

**Statement Concerning Plaintiff's Suggestion for Clarification and/or Modification of
Board of Governors' Delegations of Authority to University Boards of Trustees
June 22, 2006**

Chairman of the State Board of Education, Phil Handy, called the first meeting of the Florida Board of Governors on January 7, 2003. This meeting was held some two months after Florida voters had approved an amendment to the Constitution creating the Florida Board of Governors as the governing body for the State University System of Florida.

Initially it was unclear whether there had been appropriate notice of the meeting of the Board of Governors prior to the time of the meeting. It has since been established that there was no notice of this meeting which was clearly in violation of the Sunshine Law.

Among the actions the Board of Governors was asked to take was a request to approve a Resolution delegating powers and duties to the universities' Boards of Trustees. The Board of Governors approved this very important, comprehensive Resolution with no apparent discussion of the individual Resolutions themselves.

In the Plaintiff's pre-mediation statement of the case, the Sunshine Law violation issue was raised. However, there was no desire of the Plaintiff to create a legal problem for the Board of Governors. The intent of the Plaintiff was to call attention to the fact that there had been no notice of this meeting and, therefore, there was no opportunity for the public to make input into the consideration of some extremely important issues at this meeting.

At the mediation hearing on November 29, 2005, the Plaintiffs agreed to drop Count II relating to the Sunshine violation after the Defendant, Board of Governors, agreed to reconsider the actions of January 7, 2003, related to the delegations of authority to the Boards of Trustees. To date, the Defendant, BOG, has taken no action.

Following is a discussion of specific issues related to the Resolutions delegating authority by the BOG to the Boards of Trustees:

There were some comments about the action of the BOG with regard to the Resolutions. Mr. Woodring, the attorney for the Board of Education, said: "This Resolution reflected the Governor's intent as codified in the school code. . ." Mr. Uhlfelder inquired whether this delegation would weaken the authority (of the BOG) in future decisions. Mr. Woodring said the Board (BOG) would follow the notice requirements of the Administrative Procedures Act as it addressed rule revisions" (this is an interesting comment since APA requirements were not followed for this first meeting). Mr. Dasberg inquired "if. . . at a later time, this board might want to revisit some of these issues." Mr. Petway said it was his sense that "adopting this Resolution did not foreclose the opportunity for future actions." It is significant that members of the BOG realized that future amendments would be made.

In view of the circumstances in which the initial Resolution delegating responsibilities to university boards of trustees was approved, the Plaintiff requests that the Board of Governors clarify and/or modify certain delegations of responsibilities to university boards of trustees.

It should be noted that most of the 42 delegations appear to be clear and appropriate. However, the plaintiff requests clarification or modification of the following items:

Item 1, page 2, states that, "Each board of trustees shall be a public body corporate, by the name of 'the (name of university) Board of Trustees'. . ." Amendment 11 to Article IV, Section 7 of the Florida Constitution states that the Board of Governors, "shall be a body corporate." There is no reference in the Constitution to a board of trustees as a "body corporate."

Are Items 1, 3 and 5, pages 2 and 3, which refer to boards of trustees as a corporation, appropriate?

Item 4, page 3, of the Resolution is the following statement: "No bureau, department, division, agency, or subdivision of the state shall exercise any responsibility and authority to operate any state university except as specifically provided by law OR rules of the Board of Governors (emphasis added)." The Plaintiff believes that it would be inappropriate to suggest, in effect, that a state entity could exercise any responsibility and authority to operate any state university as provided by law. A statute should not prescribe the operation of a state university—that is the responsibility of the Board of Governors. Obviously the Legislature can pass laws affecting the operation of universities, but such rules become effective only when they are also approved by the Board of Governors. A statement saying that no state entity "shall exercise any responsibility and authority to operate any state university except as specifically provided by law AND rules of the Board of Governors" would appear to be appropriate (emphasis added).

On page 5, Item 7, is the following language: "Each board of trustees has responsibility for the establishment and discontinuance of degree programs up to and including the master's degree level." For most programs this would appear to be appropriate. However, there are certain high-cost bachelor and master's programs which, perhaps, should be controlled by the Board of Governors. Recently, members of the Board of Governors raised questions about a proposed engineering program at Florida Gulf Coast University. There may be other high-cost baccalaureate or professional programs that might remain under the control of the Board of Governors. We suggest that consideration be given to the following language: "Boards of trustees may have responsibility for approving and discontinuing most bachelor, baccalaureate, and master's degree programs. However, the Board of Governors may reserve the right to approve certain high-cost, low demand baccalaureate and master's degree programs."

Item 11, page 7, states that "Each board of trustees shall establish fees pursuant to SS.1009.24 and 1009.26, does the Board of Governors wish to retain authority to approve fees recommended by boards of trustees? To do so, would, we believe, be consistent with the position that the Board of Governors has taken with regard to the authority to establish levels of tuition.

We suggest Item 19, page 7, read as follows: "Because Plaintiff believes that the Board of Governors should be the public employer for collective bargaining purposes (see page 11 below), the BOG would necessarily be responsible for establishing a personnel system for university employees on all campuses. Plaintiff recommends that the BOG and the EOT share responsibility for personnel decisions regarding presidents. Rules governing the appointment, evaluation, and termination of presidents are covered in paragraphs 21 and 22 of the Resolution. It would appear to be appropriate to delete the last sentence of Item 19, page 8, beginning with the following: "No rule of the Board of Governors shall be considered. . ." since this relates to the subject of collective bargaining which is covered in a later item and does not appear to be appropriate here.

