

A CLOSER LOOK AT FREEH'S ENGAGEMENT LETTER: How The Deck Got Stacked

-By Eileen Morgan

An engagement letter defines the legal relationship (or engagement) between a professional firm, a law firm in this case, and its client. The PSU/Freeh Engagement Letter¹ details the hiring of Freeh, Sporkin, and Sullivan, LLP (FSS) to perform legal services and act as legal counsel for the Penn State Board of Trustees' Task Force (Task Force).

LEGAL REPRESENTATION

The contract reveals that Freeh had been engaged to 'represent the Task Force.' The engagement letter clearly specifies throughout the document that 'legal services' were to be rendered by Freeh (FSS), including: page 1, 'Re: Engagement to Perform Legal Services'; part 1. Scope of Engagement, Freeh's law firm will 'serve as independent, external legal counsel to the Task Force to perform an independent, full and complete investigation' and will provide a report that 'will contain FSS's findings concerning: i) failures that occurred in the reporting process; ii) the cause for the failures; iii) who had knowledge of the allegations of sexual abuse; and iv) how those allegations were handled. FSS's report also will provide recommendations to the Task Force to ensure that those failures do not occur again.' ; page 5, part 5., 'For purposes of providing legal services....'; page 5, part 7., 'FSS will provide the above-described legal services for the Task Force's benefits'; page 7, part 10., 'FSS may terminate its legal services'; and at the bottom of page 7, 'FSS is delighted to be asked to provide legal services to the Task Force' and the Task Force was invited to call Freeh to 'discuss any matter relating to (their) legal representation.'

Why did the Board of Trustees' Task Force need additional legal counsel and representation? The Board of Trustees had already brought in the firm of Reed Smith to handle the Board's legal affairs in relation to the Sandusky matter and its aftermath. Why would PSU spend millions of additional dollars on a second law firm in November 2011 to investigate possible criminal matters (i-iv above) when the state of Pennsylvania had already charged Tim Curley and Gary Schultz with criminal wrongdoing and the investigation was underway and in the hands of the judicial system? After all, Freeh had NO subpoena power, and Task Force's Ken Frazier, who oversaw Freeh's work, acknowledged that Freeh knew he would be unable to interview ANY of the key witnesses and had no legal authority in the pending criminal matters.

In other words, the Pennsylvania courts will lawfully establish the very findings (i-iv above), if any, that the Penn State Board of Trustees paid Freeh to determine, the difference being that the Freeh Report could ultimately cost the University \$10 million and is NOT a legally binding document based on indisputable evidence. The Freeh Report, regarding the PSU officials'

¹<http://www.scribd.com/doc/129799160/Freeh-Engagement-Letter>

involvement, has been substantially refuted and would be thrown out of a court of law based on the very fact that Freeh's findings and conclusions are unproven opinions that relied upon flimsy evidence.

In essence, Freeh could not officially and did not actually render legal counsel or a legally binding report regarding the alleged failures at Penn State, and thus, failed to fully deliver the services paid for as itemized in the engagement letter. If Freeh had truly been serving in the capacity outlined in the letter of engagement, the University would never have allowed him to pontificate as he did in a nationally-televised and sensational press conference without the benefit of the Board having even read his report.

A PLAN FOR VINDICATION

So why did Penn State agree to pay for a multi-million dollar report instead of waiting for the courts to LEGALLY determine if there was knowledge of sexual abuse and if there were failures of reporting that abuse, in accordance with the law? Since Freeh's report would have no legal standing and the courts would have the final say, it appears the Board essentially hired Freeh to produce an unofficial report that would vindicate their highly controversial terminations of Joe Paterno and Graham Spanier on November 9, 2011.

First, Freeh was clearly **representing** the Board of Trustees, as indicated twice on page 1. On page 2, Freeh's team was 'under the sole direction of the (Board's) Task Force,' meaning the Task Force 'supervised, guided, and/or managed' the actions of the investigation and possibly 'gave explicit instruction(s)' to Freeh. On page 5, part 7., Freeh provided his legal services for the 'Task Force's benefit.' In addition, the two parties would 'consult one another' during the investigation, as necessary, as indicated on page 6, line 1. And finally, Freeh's team was 'looking forward to working with the Task Force.' Based on this description of a mutual working relationship and Freeh's legal representation of the Task Force, it begs the question: How could Freeh possibly 'perform an independent investigation' as promised? Independent means 'not influenced or controlled by others; not subject to another's authority or jurisdiction.' Freeh obviously did not perform an independent investigation, but rather, was under the authority of the Task Force who could control the content of the report. Therefore, Freeh failed again to deliver the services paid for as itemized in the engagement letter.

