

Minutes
Board of Trustees Meeting
University of Central Florida
January 18, 2019

Chairman Marcos Marchena called the meeting of the Board of Trustees to order at 3 p.m. in the *FAIRWINDS* Alumni Center on the UCF Orlando campus.

Chairman Marchena reminded the board that the meeting was covered by the Florida Sunshine Law and that the public and press were invited to attend.

WELCOME

Marchena welcomed the board members and called on Grant Heston, Associate Corporate Secretary, to call the roll. Heston determined that a quorum was present.

The following board members attended the meeting: Chairman Marcos Marchena, Joshua Boloña, Ken Bradley, Joseph Conte, John Lord, Alex Martins, Beverly Seay, William Self, David Walsh, and William Yeargin.

Vice Chair Robert Garvy and Trustee Danny Gaekwad attended via teleconference.

PUBLIC COMMENT

There were no requests for public comment.

NEW BUSINESS

BOT – 1 Bryan Cave Investigation (Trustee Beverly Seay, Chair, Audit and Compliance Committee and Mr. R. Joseph Burby IV, Bryan Cave Leighton Paisner LLP)

Marchena indicated there was one new item of business, the investigative report from Bryan Cave. He reminded the board that Trustee Seay was appointed by the board to be the trustee to interact with Bryan Cave, and he asked Seay to make introductions and provide comments.

Seay stated that for transparency, all documents produced by the investigation were electronically housed in one location so that the Board of Governors (BOG) and House would have access to the same information. Seay asked Mr. Joey Burby from Bryan Cave to provide a summary of the report.

Burby stated the mandate the Board of Trustees (board) gave on September 20, 2018 was to find the facts. He stated that his firm and Pricewaterhouse Cooper (PwC) had not been influenced by any outside sources. The findings of the investigation are theirs and theirs alone. He noted that Seay oversaw the investigation, and although she assisted in gathering the requested information

from the university, she did not influence the investigation, drafting of the report, results, or decisions. He noted they have not been asked to make any recommendation to any actions, except for internal controls which is addressed in the report.

Burby specified that they retained the services of PwC to provide expertise in finance and accounting, including forensic accounting. Bob Gallagher, a partner at PwC, led the team and was available for questions. Burby stated the investigation was conducted over a period of three months, which included five trips to campus, and over 56 interviews with 43 different witnesses. (Appendix A) They reviewed tens of thousands of documents, including emails, text messages, board minutes, financial reports, accounting records and listened to hours of recordings of board meetings. A more detailed account of the document review and collection process is available in the report. Burby assured the board that they were thorough. He also noted that they worked with the Board of Governors (BOG) and its Inspector General, Julie Leftheris, who was present in the audience.

Burby said the organization of the report is divided into four sections:

1. Background and scope of the investigation
2. Summary of findings
3. Timeline of significant events
4. Internal controls analysis and recommendations

Burby summarized the key factual findings from the investigation. He noted his comments are not to serve as a substitute for the full report and nothing he says is to contradict the report. Education and General (E&G) funds are public funds used to run the operation of the 12 universities in the state of Florida. The University of Central Florida (UCF) receives E&G funds annually from the state through the General Appropriations Act. Under Florida law and BOG regulations, E&G funds can only be spent to support certain types of operations activities, which does not include construction of a new facilities. Between the years 2013-2016, the university allocated more than \$38 million dollars in E&G funds including \$37 million in carry forward funds toward a project which resulted in the construction of Trevor Colbourn Hall (TCH). He noted that TCH replaced a smaller Colbourn Hall that was built in the 1970s. Of the \$38 million that was allocated to the project, \$30.6 million in E&G funds was spent as of August 28, 2018. The vast majority of these funds were spent in fiscal year 2017-2018 on the design and construction of TCH (Appendix C).

