effective on

January 1, 1994, and she took office as president of USF on January 17, 1994.

Castor was a member of the Board's "search committee" for the initial selection of a final candidate for president of USF. Upon her nomination, she resigned from both that committee, and the search committee for a president for Florida State University. She did not participate in the vote on her appointment.

The remainder of Clayton's allegations (Petition, paragraghs 21-26) are denied. They are non-factual legal conclusions, or so vague and conclusory that no meaningful response is possible. Also, Clayton's allegations with regard to Castor's role in establishing standards for presidential candidates, establishing search committees, and negotiating the terms of her employment; are not supported by his petition or any of its attachments. The Board also notes that the last sentence of Clayton's paragraph 15, which alleges Castor "voted the approval" of a majority of Board members during her tenure as Commissioner of Education, is vague anad conclusory, and not supported by the petition. The Board has no interest in reviewing the minutes of all appropriate cabinet meetings to determine whether, and how, Castor voted on appointment of Board members. The Board adds that such appointments must also be confirmed by the Senate, pursuant to Section 240.207(1), Florida Statutes, ("F.S.").

III. Procedural Bars to Relief Sought

A. Lack of Standing

Two allegations are made to support Clayton's claim of standing: (1) that he is a Florida citizen, voter and taxpayer; and (2) that the Attorney General was asked to bring an "action in his name." Taking the allegations in reverse order, there is no legal requirement that the Attorney General be notified as a condition precedent to seeking a writ of mandamus.[1] While the circumstances[2] of Clayton's notice are not clear, the "refusal" of the Attorney General's office to participate neither establishes *nor* diminishes Clayton's standing as an individual.

Clayton's standing turns on whether--as a Florida citizen, voter and taxpayer--he has the requisite interest in the rescission of Castor's appointment. Preliminarily, Clayton candidly admits he is "not questioning the ethics of any of the Board of Regents members" [e.s]. (pet., par. 9).

---

[1] Section 80.01, Fla. Stat., authorizes a person "claiming title to an office which is exercised by another" to file an action in the State's name when the Attorney General refuses to do so. There is no such requirement for mandamus, the only relief Clayton seeks (pet., par. 27). Moreover, Clayton does not, and could not claim title to the presidency of USF; thereby precluding this court from construing his petition as one seeking a writ of quo warranto.

[2] The Attorney General's Office has no correspondence from Clayton in this regard. To the best recollection of the persons involved, Clayton visited the office in late December, 1993, and spoke with several persons about this matter.

Instead, he relies on one case: State ex rel Village of North Palm Beach v. Cochran, 112 So.2d 1 (Fla. 1959).

Cochran is not persuasive. North Palm Beach was a small municipality. Under the law at the time, the state beverage director could not transfer a liquor license into a municipality with less that 1251 people; that is, into a municipality the size of North Palm Beach. Nevertheless, the beverage director approved transfer of the license to a location inside municipal limits. Id. at 2-3.

Cochran, the state's beverage director, contended North Palm Beach lacked standing, as none of its ordinances were violated. Rejecting this argument, the court declared:

> [T]he act of the respondent so affects the relator municipality...to characterize it as an act of public nature. It cannot be doubted that the sale of liquor within the municipality may affect the welfare and morals of the community and may involve the issuance of a municipal license, the adoption of zoning ordinances...and ordinances regarding hours of sale of liquors therein.

Id. at 5.

This language alone refutes Clayton's claim of standing. He is not affected by Castor's appointment nearly so specifically as was the municipality (or its residents) in North Palm Beach. While the North Palm Beach decision does

stand for the proposition that any municipal resident did not have to show a legal interest distinct from that of any other resident, the decision also stands for the proposition that there must be some minimal connection between a petitioner and the relief sought.

Under Clayton's rationale, any Florida citizen would have standing to bring the instant petition. That Clayton is also a taxpayer and voter does not heighten any interest he has in Castor's appointment.

Nevertheless, Clayton alleges he is a "taxpayer." This court has consistently held that citizen-taxpayers have standing to "challenge the constitutional validity of an exercise of the legislature's taxing and spending power without having to demonstrate special injury. Chiles v. Children A,B,C,D,E and F, 589 So.2d 260, 263 at n.5 (Fla. 1991), citing Brown v. Firestone, 382 So.2d 654 (Fla. 1980) [other citations omitted]. Here, neither a legislative action nor the exercise of taxing and spending authority is at issue. Constitutional validity of a statute--or the Board's appointment power--is not at issue. While a taxpayer has a minimal, but legally cognizable, interest in the proper expenditure of the tax revenue collected by the state; a taxpayer-citizen has no interest in the appointment of an otherwise qualified Board member to the presidency of a university.

