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Wilberforce University Board of Trustees
c/o John M. Stephen
Porter Wright Morris & Arthur, LLP
41 South High Street
Suites 2800-3200
Columbus, Ohio 43215-6194

RE: Wilberforce University

Dear Mr. Stephen:

Thank you for your continued cooperation as our Charitable Law Section completed its review of the Citizens of Greene County's Petition concerning allegations that the Wilberforce University Board of Trustees breached their fiduciary duties. While I will discuss the specific allegations in more detail below, the brief conclusion is that this review did not reveal any violations that warrant our office filing an action. Therefore, we are closing our investigation.

As you are aware, the Attorney General is charged, both at common law and by the Ohio Charitable Trust Act, Ohio Revised Code Section 109.23 *et seq.*, with the enforcement of trusts and gifts for charitable purposes in the State of Ohio to protect and preserve the interests of the charitable beneficiaries. In fulfilling this role, the Attorney General has an obligation to ensure that charitable organizations are operating in accordance with the various laws that govern these organizations.

In a review of an organization like Wilberforce University, the focus of the review is primarily to determine whether or not the organization is operating in accordance with the fiduciary duties imposed upon the directors, officers, and employees of the organization. These fiduciary duties include the Duty of Care, Duty of Loyalty, Duty of Compliance, and Duty to Maintain Accounts. In evaluating whether these duties have been met, we look for clear and convincing evidence that the board members failed to act in good faith for the organization's best interests. We examine this conduct based upon the circumstances existing and information available to them at the time they acted rather than what the ultimate conclusion turned out to be. O.R.C. § 1702.30(C)(1). Based upon this framework, within which the Attorney General must work, our review did not find the allegations of the Petitioners against the Board to be an actionable breach of fiduciary duties.

Our review focused only on those laws discussed in the previous paragraph. We did not address issues concerning employment law or any potential private causes of action, as these are outside of the Attorney General's authority.

Additionally, we based our conclusions on the Petition filed with this Office, the documents which accompanied that Petition, documents provided by your client pursuant to Ohio Revised Code Sections 109.24 and 109.28, and conversations with you and your co-counsel. As we discussed previously, those documents are not subject to public disclosure pursuant to O.R.C. § 109.28. However, that code section does not protect the records which were submitted as part of the initial Petition. Since we had previously discussed the confidentiality of the records being provided, I wanted to make sure the distinction was clear between the documents submitted with the Petition and those which your client provided to this Office.

Specific Allegations

The Complaint was filed in the form of a Petition to the Ohio Attorney General's Office and outlined 12 specific areas where the complainants felt the Board violated its fiduciary duties to the detriment of the University. The Charitable Law Section reviewed the following 12 allegations:

1. Board members and President Hardaway have failed to raise sufficient funds for the University

The Petition alleged that the fundraising efforts of the Board and President Hardaway were ineffective. In particular, the Petition alleged that in light of the University's increasing debt and the declining enrollment of students, the lack of effective fundraising could somehow be considered a breach of fiduciary duty.

In reviewing this particular allegation, this Office looked to records of solicitation activities that occurred during the period of the complaint. From the review of these records, including Board meeting minutes, it is clear that the necessity to raise more funds for the University has always been a major area of concern for the Board. It appears that there was a bit of a fundraising hurdle from Fall 2008 through Summer 2010, where fundraising efforts were less successful following the resignation of key staff members. However, unsuccessful fundraising efforts do not necessarily equate to a violation of the law -- particularly during a time of economic hardship where decreased fundraising is an issue for the entire nonprofit sector. What is of importance here is that fundraising was still important, and the Board discussed it and undertook efforts to increase revenues.

2. The Board over-compensated President Floyd Flake, who was frequently absent from campus

The Petition alleges that the Board violated their duty of care and duty of loyalty by hiring Floyd Flake as President and compensating him with a salary on par with other similarly situated full-time University Presidents. The Petitioners were particularly concerned about this salary because President Flake continued to reside in New York during his tenure as President and was only on campus a few days during the week.