The project was initially conceived as a renovation of Colbourn Hall, which was expected to cost between \$5-8 million. In 2013, when the construction account for the project was first set up and the first transfer of E&G funds occurred, there were no plans to construct a new building. Over the next three years, however, the plan evolved in several iterations. In the spring of 2014, concerns over rising renovation estimates and the need to relocate employees led to a proposal to construct a new building next to Colbourn, move Colbourn's occupants into that building, and then renovate Colbourn at a later date. The board approved the construction phase of this

proposal, which was expected to cost \$21.3 million, but did not address funding and decided to table any decision on Colbourn's fate. In 2015, a new plan emerged - to construct the new building and renovate Colbourn at the same time, at a combined cost of \$38 million. The Finance and Facilities Committee (FFC) was informed about the project and its new price tag after the fact but was not asked to formally approve it or the source of funds. In May 2016, the plans changed for a final time, as it was decided to raze Colbourn rather than renovate it, and to increase the size of TCH, using the funds that would have been spent on the Colbourn renovation. The decision to raze Colbourn was approved by the board in July 2016. Since the estimated cost of the project was still \$38 million, no decision with respect to funding the new construction or demolition was put before the board. Construction on TCH began in May 2017 and was completed in July 2018. The demolition of Colbourn began in late 2018.

Burby found that the key figure in all of the decisions outlined above was the University's former Vice President for Administration and Finance and Chief Financial Officer William J. "Bill" Merck II, who was asked to resign from his position effective immediately in September 2018. Merck oversaw the University's Finance & Accounting (F&A) department, which is responsible for managing E&G funds received by the State and accounting for and reporting on the use of E&G funds. He simultaneously oversaw the University's Facilities and Safety (Facilities) department, which among other things is responsible for planning and overseeing the university's capital projects. This dual role placed Merck in a position to make all of the important decisions with respect to the Colbourn and TCH projects and its funding, and to direct employees of F&A and Facilities to carry out all necessary tasks.

Burby stated when the Auditor General (AG) officials announced their audit findings regarding TCH at a meeting in August 2018, Merck took full responsibility for the decision to use E&G funds to build TCH. Since then, he has consistently and openly acknowledged his role in the matter, though he declined to be interviewed by Bryan Cave in connection with the investigation. He also has stated, after the fact, that he viewed the decision as necessary and justified because Colbourn presented an imminent health and safety risk to its occupants, and because there were no other options to fund the project. The report found both claims to be rooted in legitimate concerns that Merck and other university officials faced at the time of the decisions. However, the evidence does not support a conclusion that Colbourn presented an imminent health or safety risk requiring emergency action, nor does it support the claim that there was no other alternative but to use E&G funds.

Burby viewed it as more credible that Merck, and perhaps others, saw the university's E&G carryforward balance as a convenient solution to the problems created by the university's aging infrastructure and the decrease in available state funding. By transferring carryforward funds to the construction account - and \$37 million was transferred to the account *before* any significant portion of it was actually spent - these funds no longer needed to be reported to the State as a carryforward balance. F&A officials were able to "report" the transfers as planned expenditures on deferred maintenance, even after it became clear that the project would involve new construction rather than repairs or renovation (Appendix D). Moreover, by 2016, the project was considered internally to be "funded," and university officials involved in the budgeting process could move on to other projects.

Burby stated that they found no evidence of any improper motive or that Merck stood to gain financially from any of his actions. While it is possible that Merck may have genuinely believed that he was acting in the best interest of the university, it is nonetheless clear that he understood the significance of the decision to use E&G funds for the TCH project, and that he took steps to conceal or downplay that significance. Bryan Cave found no evidence that Merck, or anyone acting at his direction, ever specifically told the board that the source of funding for TCH was E&G funds. More significantly, no evidence was found that Merck, or anyone acting at his direction, ever explained to the board that the funding of TCH was not permitted under BOG regulations and may lead to adverse consequences for the university. Merck clearly understood that state auditors might find the project to be in violation of the restrictions on the use of E&G funds. He told others close to the project that the project might result in an "audit comment," but downplayed the significance of this. After the 2018 state audit uncovered the use of E&G funds for TCH, Merck acknowledged on several occasions that he could not have disclosed the relevant risks to the board, because he knew the board would not have gone forward with the project had he done so.

Burby addressed the questions that he was charged with back on September 20.