Clayton's rationale would confer standing on any Florida citizen to contest--by extraordinary writ--the application of the law, merely by alleging that some state agency did not perform its duty. This Court must reject his claim of standing and dismiss the petition.

B. Wrong Choice of Forum

Assuming Clayton has standing does not help him. He has chosen the wrong forum. Clayton could have brought his petition to the First District Court of Appeal or the Circuit Court of the Second Judicial Circuit, in and for Leon County. Both of these courts would have jurisdiction over the Board and are vested with jurisdiction to issue extraordinary writs. Moreover, the circuit court is better able to act as a fact-finder and obtain legislative history, should those needs arise. This court, with or without an intervening decision by the First District Court of Appeal, would be in a posture of reviewing a record. See State ex rel. Sentinel Star Co. v. Lambeth, 192 So.2d 518, 523 at n.3 (Fla. 4th DCA 1966) ("[E]ven if both the circuit court and this court have jurisdiction to issue writ of mandamus or prohibition in this cause, the general rule is that a court generally will not issue such a writ against an inferior tribunal where application for a writ has not been made to an intermediate tribunal having jurisdiction."); and Johnson v. Florida Parole

and Probation Commission, 543 So.2d 875, 876 (Fla. 4th DCA 1989) (circuit court, not district court, is the proper forum for writs of mandamus seeking review of inmate's presumptive release date). See also, Spalding v. Dugger, 526 So.2d 71, 73 (Fla. 1988) (the better practice is to give the trial court the initial opportunity to rule) (Barkett, J., concurring).

IV. Requisites for Writ of Mandamus

To obtain a writ of mandamus, Clayton must show he has a "clear legal right to the performance of a clear legal duty by a public officer and that he has no other legal remedies available to him [e.s.]." Hatten v. State, 561 So.2d 562, 563 (Fla. 1990). Even if he has standing and is in the proper forum, Clayton cannot make either of the above showings.

A. No Other Adequate Remedy

Clayton's sole effort to show that he has no other legal remedies available to him is this unsupported and conclusory statement: "[t]he Relator has no other remedy than this Petition for Writ of Mandamus. The Relator has no administrative remedy." (Petition For Writ of Mandamus, par. 5) However, assuming standing, Clayton has the remedy of declaratory relief in the circuit court.

Declaratory relief has previously been sought to determine whether Florida's anti-nepotism law, Section 112.3135(2)(a), F.S., prohibited relatives of members of appointing authorities from being appointed by boards or commissions on which their relatives serve. City of Miami Beach v. Galbut, 626 So. 2d 192, 193 (Fla. 1993). Additionally, in Lovejoy v. Grubbs, 432 So. 2d 678 (Fla. 5th DCA 1983), the Fifth DCA held that taxpayers could bring suit for declaratory relief regarding whether the actions of an engineer, employed by both a city and a county and a private engineering firm, violated the Code of Ethics for Public Officers and Employees.

Since he has available to him the remedy of a declaratory judgment action, Clayton is not entitled to a writ of mandamus. Padavano, Florida Appellate Practice, §. 22.2 ("It is also generally recognized that mandamus will not lie if there is another adequate remedy at law.") See Park v. Dugger, 548 So.2d 1167 (Fla. 1st DCA 1989) (mandamus not appropriate to compel the Department of Corrections to allow petitioner access to psychological evaluations absent exhaustion of administrative remedies such as grievance proceeding). See also Florida Pharmacy Association v. Strong, 604 So.2d 529, 530 (Fla. 1st DCA 1992) ("Where private individuals seek mandamus to compel a public official to

perform a duty, they must first make an express and distinct demand on the respondent to perform the duty before the remedy of mandamus will be considered.").[3]

Since Clayton argues matters of law only, and the facts material to that argument are not disputed; this court may be tempted to entertain his petition on the merits. Spalding, supra, teaches otherwise. There, Spalding sought mandamus relief directing trial courts to stay execution of inmates sentenced to death, on the grounds his agency (Office of Capitol Collateral Representation) had exhausted its budget and could not function effectively. Apparently, these facts were not disputed. Noting that the matter had largely been resolved by intervening events, this Court agreed with the state that "any [such] claim...must be individually addressed by the trial court." Id. at 73. Concurring, Justice Barkett said: "I can agree that, in general, it is the better practice to give the trial court the opportunity to rule on these matters initially." Id.