This was an area of particular concern for us because, while President Flake's initial compensation was the same as his predecessor, the little time he spent on campus was a potential

red flag. However, as we reviewed the facts and circumstances concerning President Flake's appointment, we are unable to say that this decision was unreasonable. At the time of President Flake's appointment, the University was already suffering financially. According to the records reviewed, the Board chose President Flake not just because he was an alumnus and member of the University's Board of Trustees, but also because he is a former United States Congressman and a senior pastor of an African Methodist Episcopal church with more than 15,000 members. The Board believed that his management skills and status were desirable and necessary in halting the University's financial downturn.

Further, it appears that President Flake continued to fulfill his functions even when not on campus. So, despite the fact he was not physically present on campus every day of the week, the information we reviewed confirms he was fully performing his job duties. Considering his salary was well within market range, it does not appear that the Board over-compensated President Flake and that rather, the Board had a reasonable business justification for hiring him.

3. The Board over-paid the Vice-Presidents to the University's detriment

Similarly, the Petitioners allege that the Board violated its duty of loyalty and care to the University by increasing the number of Vice-Presidents and increasing the average pay for the new Vice-Presidents. Further, the Petitioners were concerned because the Board did not conduct a national search for new Vice-Presidents. The Petition points to specific examples of what it deems to be excessive compensation or improper loyalty. For example, the Petitioners question whether it was appropriate to appoint protégés of President Flake into these positions without conducting a national search. Also, the Petitioners question whether it was appropriate to pay an individual to develop a strategic plan for the University which the Petitioners incorrectly claim was not used.

Much like the analysis done above concerning President Flake's salary, it is important to note that these increases in number and salaries of Vice-Presidents occurred during a time when the University was struggling and trying to attract administrators who were competent to help stop the University's financial losses. The records reviewed indicate that this was the business decision behind increasing the number and salaries of Vice-Presidents. As with President Flake's salary, this decision does not appear to have violated their fiduciary duties.

4. The Board did not do a wide-scale search for new executives, a possible breach of the duty of care to the University

This particular allegation has three parts. First, the Board appointed President Flake as an interim President, promising to conduct a full search for a permanent president. However, this never occurred. Second, President Flake unilaterally selected Patricia Hardaway, then Chair of the Board of Trustees, as the Provost. Third, the Board appointed Patricia Hardaway as Interim President, then permanent President, without doing a national candidate search.

Based on the documents reviewed, the Board did not breach its duty of care to the University on these three issues. The Board made President Flake permanent President as a direct result of his success on objectively quantifiable factors during his term as Interim President. The Board

appointed Patricia Hardaway as Provost, Interim President, and then permanent President because it was looking for a qualified individual who also possessed a steady history with the University to prevent internal turmoil from staffing changes. These appear to be legitimate business purposes for making such decisions.

5. The Board allowed President Flake to engage in self-dealing in a contract with the Princeton Review, a possible breach of duties of loyalty and compliance

Petitioners allege that President Flake breached his duty of loyalty by engaging in self-dealing with respect to a Princeton Review program that the University adopted. More specifically, Petitioners allege that President Flake served on the Princeton Review Advisory Board during a time that the University entered into a contract to impose a series of Princeton Review high school prep courses. This program resulted in the University paying a total of \$1,180,998 to Princeton Review over six years.

When dealing with issues of potential self-dealing, we look at disclosures. As human beings with ties to the community, conflicts will arise. These conflicts are handled by creating a conflict of interest policy and abiding by it. That conflict of interest policy should include disclosure of potential conflicts and abstention from decision-making discussions. In reviewing the records and meeting minutes concerning the decision to contract with Princeton Review, it is apparent that the Board did just that. Inquiries were sent to multiple diagnostic corporations, and the Board discussed their merits at length. President Flake's relationship with the Princeton Review Board was fully disclosed and appropriate actions were then taken in light of the disclosed potential conflict. This allegation does not amount to improper self-dealing.

6. The University has been in danger of losing its accreditation

Petitioners allege a possible breach of duty of care resulting from the Higher Learning Commission putting the Board on notice that the University was about to lose its accreditation. After reviewing the reports, this allegation is simply not true. The reports produced by the Higher Learning Commission, which accredits degree-granting post-secondary educational institutions in 26 states, never indicated the University was in danger of losing its accreditation. The reports did, however, highlight areas where the University may want to focus attention to better its position with respect to finances and increasing enrollment. The Board focused on these recommendations in making future decisions.