CALCULATED RESULTS

The results from the investigation were to be provided in a written report per the Scope of Engagement. Remarkably, this report seemed to have predetermined results before the investigation even began. Notice that Freeh is certain of what the report **will contain**. FFS discloses that 'the report **will contain** FSS's findings concerning: i) failures that occurred in the

reporting process; ii) the cause for the failures; iii) who had knowledge of the allegations of sexual abuse; and iv) how those allegations were handled. FSS's report also **will provide** recommendations to the Task Force and Trustees for actions to be taken to attempt to ensure that those and similar failures do not occur again.' Freeh was careful to address the 'sexual abuse' as *alleged* since those charges were pending at the time, even though all of the other aspects of his planned "investigation" were more definitive, making no use of the word "alleged." And on page 2, Freeh states that '**any** discovered evidence of criminality' and '**if** any victims of sexual crimes' are identified, they 'will be reported to appropriate authorities.' Here, Freeh discusses his course of action 'if' he finds certain data. However, as previously mentioned regarding the Scope of Engagement, he did not say his report 'will contain any findings determined' or 'if findings are determined.' Clearly, Freeh differentiates between what he might find and what he will find.

On the date of this contract, November 18, 2011, Freeh seemingly guarantees to the Task Force that his future report **will contain** findings concerning the failures of the Penn State Officials in reporting sexual abuse, the cause for those failures, who had knowledge and how did they handle that knowledge. He also guarantees his report **will provide** recommendations to ensure **those failures** do not occur again. This is amazing foresight by Freeh since he did not actually know at the time if there even was a confirmed report of sexual abuse, let alone if there were indeed failures in reporting it.

Although Freeh states at the top of page 6 that his team 'does not promise any result' he claims they 'will make every reasonable effort to provide specific results.' It is apparent, from the Scope of Engagement, that many of the findings of the Freeh Report, which was publicly released on July 12, 2012, had been premeditated from day one. The results the Board wanted, regarding the top PSU officials, were apparently the results they were going to get. Since the criminality of any wrongdoing by individuals was being handled by the judicial system, there seems to be only one motivational factor to pay millions of dollars for an unsubstantiated report: To justify the Board's reckless and impetuous decisions to terminate Paterno and Spanier.

Trustee Frazier's recent statement² appears to confirm the Board's need for a predetermined outcome: "I believe that we are entitled to look at the words and contemporaneous emails and other documents that draw the conclusions *that we need to draw as a university.*" What *conclusions* did the Board *need* to draw as a university? The courtroom will determine the factual findings once and for all. All the Board *needed* to do was to be responsible stewards of the University, exercise patience, and allow the legal system to establish the ruling regarding the Penn State officials.

²Ken Frazier's statement at the Penn State Board of Trustees Legal & Compliance Committee Meeting, Hershey, PA-March 14, 2013

But Frazier actually answers that question by further saying, “We can take employment actions, we can take corrective actions without any need to resort to the so-called due process, reasonable doubt standard, and I don’t care if they are acquitted.” Clearly, Frazier and the rest of the Board needed to draw certain conclusions to justify the Board’s ‘employment actions’ taken against Paterno and Spanier.

INSURANCE

What’s even more fascinating is that the Penn State Board of Trustees indemnified Freeh and his team for ALL costs, expenses, and judgments, including any amounts paid in settlement of ANY claims. It was actually a brilliant plan. The Trustees ostensibly paid Freeh millions to publish a report with (unsubstantiated) findings that legitimized their rash decisions of November 9, 2011, and by indemnifying him, provided Freeh with unbridled freedom to publicly spew fallacious and slanderous statements about Paterno, Spanier, Curley and Schultz. Essentially, Freeh had carte blanche to produce findings and conclusions, regardless of truth, that would substantiate the Board’s previous actions without the liability of being sued. By protecting Freeh from the fallout of lawsuits, the Task Force could contrive the results they desired while relieving Freeh of any accountability. Should there be any legal action taken against Freeh and his firm, should there be any judgments against Freeh, and should Freeh have to spend any time defending himself to the University or the public, the tab for all of his bills will generously be picked up by Penn State.

FREEH’S FAILURES ARE THE BOARD’S VICTORIES

Freeh’s failure to perform an independent investigation allowed the Task Force, overseen by Frazier and Corbett’s Secretary of Education Ron Tomalis, to supervise the probe. And, Freeh’s failure to deliver a report that was legally binding allowed the Task Force to acquire what seemed to be its ultimate goal: exoneration for the Board. This truly was a match made in heaven.

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