The majority in Spalding implicitly held that the existence of another remedy precluded mandamus. Justice

---

[3]Clayton's petition fails to allege that he made an express and distinct demand to the Board to rescind Castor's appointment. A review of the Board's records indicate that no such demand has been made by Clayton.

Barkett's concurrence buttressed that holding. Spalding compels dismissal of Clayton's petition.

B. Clear Legal Right/Clear Legal Duty

Assuming he has standing, has chosen the proper forum, and has no other remedy, Clayton still cannot obtain mandamus relief. He has not alleged a clear legal right to the appointment of someone not a member of the Board, and has not alleged a clear legal duty of the Board to make such an appointment.

Even a superficial reading of Clayton's petition reveals the lack of a clear right or duty. He does not, and cannot, cite any constitutional or statutory provision expressly prohibiting the Board from appointing[4] one of its members. Instead, he claims the appointment was made in violation of "common law and public policy." (pet., par. 6). Shortly thereafter, he asks this court to take original jurisdiction to settle "this novel issue [e.s]." (pet., par. 8).

---

[4] Ms. Castor did not participate in the vote on her appointment. See Exhibit A attached, which is the minutes of the Board's meeting when the vote was taken. Ms. Castor is not shown as present. (Ex. A, p. 1).

The opening paragraph of Clayton's argument reiterates that the appointment contravenes "public policy" and "common law." He then analogizes to various authorities that address self-dealing by public officials. He cites a Florida Attorney General Opinion and court decisions from other states. (Petition, pages 15-30).

Clayton argues at length that this Court should interpret Florida law, and decide an issue of first impression in a manner favorable to him; and, based on that decision, declare that the Board has no choice but to rescind Castor's appointment. In short, he is using a mandamus petition to establish the existence of and entitlement to a legal right, not to enforce an already established right. He cannot do so. Hatten, supra. See Padavano, supra at §22.2: "[A] writ of mandamus may only be employed to enforce a right by compelling performance of a corresponding duty, and not to litigate the entitlement to the right. [e.o.]".

Clayton states in his petition that he is not questioning any of the Board members' ethics. (Petition, paragraphs 9 and 52) However, his arguments against Castor's appointment are based on cases discussing the ethical standards applicable to public officials. Moreover, the question of whether or not a clearly established duty exists hinges upon whether there is an established standard of

ethical conduct regarding a board's appointment powers which rises to the level of a clearly established duty.

The two Florida cases cited by Clayton on this point are distinguishable. Both E. F. Watson v. City of New Smyrna Beach, 85 So. 2d 548 (Fla. 1956), and City of Miami v. Benson, 63 So. 2d 916 (Fla. 1953), involved challenges to government contracts on the basis that a city employee or official had a personal interest in the outcome of the contract. Unlike the case at bar, both of these cases were brought in circuit court pursuant to statutes specifically prohibiting a private interest in a public contract. Consequently, these cases fail to provide support for Clayton's position.

None of the foreign jurisdiction cases cited by Clayton have been adopted as law in this state. Furthermore, Attorney General Opinion 070-46, which references to a number of these decisions from other states, is not binding on the courts of Florida. See, Leadership Housing, Inc. v. Department of Revenue, 336 So. 2d 1239 (Fla. 4th DCA 1976), and Beverly v. Division of Beverage of the Department of Business Regulation, 282 So. 2d 657 (Fla. 1st DCA 1973)(While entitled to great weight in construing state law, the official opinions of the Attorney General of the State of Florida are not legally binding upon the courts of this State). Furthermore, a review of the opinion reveals that the questions posed to the

Attorney General in that opinion involved dual office holding and that the discussion of these foreign jurisdiction cases was therefore akin to legal dicta. Id.

