

## **THE PENN STATE BOARD OF TRUSTEES: NOT UPHOLDING THEIR DUTIES AND RESPONSIBILITIES**

*The students, faculty, staff and alumni have the right to know where the trustees stand regarding the Freeh Report.*

### **THE FIRING**

As most are well aware, the Penn State Board of Trustees fired Joe Paterno on November 9, 2011. And by refusing to allow then President Graham Spanier to respond to the Sandusky crisis and let him lead the University as he had for the previous 16 years, the Board of Trustees forced Spanier into the position of stepping down, which he did graciously and with dignity. Even after Paterno announced his retirement earlier that day, the trustees decided to fire him, not allowing him to retire with dignity. And, even after Spanier presented the trustees that same day with a magnanimous resignation statement, the trustees downplayed it and later made a point in the media to talk about his "firing."

Believe it or not, their terminations were based on the grand jury presentment used to indict Jerry Sandusky for alleged child sexual abuse and they came just two days after the Attorney General's press conference announcing the indictments. It is important to clarify that a presentment is a report by a grand jury, **without a request for or presentation of evidence** by the prosecutor. The inflammatory content of the presentment turned out to be insufficient to prove in a court of law that Sandusky committed the most serious of the alleged crimes, the supposed anal rape of a child in a Penn State locker room, let alone be used to take career-altering and reputation-damaging actions such as the ousting of Paterno and Spanier.

However, the Penn State trustees apparently read this document and believed the 2001 eyewitness account without question or proof. The eyewitness was later revealed to be Mike McQueary, not by the presentment, but by a news story. It appears the trustees concluded, without evidence, that Paterno and Spanier did not properly handle the 2001 incident, which constituted a failure of leadership.

But, at Sandusky's trial the presentment's most shocking revelation, McQueary's eyewitness account in which he allegedly saw Sandusky sexually assaulting a boy, was completely refuted. In fact, the witnessing of "anal rape" or any sexual assault was denied by McQueary himself. Neither Paterno nor Spanier at the time of their terminations had been charged with any crimes. Moreover, they willingly testified before the grand jury about what little they knew of the 2001 incident involving Sandusky. Yet, based on the testimonies given by these men almost 10 years after the incident, the trustees, under perceived media pressure and without thoughtful debate, fact finding, or due process, terminated the men's employment immediately. Even Sandusky, alleged to have committed horrific crimes, was afforded fairer treatment and due process.

This Board decision incited anger throughout much of the Penn State community including students, faculty, staff and alumni. The rush to judgment to get rid of these men, without even the courtesy of discussing the matter, was and still is to this day unacceptable to many.

### **THE HIRING**

That same month, the Board hired Louis Freeh to investigate the matter, an investigation in which Freeh had no subpoena power, interviewed none of the key witnesses, and those he did interview were not under oath. Dozens of people who were interviewed gave substantial positive testimony of the honesty and integrity of Joe Paterno, Tim Curley, Gary Schultz, and Graham Spanier, including many trustees. Likewise, many individuals spoke positively about the culture of Penn State athletics and the Penn State Football program. But it is clear that Freeh and his team ignored exculpatory testimony and evidence. Freeh's weak and unsubstantiated conclusions regarding these men could never be used in a court of law or be used to convict them of any crimes. In reality, the findings and conclusions regarding their alleged wrongdoing are simply one opinion based on a few emails taken out of context and given the most unfavorable interpretation.

This 267 page report came out July 12, 2012, and based on the Board's statement<sup>1</sup>, was released simultaneously to the Board and public. Yet, amazingly, within hours the Board had a prepared statement and made themselves available to the media. The statement (addressed below) most likely was in response to Freeh's forty-five minute press conference and not in response to reading the lengthy report, digesting and analyzing the evidence, and determining if the facts and evidence clearly supported the findings and conclusions drawn by Freeh. It seems clear that the trustees boxed themselves in by proclaiming that they would see the report at the same time as the public and by suggesting all along that they would accept whatever was in the report. Unfortunately, to this day, there has never been a Board of Trustees meeting in which the Freeh Report has been discussed, dissected, analyzed and verified. One would think that most, if not all, of the trustees have read the Freeh Report, the King and Spalding study sponsored by the Paterno family, the report of Spanier's attorneys, and other independent analyses, but only a few of the trustees have publicly stated their position. Do these actions represent responsible stewardship of Penn State University?