1. What individuals, other than Merck, were involved in the decision to construct TCH using E&G funds for the project? Burby referred the board to the full report for that information. However, he did report the findings as they related to Dale Whittaker, the university's current president. Whittaker became provost in August 2014 and by that time, the board had already approved the construction of TCH, and a decision to commit \$10 million in E&G funds toward that project had already been made and the funds had already been transferred to the construction account. Whittaker signed a budget document less than two weeks after his tenure as provost began in which he recommended for approval by President Hitt the allocation of an additional \$18 million in E&G funds toward the project, and that document was later used by F&A as justification to transfer that amount to the project in June 2015. Burby stated that Whittaker could not have fairly understood the significance of the document he signed in August 2014, since he had just arrived at the university and funding decisions on capital projects are typically not made by the provost. As time passed, however, Whittaker developed at least some understanding of the university's strategies and decisions with respect to funding capital projects, in light of the decline in PECO funding. Bryan Cave found evidence that as provost, Whittaker took an interest in the backlog of unfunded capital projects, particularly those involving academic facilities, at one point calling a meeting in 2016 with President Hitt, Merck and the CEO of the UCF Foundation to discuss how to prioritize the university's planned capital projects. Whittaker also pushed for the formation of a Facilities Budget Committee in 2017, which he co-chaired along with Merck. Bryan Cave found that over time, Whittaker was provided with information accurately showing that E&G funds were being used to pay for the construction of TCH. However, they also found evidence that during the same time, Whittaker received vague and arguably misleading information about the source of funding for TCH from Merck and others. Perhaps more importantly, Whittaker stated that he was not familiar with restrictions on the use of E&G funds, and no persuasive evidence to the contrary was found. Whittaker also stated that at the time, he was primarily focused on unfunded

capital projects and making sure they were prioritized based on academic needs, and information about the funding source for funded projects like TCH would not have been important to him. Like others, Whittaker recalled hearing Merck state that the funding for TCH might lead to an “audit comment,” which he said did not worry him because he was not familiar with state audits at the time and because Merck downplayed the significance of this.

2. Did anyone personally profit from this? No, they did not.
3. Were there controls in place that failed to prevent or detect this activity or that were violated? There were certain internal controls that were absent or inadequately designed (Section IV). Specifically, they found deficiencies in the areas of written policies and procedures regarding the use of state appropriated funding, training and education on such policies and applicable laws and regulations, oversight and approval of significant decisions involving the use of appropriated funds, auditing for proper funding of capital projects, monitoring and reporting. It was also found that the F&A department failed to foster a culture that encouraged challenging senior members of the administration and it did not encourage whistleblower activity.
4. What additional controls should be put in place to ensure that this does not happen again? Based on these control deficiencies, and in consultation with PWC, they have proposed certain enhancements to the university’s internal controls for the board and university leadership to consider (Section IV).

Following are the board’s questions and comments for Burby:

1. If there were any documents to which Burby was denied access that he needed to review (Marchena)? Burby said there was not.
2. Were there any employees that he did not get to interview (Marchena)? Burby said there were not, although there were some employees he would have liked to have interviewed more thoroughly.
3. Was he at any time pressured not to look in a certain area or denied access to a certain area (Marchena)? Burby said he was not.
4. If he had any interaction with Dr. Whittaker since he interviewed him (Marchena)? Burby said he did not.
5. Did he receive full corporation from the Board (Garvy)? Yes, he did, and it was not tainted.
6. Did the investigation look into these matters the same way it would at other universities (Garvy)? Yes, it did.
7. Could the investigation be expanded (Walsh)? Before Burby’s answer, Walsh qualified

his request by restating the scope surrounding the TCH investigation. Walsh stated that since this investigation began, there has been a total of \$85 million found either spent incorrectly or planned but not spent. Burby said they did not investigate the additional transfers but he hopes the board is able to use the report of how capital projects like this were handled. Walsh requested the board take a motion to accept the report and that it answers all the questions the board has. Marchena said they should take up the report next week after the board has had time to review it.