The majority of foreign jurisdiction cases relied upon by Clayton are factually inapplicable, as those cases address dual office holding. See, Hetrich v. County Commissioners of Anne Arundel County, 159 A.2d (Md. Ct. App. 1960); State ex. rel v. Thompson, 246 S.W. 2d 59 (Tenn. 1952); Ehlinger v. Clark, 8 S.W. 2d 666 (Tex. 1928); Wood v. Town of Whitehall, 197 N.Y.S. 789 (N.Y. 1923); Snipes v. City of Winston, 35 S.E. 610 (N.C. 1900); Beebe v. Board of Supervisors, 19 N.Y.S. 629 (N.Y. Sup. Ct. 1892). It is undisputed that Ms. Castor resigned as Commissioner of Education before she exercised any authority as president of USF.

Moreover, one of Clayton's cases involves express statutory provisions prohibiting the governmental body from appointing one of its own members. See, State ex. rel Bove v. McDaniel, 157 A.2d 463 (Del. 1960). The fact that Clayton relies on these foreign jurisdiction cases to support his petition for mandamus highlights the fact that there is no clear legal right or duty under Florida law.

Unlike the jurisdictions discussed above, Florida law does not contain any specific prohibition against a board

appointing one of its own members.[5] Part III of Chapter 112, F.S., codifies the Code of Ethics for Public Officers and State Employees. Section 112.311, F.S., which sets forth legislative intent and policy underlying the Code of Ethics, states, in relevant part:

> (1) It is essential to the proper conduct and operation of government that public officials be independent and impartial and that public office not be used for private gain other than for remuneration provided by law. The public interest, therefore requires that the law protect against any conflict of interest and establish standards for the conduct of elected officials and government employees in situations where conflicts may exist.
>
> (2) It is also essential that the government attract those citizens best qualified to serve. Thus, the law against conflict of interest must be so designed as not to impede unreasonably or unnecessarily the recruitment and retention by government of those best qualified to serve. Public officials should not be denied the opportunity, available to all other citizens, to acquire and retain private economic interests except when conflicts with the responsibility of such officials to the public cannot be avoided.

Section 112.311(1) and (2), F.S.

---

[5] Florida law does contain specific prohibitions against dual office holding. See §112.313, F.S.

Section 112.311, F.S., further states that no officer or employee of a state agency:

> shall have any interest, financial or otherwise, direct or indirect, engage in any business transaction or professional activity; or incur any obligation of any nature which is in substantial conflict with the proper discharge of his duties in the public interest. To implement this policy and strengthen the faith and confidence of the people of the state in their government, there is enacted a code of ethics setting standards of conduct required of state, county and city officers and employees, ... in the performance of their official duties.

Section 112.311(5), F.S.

The term "conflict of interest", for purposes of the Florida Code of Ethics, is defined as "a situation in which regard for a private interest tends to lead to disregard of a public duty or interest." Section 112.312(8), F.S.

The specific standards of conduct are set forth in Section 112.313, F.S., including prohibitions against unauthorized compensation (Section 112.313(4), F.S.), misuse of public position (Section 112.313(6), F.S.) and conflicting employment or contractual relationships (Section 112.313(7), F.S.). Section 112.313(6), F.S., entitled, "Misuse of Public Position", states in relevant part:

> No public official or employee of an agency shall corruptly use or attempt to use his official position or any property or resource which may be within his trust, or perform his official duties, to secure a special privilege, benefit, or exemption for himself or others.

Section 112.313(6), F.S.

Through the adoption of the Florida Ethics Code, the Legislature has codified the duties imposed upon state officials and employees. The intent language of the Code of Ethics sets forth the public policy considerations the Legislature deems relevant when determining whether an unavoidable conflict of interest exists. Section 112.313, F.S., does not contain language on its face which prohibits the appointment of a member of a board by the board. Nor is there any case law construing Section 112.313, F.S., to include such a prohibition. Because Florida's Code of Ethics is penal in nature, it should not be liberally interpreted for the public benefit, but instead should be strictly construed so that those covered by the statute have clear notice of what conduct the statute proscribes. Galbut, supra, at 194 (Anti-nepotism statute was strictly construed so as not to create an unnecessary barrier to public service by otherwise qualified individuals, thus allowing Galbut's reappointment by a five-sevenths vote of the city commission, as long as Galbut's relative abstained from voting and in no way advocated the

reappointment). Galbut, supra, also holds that the prohibitions contained in Florida's Code of Ethics should be construed in light of the language in Section 112.311(2), F.S., which states that it is

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

Section 112.311(2), F.S., Galbut, supra, at 194.