Remember, the Freeh Report, which alone has reportedly cost the university up to \$10 million, was commissioned by the Penn State Board of Trustees. Should it not be required of each trustee to thoroughly read, verify the content, and comment on the product they paid for? Should they not be required to collectively discuss the evidence to determine, as the governing body, if they agree or disagree, with Freeh's findings? After all, they apparently read and discussed the presentment to reach their decisions regarding the terminations of Paterno and Spanier. It is an undeniable breach of fiduciary responsibility that the leaders of Penn State, who paid millions for an investigation, have not publicly stated where they stand regarding the findings of the final product.

## **THE FALLOUT**

Not discussing and verifying the findings of the Freeh report, is merely the tip of the iceberg. This report was the single source used by the NCAA to levy unjustifiable sanctions that included a \$60 million fine. The consent decree<sup>2</sup>, which PSU President Rodney Erickson agreed to without confirming Freeh's findings, included a clause that the 'University willingly accepted the Freeh Report.' How is it possible that the governing body of Penn State agreed to the sanctions without question or fight? How is it possible that at the time the sanctions were coming down, the Board didn't take a step back, get together as a group, and consider the merits of the very source (Freeh Report) for the sanctions? In addition, this report is apparently the primary reason why Penn State has decided to enter into settlement talks with possible victims because of Penn State's alleged liability for Sandusky's crimes. Indescribably, the Board actually invited plaintiff lawyers to settle quickly, in fact announcing that they wanted to compensate all victims before the end of 2012, even before anyone's guilt other than Sandusky's could be determined. Although it looks increasingly unlikely that there is any evidence that university officials had any role in enabling Sandusky's crimes, the University continues to apologize and open the doors of liability for itself.

The Freeh Report and Penn State's implied acceptance of it could easily cost Penn State well over \$100 million, and the Board of Trustees has not been brave enough to stand up and acknowledge the report's substantial limitations. Do these actions represent responsible stewardship of Penn State University?

The following section contains the mission statement, standing orders, and public statements of the Board. In light of the hasty terminations of Paterno and Spanier, the silent acceptance of the Freeh Report, the acceptance of the NCAA sanctions and the pending settlement talks with possible victims, determine for yourself if the Board of Trustees has responsibly governed the University. [My comments are in blue and in brackets.]

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<sup>1</sup> Legal Matters <http://progress.psu.edu/legal-matters>

<sup>2</sup><http://s3.amazonaws.com/ncaa/files/20120723/21207236PDF.pdf>

## THE BOARD'S DUTIES AND RESPONSIBILITIES

The following is the Penn State Board of Trustees' mission statement: The Board of Trustees of The Pennsylvania State University is the corporate body established by the charter with complete responsibility for the government and welfare of the University and all the interests pertaining thereto including students, faculty, staff and alumni.<sup>3</sup>

[The welfare of the University and interests of the students, faculty, staff, and alumni has been neglected by the Board for the past 16 months as evidenced by their rush to terminate Joe Paterno, 61 year employee, and Graham Spanier, a 27 year employee, 16 as president, with no evidence of wrongdoing. The fact that the trustees have not collectively acted on the findings of their multi- million dollar Freeh Report and have not publicly stated where they stand is additional proof of their negligence. Furthermore, their surrender to the NCAA and their apparent surrender to the possible victims, without challenge or confirmation of Penn State's culpability at this point in time, is a complete disregard for the welfare of the University. The hasty acceptance of the sanctions and settlements could cost the state-funded school \$100 million or more, quite possibly forcing tuition increases and risking loss of enrollment.]

One of the 'Guiding Policies' states that 'the Board shall receive and consider thorough and forthright reports on the affairs of the University by the President or those designated by the President. It has a continuing obligation to require information or answers on any University matter with which it is concerned.'<sup>4</sup>

[The Freeh Report pertains to the affairs of the University. However, the consideration the report has gotten from the trustees has not been publicly stated. The trustees who are not on the Executive committee are obligated to require information and answers regarding the Freeh Report and the details of the agreement between Erickson and the NCAA regarding the sanctions.]

The 'Expectations of Membership' state<sup>5</sup>: In exercising the responsibilities of trusteeship, the Board of Trustees is guided by the expectations of membership, each of which is equally important (not all listed):

1. Understand and support the University's mission, vision, and values

[Based on the above, the trustees do not understand or support, by their actions, the University's mission.]

2. Act in good faith at all times and in the best interests of the University in a non-partisan manner

[The actions of the trustees over the past 16 months have not been in the best interest of the University, in fact, their actions have been detrimental to Penn State.]

4. Prepare diligently, attend faithfully, and participate constructively in all Board meetings and related activities by reading the agenda and supporting materials

[The trustees are directed to read the agenda and supporting materials for all Board meetings but have not been required to act on their own \$10 million Freeh Report?]