8. If there was anything that came up outside of the scope they were investigating that would be of interest or concern to the board (Yeargin)? He said there was nothing coming to mind.
9. Did Burby review the letters sent from Mr. Merck and Dr. Hitt (Yeargin)? Burby indicated they did review them and they are in the report.
10. What should the board do going forward (Bradley)? Burby suggested the university audit department add "capital project funding" as part of their audit report.
11. Bradley confirmed there was no personal gain found in the report.
12. Through the report, you provided an opinion on the culture in regard to lack of confidence to whistleblowing. Did you find anything relative to sharing or lack thereof of information to the board (Martins)? Burby stated there was an individual that did not share the funding sources accurately. He said the individual noted that Merck did not instruct her to keep quiet.
13. Do you feel like there was a culture of withholding information to the board (Martins)? Burby noted that he wouldn't go to that extreme. There was one or two people that withheld information, but he wouldn't say it was the whole department.
14. Did any of the outside audits conducted at the university contain comments or references to the funding of TCH for any of the years referenced (Conte)? No, he does not recall any comments in the audit reports that he reviewed.
15. Did you come across any reports that referred to Colbourn Hall as a catastrophic issue (Conte)? Burby did not see that in his reports.
16. Did you review state statutes as opposed to BOG statutes relative to the use of carry forward E&G funds (Conte)? Burby said they did review them. State law enables BOG to enact restrictions on the use of the funds and he did not see any inconsistency between the two.
17. Is there any information that could have lead Mr. Merck to translate the reports to Colbourn Hall being a safety risk (Boloña)? He did not see that in any of the reports.
18. Self commented that he believes the budget management at the university needs to be

reviewed in further detail.

19. Self commented that Appendix D was very unsettling in the report. He had a question for the board to see reports of where the other E&G funds were used?
20. Was TCH paid using interest funds (Self)? It was not, but Marchena clarified interest funds are also considered E&G carry forward funds.
21. How did the state auditor find we used state funding inappropriately (Walsh)? Burby said he believes they had impression there were incorrect funds used and decided to request information and use this for the audit.
22. Walsh commented that a whistleblower situation could have happened here. Someone may have tipped off the state and thinks it would be relevant to know.
23. Burby indicated they did not do an audit of the construction funds. They did audit that every dollar was spent on construction. Burby doesn't believe there was any indication anyone received financial gain from the construction company.
24. What is the next step (Gaekwad)? Marchena said he would be going into detail on the next steps.

Marchena gave statements and recommendations. He started by thanking Trustee Seay, Joey Burby and his team for their methodical and thorough investigation of this matter. Marchena indicated that there are two types of actions he is recommending to the board. The first and most important type is systemic. These include several procedural changes mentioned in the investigation and some already implemented:

1. The certification of funds form will remain in effect.
2. President Whittaker already separated the position of CFO and V.P. for Administration . Marchena recommends the board adopt the change as policy and approve the change to structure and responsibilities of the two positions.
3. The office of the General Counsel, the compliance, ethics and risk office and internal audit will develop updated specific written policies and procedures for the board's consideration to further ensure proper use of state appropriated E&G funds.
4. He recommends the review of the existing whistleblower program and update it to encourage reporting of known or suspected violations of law, regulation or University policy.
5. Real-time audits for all capital projects in excess of \$2 million be formally adopted as board policy.
6. Marchena recommends a standard format be adopted for committee and board agenda

memoranda. The essential components of the recommendation are that all decision points relative to an agenda item be specifically identified, all pro and con facts relative to each decision point be disclosed and identified, that the specific source of funding and fiscal impact be included in the agenda item and any restrictions on the proposed funding source be identified and disclosed. Marchena distributed a copy of the requested agenda format document to the trustees.

7. He expects additional recommendations will come after the Association of Governing Boards (AGB) gives its report.

The second type of recommendation is retributive. Marchena stated that the report found the person primarily responsible for the decision to use restricted funds for the TCH project and for not informing the board was the former CFO Bill Merck. Marchena discussed CFO obligations with multiple CFOs. They informed Marchena that Merck had a duty to not only inform the committee and the board of the restricted nature of the funds but to highlight the restricted nature of the funds and ensure that a decision was made knowingly. The report makes it clear that the reason Merck hid the information was because he knew the board would say no.

1. Marchena recommends that Mr. Merck be stripped of all remaining unpaid performance bonus.
2. There were four additional employees who knew that this was inappropriate use of funds. Even though they are dedicated employees who have shown significant passion for their work, it must be made clear that concealing information from the board is unacceptable. Marchena concurs with the actions taken by President Whittaker in respect to all four employees.
3. Dr. Hitt requested to end his one-year employment agreement effective immediately. Marchena accepts this request as of January 10, 2019, the date Dr. Hitt's letter was received, and asks the board to ratify his action.
4. Marchena recommends that Dr. Whittaker's participation in the performance bonus program be suspended for two years, covering his time as provost.