On Item 21, page 8, Plaintiff suggests the following modification. *"Each board of trustees shall appoint a presidential search committee to screen applicants and shall recommend no less than three candidates to the Board of Governors, The Board of Governors shall make the final selection of the president."*

We suggest that Item 22, page 8, of the BOG Resolution read as follows: "Each board of trustees shall conduct an annual evaluation of the president in accordance with goals established by the Board of Governors and submit such evaluations to Board of Governors for review and approval. The evaluation must also address the achievement of the long-term objectives established in the employment contract with the president.

Item 42, page 11, reads: "A board of trustees shall perform such other duties as are provided by law OR by the Board of Governors. This poses the same problem as discussed in Item 4, page 3. It is suggested that this read: "A board of trustees shall perform such other duties as are provided by law AND the Board of Governors."

On page 11, after Item 42, there is a resolution stating that: "In addition to the duties and responsibilities of the boards of trustees enumerated herein, the university shall have those duties responsibilities specifically set forth in the K-20 Education Code. . . and shall act consistent with those responsibilities." Does the board of trustees have any responsibilities except those given them by the Board of Governors? Are the responsibilities under K-20 Education Code, titled XLVIII Florida Statutes, consistent with delegations given them by the Board of Governors? If not, this might be deleted. Indeed, shouldn't all references to the K-20 Education Code be deleted?

On page, 11, the third Resolution under Item 42, states that: "It is the intent of the Board of Governors that the university boards of trustees shall be the sole public employers with respect to all public employees of the respective state universities. . ."

Of the many delegations the BOG has made to the Boards of Trustees, one of the potentially most costly was delegating the responsibility for collective bargaining. For all practical purposes, the matter has not reached a critical stage up to this point, because of PERC and 1st District Court of Appeal decisions. The principal question was the identity of the public employer for university employees.

The 1st District Court of Appeal held that the Board of Governors is the successor public employer to the Board of Education, which had become the public employer when the Board of Regents was abolished by the legislature in July of 2001. With the passage of the K-20 statute, the State Board of Education was considered to be the public employer. In the meantime, Amendment 11, creating the Board of Governors, was approved by the people. Although one could argue that the Board of Governors, under the language of Amendment 11, did have the power to delegate the responsibility to collectively bargain to the Boards of Trustees, there are strong arguments against having made such a delegation.

a. The potential costs of delegating personnel and collective bargaining functions to the Boards of Trustees could turn out to be extremely costly. Floridians for Constitutional Integrity, in testimony before the 1994 Legislative Revenue Estimating Conference, presented the following facts:

I. Bargaining on each campus would require at least one labor relations specialist or negotiator: \$80,000.

$$11 \times \$80,000 = \$880,000$$

2. Each campus would need at least one position dedicated full-time to collecting and analyzing data in preparation for bargaining: \$50,000

$$11 \times \$50,000 \sim \$550,000$$

3. Each campus would need at least one specialist to handle contract interpretation, grievances, arbitrations, and the like: \$50,000.

$$11 \times \$50,000 \sim \$550,000$$

4. Clerical support would be needed for preparing bargaining materials; handling paperwork associated with grievances, appeals of grievances, and arbitrations; and providing general clerical support to the entire staff: at least \$35,000.

$$11 \times \$35,000 \sim \$385,000$$

5. In addition to these staff costs, the campus would incur additional operating costs for telephone, materials, services, and other incidental expenses at a rate of at least \$15,000.

$$11 \times \$15,000 \sim \$165,000$$

The minimum total in salaries and expenses: \$2,530,000

b. Perhaps even more costly is what is known as "the whipsaw effect." Up until this point, the most recently bargained systemwide agreement prevails on the campuses where subsequent agreements have been reached. But, in an arrangement where each campus would bargain with its own employees, and one of the campuses agrees to a benefit that is not available on the other campuses,

there would be extreme pressure on the other campuses to agree to the benefit change won by the union on the first campus. Thus the whipsaw effect.

That is why, in the 1970s, when public sector bargaining was being developed in the Florida legislature, the Governor's office lobbied strenuously and successfully for statewide bargaining units for all Career Service employees and insisted that the Board of Regents become the public employer for faculty and other professional employees on the campuses.

c. Finally, careful consideration must be given to the following language in Amendment 11: "The board of governors shall be a body corporate¹ consisting of seventeen members. The board shall operate, regulate, control and be fully responsible for the management of the whole university system." Practically speaking, how could the BOG turn over to the BOTs something as potentially costly and consequential as a labor agreement?

d. If the BOG agrees that it should retain the power to bargaining collectively with employee unions on a statewide basis, the personnel system must ultimately be under the control of the BOG. The administration of the personnel system would take place on the campuses, but the rules and regulations should be under the control of the BOG.

The Plaintiff requests that the BOG reconsider its decision to delegate authority for collective bargaining in the university system to the university boards of trustees.

¹ No mention is made in the constitutional amendment of the boards of trustees having corporate status. How, then, could a university have the ability to agree to a contract that would bind the board of governors since the BOG is the corporate body?