Based on arguments set out above, this is not a proper case for mandamus relief. There is no existing Florida statute establishing or imposing a well established duty on the Board such that the Board was prohibited from appointing Castor as president of USF. There is no case authority in Florida establishing or imposing such a duty. Regardless of whether or not such a duty would constitute good public policy, in order for such a duty to be established, the Legislature would need to codify the prohibition; or a Florida appellate court would need to construe Florida statutory or common law to contain such a prohibition.

The authority to appoint officials is not inherent in the general powers of a governmental department, and must be duly conferred before it can be lawfully exercised. State ex

rel. Landis v. Bird, 163 So. 248, 260, 120 Fla. 780 (Fla. 1935). The authority to appoint must be exercised strictly within the limitations and intendments of the language delegating the authority. Id. The statute authorizing the Board to appoint university presidents places little restraint on that authority. The Board "may appoint a search committee." Appointments must be conducted in accordance with the provisions of Section 119.07, F.S., (the public records law) and Section 286.011, F.S., (the public meetings law). The Board "shall determine compensation and other conditions of employment for each president." Section 240.209(3)(b), F.S.

Only one specific restriction on the appointment power appears in the statute. The Board cannot "provide a tenured faculty appointment to any president who is removed" (Id.) for specified reasons. As a matter of public policy, the Legislature could have enacted additional restrictions. Instead, it chose to enact only the quoted language. The reasonable inference is that the Legislature did not deem additional restrictions such as a prohibition of appointment of Board members as necessary. The presence of a single restriction on the Board's appointment power, and the absence of the prohibition Clayton urges, strongly imply that the Board has no clear legal duty not to appoint one of its members.

In City of Miami v. Rezeau, 129 So.2d 432 (Fla. 3d DCA 1961),cert. den. 133 So.2d 646 (Fla. 1961) the petitioner sought mandamus relief compelling his promotion to a higher ranking police position. The City's civil service rules provided that vacancies in higher positions "shall" be filled. Id. at 433. The trial court granted a writ of mandamus. That judgment was reversed, on the ground the rules did not say when any duty to fill the vacancies must be met. Thus, the petitioner did not show entitlement to the promotion. Id.

Here, Clayton--in the absence of a statutory bar or applicable Florida case authority--analogizes to other states' cases, etc. Like the petitioner in Rezeau, he cannot show entitlement to rescission of Castor's appointment. See Ridaught v. Division of Florida Highway Patrol, 314 So.2d 140, 143 (Fla. 1975) (affirming denial of mandamus, when petitioner was FHP officer who voluntarily retired but was denied reinstatement due to age; as the petitioner did not show a clear legal right to reinstatement).

Although more pertinent to Clayton's choice of remedy, the Fourth District's observation in Lawnwood Medical Center, Inc. v. Cassimally, 471 So.2d 1346 (Fla. 4th DCA 1985) bears repeating here. Upon concluding that the mandamus relief granted by the trial court was "not an appropriate remedy," the court discussed why the petitioners had not demonstrated a

clear legal right. Recognizing the existence of a genuine dispute, the court concluded:

> The right to have such a dispute resolved, however, does not mean that a [petitioner]...has the right to invoke the extraordinary remedy of mandamus to resolve the dispute.

Id. at 1347.

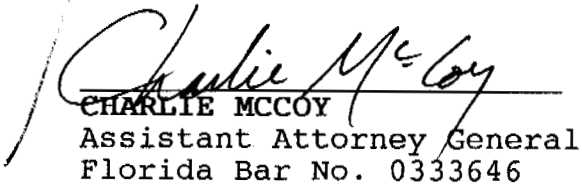
If he can establish standing, Clayton has a right to present this dispute. He does not, however, have the right to extraordinary relief.

V. Conclusion

Clayton's petition for writ of mandamus must be dismissed due to his lack of standing, the availability of another adequate remedy and the absence of a clear legal duty regarding the Board's appointment powers.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



CHARLIE MCCOY
Assistant Attorney General
Florida Bar No. 0333646
Office of the Attorney General
The Capitol - PL01
Tallahassee, FL 32399-1050
(904) 488-9935

CERTIFICATE OF SERVICE

I HERBY CERTIFY that a true and correct copy of this Response to Petition for Writ of Mandamus has been sent by U.S. mail to James B. Clayton, P.O. Box 39, DeLeon Springs, Florida 32130, this 15th day of February, 1994.

Charlie McCoy

<charlie>clayton/mandamus