7. The University reduced employee compensation and has been in default of faculty employment contracts

Petitioners point to decreases in faculty salaries and benefits as an area for concern. These complaints are issues concerning the faculty's employment contracts. The Charitable Law Section did not largely review these concerns. There may or may not be private causes of actions resulting from the Board's actions on this front. However, when reviewing these allegations, we considered the University's financial hardship. When we reviewed the decision from that set of circumstances, it did not appear that the Board violated their fiduciary duties.

8. High risk of lawsuits against the University due to bad employment practices threaten University finances

Petitioners indicate that the decreases in salaries and benefits mentioned above, as well as dismissal of staff, open the University up to lawsuits which can further danger the University financially. We reviewed this allegation contemporaneously with the allegations of decreased faculty pay and benefits. Potential litigation is one of the factors the Board has to take into consideration when making decisions, but taking an action that may result in litigation against the University is not, on its own, a violation of a fiduciary duty.

9. Board Members allowed actions which resulted in steadily dropping student enrollment and decreasing student revenues

Petitioners allege that the Board has allowed conditions at the University to deteriorate to such a level that enrollment continues to decline. The Board contends that as enrollment continues to decline, it is unable to improve the conditions at the University. This has become a “chicken or the egg” argument. While the Petitioners point to areas that could be improved to entice future students, the Board chose to focus on different areas to improve the situation. The records reviewed indicated that the Board was consistently evaluating the needs of the University and taking steps to make improvements. These decisions were made in a good faith belief that the Board was acting in the best interest of the University.

10. Poor grants management, accounting errors, and discrepancies call into question the ability of the board to manage the finances of the University

Petitioners make a blanket statement that the University has a poor record with respect to the management, use, and reporting on a wide range of federal government grants. With the exception of the Title IV Financial Aid Funding, which will be discussed below, there was little to flesh out this claim. The records this Office reviewed did not substantiate this allegation.

11. Pending insolvency, low financial ratios and a letter of credit requirement threaten the viability of the University

The Petitioners make a statement concerning the dire financial situation of the University. In particular, the Petitioners point out that the University could reach a point of insolvency which would jeopardize the University’s accreditation and access to federal financial aid. It is hard to determine whether this particular statement actually contains an allegation of a breach of fiduciary duties. However, it did paint a picture of the University’s current situation. This factor was considered while the other specific allegations were evaluated.

12. The Board violated the Duty of Compliance when it neglected requirements of Department of Education Title IV Financial Aid Funding

Petitioners allege that President Flake dismissed the Financial Aid Director and the entire financial aid staff in the early part of his administration (some time before 2005) and replaced the staff with less experienced individuals. According to the Petitioners, this resulted in several

errors being made which the Department of Education uncovered during an audit of fiscal years 2004 and 2005. In September 2010, in its final determination, the Department of Education established a total liability of \$554,000 for the University. By permitting this situation to arise, the Petitioners allege that Board violated its duty of compliance.

Our review confirmed inexperienced staff mistakes led to the Department of Education's findings. The question of whether to remove staff is, again, an employment issue. The information reviewed by this office supports the conclusion that the Board was acting in the best interest of the University when it made these decisions. The fact the University received a penalty from the Department of Education does not mean that the decision to replace staff was made in bad faith. Reviewing the Board's actions in light of the information available and circumstances which existed at the time of its decision reveals that the Board made its decision in the best interest of the University. Further, the errors that the Department of Education identified have been corrected. As such, at this time, this allegation is not an actionable violation.

Conclusions

We have fully reviewed the allegations presented in light of the information available to the Board and the circumstances which existed at the time of its decisions. No clear and convincing evidence was provided that the Board failed to act in good faith or that the Board acted in a manner opposed to the best interests of the University. Therefore, the Charitable Law Section has concluded its investigation and, based on the issues and documents reviewed, finds that the Board has not violated its fiduciary duties or applicable charitable trust laws.

If you have any questions concerning the content of this letter, please contact my office at 614.466.3181.

Very respectfully yours,

MIKE DEWINE
Ohio Attorney General



Meghan K. Fowler
Associate Assistant Attorney General