6. Make decisions and instruct the administration as a Board, not as individuals

[The Board, as a whole, did not make the decision to silently accept the Freeh Report nor to accept the NCAA sanctions, but individual trustees did.]

8. Disclose promptly and fully any potential or actual conflicts of interest, and personally maintain exemplary ethical standards

[Gov. Tom Corbett did not disclose his conflict of interest regarding his investigation into Sandusky's crimes that possibly involved the University. Trustees Corbett and Ken Frasier did not reveal conflicts over their prior relationships with Freeh around an internal investigation at Merck, where Frazier is CEO, which resulted in massive fines. The silence surrounding the Freeh Report and the questionable actions of the consent decree signing by Erickson, which are costing the University millions of dollars, before culpability has been determined, appear to be less than ethical.]

13. Extend goodwill to one another and to all members of the University community.

[The Board's failure to extend goodwill (due process) to its former employees speaks for itself.]

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<sup>3</sup>Standing Order IX, (1)(a)

<sup>4</sup>Standing Order IX, (1)(b)2

<sup>5</sup>Standing Order IX. (1)(f) Expectations of Membership

## PRESIDENT ERICKSON'S PROMISE TO THE PENN STATE COMMUNITY (2011)<sup>6</sup>

With the full support of the Board of Trustees, I have outlined five promises to the Penn State community that will guide my leadership of this great institution in the wake of this tragedy. I wish to share these promises with everyone who is a part of our community. (Not all listed)

1. I will reinforce to the entire Penn State community the moral imperative of doing the right thing – the first time, every time. [\[Throwing caution to the wind that will cost the University \\$100 million is NOT the right thing.\]](#)
  - I ask for the support of the entire Penn State community to work together to reorient our culture. Never again should anyone at Penn State feel scared to do the right thing. My door will always be open. [\[The Penn State culture has never needed to be reoriented, until now, due to the Board's negligent and irresponsible leadership. Penn State cannot be responsible for anyone's feelings. Adults are responsible for their own behavior. The story of the scared janitor has been disproven by the evidence. Mr. Erickson, the right thing, as our President, is for you to fight for our school and defend the University. But, out of fear, you accepted the NCAA sanctions and signed the consent decree. Practice what you preach.\]](#)
2. As I lead by [\[poor\]](#) example, I will expect no less of others [\[trustees\]](#).
  - I will ensure proper governance and oversight exists across the entire University, including Intercollegiate Athletics. [\[As detailed above, the governance and oversight of the University has been improper, irresponsible, and disgraceful.\]](#)
3. Penn State is committed to transparency to the fullest extent possible, given the ongoing investigations.
  - I encourage dialogue with students, faculty, alumni, and other members of the Penn State community. [\[The Penn State Community demands to know which trustees read the 267 page Freeh Report before lending their support for it, and when will the Board discuss the report, collectively, as a body.\]](#)
5. My administration will provide whatever resources, access, and information are needed to support the Special Committee's investigation. I pledge to take immediate action based on its findings. [\[These promises were made in Nov. 2011. Erickson pledges 8 months before the findings of Freeh are to be released that he will 'take immediate action on its findings.' It appears Erickson gave up all rights of Penn State to Freeh in 2011. Whatever Freeh determined to be true would be true and Penn State would blindly do whatever Freeh dictated, as well as, blindly accept whatever the NCAA would hand down. This is the epitome of poor leadership. Responsible stewardship would be to immediately take the findings under advisement, analyze the report as a body, determine if the evidence supports the findings, and THEN decide, as a corporate body, what actions Penn State would take.\]](#)

## THE BOARD'S PUBLIC STATEMENTS

On July 12, 2012, the Board released this statement<sup>7</sup> in response to the Freeh Report (not in total): Today's comprehensive report is sad and sobering in that it concludes that at the moment of truth, people in positions of authority and responsibility did not put the welfare of children first. The Board of Trustees, as the group that has paramount accountability for overseeing and ensuring the proper functioning and governance of the University, accepts full responsibility for the failures that occurred. [\[A responsible governing body would not have blindly accepted full responsibility for Sandusky's crimes without first reading and analyzing the basis of the accusations.\]](#)

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<sup>6</sup><http://president.psu.edu/goals>

<sup>7</sup><http://progress.psu.edu/resource-library/story/penn-state-issues-statement-on-freeh-report>

If they indeed accept full responsibility for the failures that occurred then why haven't each of them resigned from the Board? After all, they terminated Paterno and Spanier for 'failure of leadership,' without any evidence of wrongdoing, so why haven't they taken the same punishment they allocated to those men for the same infraction?]