Marchena stated that these recommendations have not been easy for him. He has no desire to injure any of the individuals impacted, but his obligation is to the university, ensuring that we behave appropriately within the law and to the regulations that apply to us and more importantly, that we continue to earn the community's trust, the Board of Governors' trust and the trust of the Legislature and Governor.

Bradley indicated he had several systematic recommendations he would like to bring forward. Marchena asked that any trustee recommendations be sent to Heston, who will compile them and bring them to the board as one document.

Bradley recommended the Audit department report to the Office of the President, that there is a plan made to review spending on campus to ensure it is following the law and for the capital

projects to be reviewed to see how projects go from \$8 million to \$38 million.

Boloña requested that any actions taken do not have secondary negative effects on students.

Walsh made a motion to extend the investigation which was initially seconded by Bradley for discussion. After discussion, Bradley made a motion to table the request which was seconded by Martins, and approved by the board with one opposition from Walsh.

Bradley made a motion to ratify the acceptance of President Hitt's request to end his one-year employment agreement. Martins clarified this was just ending the employment and not stripping him of his emeritus title. The board approved the motion with one opposition from Walsh.

Whittaker had comments for the board. The meeting today provided clarity about TCH but it is not the end of the accounting for how E&G funds are spent. Staff has identified additional projects during an internal look-back. Combined with TCH, this totals about \$85 million of construction projects that were either built or planned to be built, with inappropriate funds. Whittaker stated this is about more than one building, and the university accepts responsibility for it. The report indicated a leadership culture in the Administration and Finance division that did not place enough value on integrity and competence. Per the report "failed to foster a culture that encouraged challenging senior members of the administration and whistleblower activity."

Whittaker committed to leading change that creates a stronger culture. That starts with knowing that everyone has a responsibility to report unethical or illegal activity. UCF has multiple ways employees can report – including anonymously. The flawed leadership culture purposefully prevented the board from exercising its oversight and governance roles which is completely unacceptable. The Governor, Legislature, Board of Governors and this board expects and deserves better. Ultimately, this is an issue of trust placed in UCF to properly manage its resources.

Whittaker accepted Chairman Marchena's recommendation about the performance unit plan from when he served as provost and asked the board to vote on it. He reiterated that although he knew E&G funds were used for TCH, he was never told and never knew that using E&G funds was inappropriate. As President, his responsibility is to guarantee that every dollar UCF spends is appropriate.

Whittaker reminded the board of the changes he already implemented:

1. Separating the position of vice president for Administration and Finance from the CFO position to ensure independence in fiscal oversight.
2. Requiring real-time audits for all major capital projects to ensure the funds we said would be used for projects are, in fact, being used.
3. Issuing a moratorium on new capital projects using more than \$2 million of university funds.

4. Hiring Bob Caslen, retired Lt. General and former superintendent of West Point, to lead change at UCF by recommending and implementing new financial and operational structures, policies and procedures.

Whittaker stated he is immediately creating three new leadership positions.

1. A new Chief Operating Officer will be responsible for many operational areas.
2. A new Chief Financial Officer will oversee financial management services.
3. A new Chief Accountability Officer will oversee the Office of Compliance, Ethics and Risk.

These three new positions will bring more checks and balances to decision making and rebuild a culture of integrity and accountability.

Whittaker stated he is creating a culture where leadership serves the university with integrity, competency and openness. Together, we will make UCF a model for what higher education can be for the United States.

Yeargin made a motion to suspend Whittaker's performance unit plan for two years. Bradley commented he would prefer the board to wait until the next board meeting before voting on this. Trustees Gaekwad, Boloña, and Walsh agreed. Martins made a motion to table this item until the next meeting, which was approved by the board.

Boloña made a recommendation to research term limits for C-level employees.

ADJOURNMENT

Marchena reminded the board the next meeting is located at the UCF Rosen School of Hospitality Management and he adjourned the board meeting at 5:13 p.m.

Respectfully submitted:


Grant J. Heston

Associate Corporate Secretary

Date: 4/11/19