Judge Freeh's report concludes that certain people at the University who were in a position to protect children or confront the predator failed to do so. There can be no ambiguity about that. [Freeh's conclusions were never verified by the Board so how can they make a claim regarding ambiguity.]

Furthermore, the Board is committed to greater transparency and communications with the entire University community. [The Board must be open and publicly state where they stand regarding Freeh's conclusions.]

In the weeks ahead, the University will carefully review and consider each of the report's recommendations. Tomorrow at its regularly scheduled meeting, the Board of Trustees will consider a series of immediate next steps. President Rodney Erickson has appointed three members of his senior leadership team to coordinate and implement operational changes suggested by the Freeh Report. [How can the governing body of a world class institution implement operational changes that they don't know in fact need changing? If Freeh recommended they shut down all athletics for two years would they do it without question and without analyzing his report? That's exactly what the Board is doing with these recommendations. The Board of Trustees is being run by substandard leaders.]

With the release of the Freeh Report we are beginning to correct our failures.... [Again, how can the Board correct failures they don't know actually exist?]

On July 23, 2012, the Board released this statement<sup>8</sup> regarding the sanctions (not in total): The NCAA announced their penalties against Penn State, which included a four-year prohibition against post-season play for the football team, the loss of scholarships, the vacating of past wins, and a \$60 million fine. Penn State President Rodney Erickson, with input from legal counsel and members of the executive committee of the Board of Trustees, accepted the NCAA-imposed penalties. [The Board had 11 days to come together to discuss and verify the findings of the report. Had the trustees done so, as one would expect of a world class University, then they would have quickly realized that Freeh's findings and conclusions were not supported by the evidence. They then would have been in a position to challenge Mark Emmert and the NCAA, defend the University against the unjust sanctions, and display effective leadership that had been lacking for 8 months.]

The events surrounding allegations of serious misconduct on our campus have led to multiple investigations and lawsuits. Many of these are ongoing or are still in early stages. The **process** of establishing what happened, determining personal and institutional accountability and ensuring that these events do not happen again is essential to our community's recovery and eventual healing. [The trustees talk out of both sides of their mouths. Their initial statement above on 7-12-12, just hours after the Freeh report came out, never uses the word 'alleged.' Their statement was total acceptance of Freeh's conclusions and that Penn State was to blame. Here, they actually admit Freeh's findings are merely 'allegations' and that the law, **due process**, has yet to determine exactly what happened and if anyone or the University is culpable. Yet, knowing all this, they irresponsibly neglected to wait for the law to determine culpability, and accepted Freeh's alleged findings, allowing Penn State to take full responsibility for Sandusky's crimes which led to unprecedented sanctions that could cost the University over \$100 million.]

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<sup>8</sup>Legal Matters <http://progress.psu.edu/legal-matters>

The University has been and is cooperating fully with all appropriate government authorities and all criminal and administrative investigations, including those described below. Out of respect for the legal process and the privacy of the individuals involved it would not be appropriate to comment on specific charges, evidence or individuals until the legal process and such investigations are completed. [Why didn't the Board take a STAND for Penn State and make this statement on November 9, 2011? Why didn't the Board take a stand and make this statement on July 12, 2012? And why didn't the Board take a stand against the NCAA, using this statement, and refuse to sign the consent decree?]

- **Attorney General:** The Grand Jury investigation is ongoing, which means further questioning and charges may yet occur. [The Board acknowledges the legal process have not concluded, yet never defends or fights for the University, which eventually may be found not responsible for any of Sandusky's crimes.]
- **Penn State Board of Trustees' Special Investigations Task Force:** The Freeh Report was released online at thefreehreportonpsu.com simultaneously to the University community, Board of Trustees, the media and the general public on July 12, 2012. [The trustees never saw the report until a couple hours before their statement. They could have never read or verified the report within that time frame. Their statement on July 12, 2012, allowing Penn State to fully accept responsibility for Sandusky's crime was reckless and a colossal dereliction of duty.]

On Oct. 26, 2012, the Board released this statement<sup>9</sup> regarding the Legal Committee (not in total): Penn State's Board of Trustees voted unanimously to authorize a subcommittee of the Board to approve possible settlements of claims made against the University related to the crimes of former assistant coach Jerry Sandusky.

This measure provides the Subcommittee on Legal -- an arm of the board's Committee on Legal and Compliance -- the authority to approve settlements that may be reached related to claims against the University by individuals alleging that Penn State is liable for injuries suffered in connection with sexual abuse by Sandusky. [Again, the Board acknowledges that the courts have yet to determine if the University is responsible for Sandusky's crimes. Why would the University even consider approving settlements before the legal processes have concluded? I wonder if the insurance companies who will be footing the bill of this negligent Board have any recourse.]

On Feb. 10, 2013, the Board released this statement<sup>10</sup> regarding its progress (not in total): The goal of this investigation was to uncover facts and identify where failures occurred in the University's governance and compliance structure and to make recommendations to help ensure that such failures never happen again. [Do you notice with each new statement, the Board adjusts its tone and position? The initial statement following Freeh's press conference was total acceptance of blame. A week and a half later, the Board is careful to correctly say "Penn State's 'alleged' misconduct" and "the process... to determine personal and institutional accountability...." With this recent statement, "the goal was to uncover facts," now suggests the Board might not necessarily agree that the goal was accomplished.]

The University intends to implement substantially all of the (119) Freeh recommendations by the end of 2013. [Many of the recommendations are derived from alleged failures that have yet to be confirmed.]

It is understandable and appreciated that people will draw their own conclusions and opinions from the facts uncovered in the Freeh report. [WOW! The Board acquiesces that the conclusions drawn by Freeh are not necessarily 100% truth and they now understand and appreciate that other conclusions, different from Freeh's, are possible from the same facts he based his findings on. So what are THEIR conclusions?]

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<sup>9</sup><http://progress.psu.edu/resource-library/story/trustees-approve-resolution-to-grant-authority-for-legal-settlements>

<sup>10</sup><http://progress.psu.edu/resource-library/story/freeh-investigation-findings-used-to-improve-penn-state-operations>

## THE DEMAND FOR REAL LEADERSHIP

Has each trustee read the entire Freeh Report? If so, where do they stand regarding Freeh's conclusion that the senior leaders of Penn State knowingly allowed Sandusky to sexually molest boys for 14 years? I believe the trustees have been silent on this matter because they have backed themselves into a corner. Either way they answer that question, their backs are up against a wall. If they continue down their current path of silence, and do not reveal that they have indeed read it, then they are displaying a complete dereliction of duty, as addressed above. Their disregard of the responsibility for the government and welfare of this University is blinding. I'm not sure which is more astonishing, the fact that the trustees have not collectively reviewed and vetted their \$10 million report, or the fact that they have gotten away with it for so long. However, if the trustees do in fact publicly reveal they each have read the report, then they will have to answer for the unsupported findings and conclusions surmised by Freeh. They will have to explain why they allowed a faulty, unsubstantiated report to be used by the NCAA, without objection, to impose hefty sanctions, including a \$60 million fine. In addition, they will have to explain why they are even considering making settlements with possible victims before the courts have determined Penn State's culpability. And finally, they will have to admit their rush to judgment and the ousting of Joe Paterno and Graham Spanier were egregious mistakes, not made in the best interest of the University. Clearly, the corner they have painted themselves into shrinks day by day.

A remarkable fact about the Penn State trustees is that many of them own and/or run well-known, successful corporations throughout America. I wonder if these trustees run their businesses in the same irresponsible and unethical manner they have run Penn State over the past sixteen months. I certainly hope they do not throw caution to the wind, like they have at Penn State, when making decisions that could cost their companies over \$100 million. I wonder if the trustees run their households this way, with the same cavalier attitude and disregard for family members.

According to Standing Order IX (1)(c)<sup>11</sup>, the Board of Trustees has a certain responsibility to evaluate the President of the University.

1. This responsibility includes a commitment to grant the President broad delegated authority, to support the President in his/her exercise of such authority, to judge the performance of the President, and if necessary, to remove the President. In the selection of a President, the Board shall consult with representatives of the faculty and the student body.

Perhaps President Erickson's performance in governing Penn State needs to be evaluated.

Penn State's situation today reminds me of the relevancy of a famous quote: "A true leader has the confidence to stand alone, the courage to make tough decisions, and the compassion to listen to the needs of others. He does not set out to be a leader, but becomes one by the equality of his actions and the integrity of his intent."

Of all the great leaders this brings to mind, Rosa Parks comes front and center. Her undeniable courage and confidence to *sit* alone in the face of adversity helped change American history forever. The Penn State Board of trustees needs a Rosa Parks. Penn State needs a true leader. Who will finally stand up for this University and refuse to sit in the back of the bus? Until then, this bus is not moving forward.

By Eileen Morgan  
March 6, 2013

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<sup>11</sup> <http://www.psu.edu/trustees/charter.html>