



James Joseph
 DC - 1075 202-942-5355
 04/15/2005 11:37 AM

To: Benjamin Ladner <ladner@american.edu>
 cc: "George Collins" [REDACTED]
 Subject: Re: compensation letter [REDACTED]

Ben, I am more than willing to go through these issues again. I have added George and Don back onto this e-mail. Maybe it would be helpful for you if all of us or some group of us got on the phone and went through your questions. Obviously, you are having trouble understanding my explanations. Maybe someone else can explain it better than I can.

In response to your questions below. The Board vote earlier this week related to the July 1, 2004-June 30, 2005 performance period. Your confusion seems to stem from your misunderstanding of what the Board did in November of 2004. At that meeting, the Board did NOT make any determination about your incentive or deferred compensation for the July 1, 2004-June 30, 2005 period. I have explained this to you in the past, and, frankly, I do not understand how there can be any confusion on this point. Both the incentive and the deferred payments voted on in November and paid to you, at least in part, in December 2004 related to your performance for July 1, 2003-June 30, 2004. The fact that these payments were made in FY05 does not change this very basic point. Your incentive compensation cannot be paid to you until you have finished your performance period, and the Board has the opportunity to review your performance. Therefore, this year, after June 30, 2005, the Board will review your performance through June 30, 2005 and vote on what bonus you should receive (up to the 13% of base salary maximum). On your deferred compensation, the Executive Compensation plan says that deferred compensation is paid at the end of the plan year, which means after June 30 when you have finished performing the services for your compensation year. Don has explained to me that historically your deferred income account is credited after he receives an authorization letter from the Board Chair. The November 28, 2004 letter that you prepared and George signed and sent to Don authorized your deferred compensation payment for the July 1, 2003-June 30, 2004 performance period. Again, like with the incentive compensation, you do not receive the deferred compensation payment until you have performed the services. You do not receive it in advance. These payments are contingent on your performing the services, just like your salary is not paid in advance. The IRS would clearly have a problem if it were any other way.

I am available to go through these issues in a phone call if that would be helpful to you.

Benjamin Ladner <ladner@american.edu>



Benjamin Ladner
 <ladner@american.edu>
 04/14/2005 05:55 PM

To: James Joseph/Atty/DC/[REDACTED]
 cc:
 Subject: Re: compensation letter

Thank you for notifying me that you are sending a letter. Because you chose not to respond to the issues raised in my last two letters to you, I am still confused. Is this my compensation for July 1, 2005 - June 30, 2006? If so, how can my performance be reviewed three months prior to the completion of my performance period, which does not end until June 30, 2005? Since a fundamental requirement of the intermediate sanctions regulations is the substance of the performance review, how can that be done until I have completed my performance for the year?

George Collins indicated that what the Board voted on was my July 1, 2004 - June 30, 2005 compensation, which would be paid by June 30, 2005. He also said this amount would be reviewed again at the November 2005 Board meeting.

As you know, the Board has already provided my June 30, 2004 - July 1, 2005 annual incentive and deferred compensation, and it was to have decided my

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F.A.U./Compensation/

C



"George Collins"

<[redacted]>

To: James Joseph/Atty/DC/ [redacted]

cc: [redacted], "Gary Cohn" [redacted]

Subject: Fw: Exec. Committee and outside counsel

03/07/2005 01:30 AM

Jim: As you will read from the enclosed message from BL, he continues to fight for control over Board functions and clearly does not want to live with the restrictions we are about to place upon him. I will not respond to BL until you have sent me a draft. We should thank him for his comments and his concerns. You might want to consider the following points in your draft..... BL's marketing tour and showing the colors here in Miami was not a proper setting to discuss these important matters which must be presented to the entire Compensation Committee for approval. Secondly, I was on a short time table as I had made prior commitments.... I do not believe the appointment of Jim Joseph of Arnold & Porter will cause any confusion. It is clear in the resolution that the Board of Directors will retain Jim and A & P to provide advice and counsel to the Chairman and to the Board of Trustees regarding issues relating to the Board's governance, responsibilities and fiduciary duties. The University may continue to employ in-house legal counsel as well as counsel for munitions, zoning, real estate etc. It is not the intent of the Board to replace these other entities. Moreover, it is clear A & P is a large and very reputable firm with many areas of expertise. Nonetheless, we intend to have A & P through Jim Joseph attend all Board meetings and should the Chairman need his expertise in matters of governance and in exercising our fiduciary duties, he will be on hand to so advise. We have not been represented by independent outside legal counsel in the past. The new counsel serves at the discretion of the Chairman and reports to the Chairman. Fees will be handled by the CFO with the approval of the Chairman. This is an item that the Board can review on a regular basis.... Although the IRS does not require a "comfort letter", a substantial majority of the Board has indicated that it will require one to continue with the executive compensation approval process. Mr. Joseph is not a "middle man" he is an integral partner in that approval process. The cost involved is a necessary expense in the on going functioning of the Board. In fact, the present Chairman will not serve on this Board without the retention of outside legal counsel. There are others who also share this view. While Leslie was involved in the process of hiring Mr. Joseph, both Paul Wolf and I researched this issue, the firm and Mr. Joseph before proceeding on this course. The Executive Committee is only the first step in this action as I intend to seek Board approval as the first agenda item at the next meeting. In fact, perhaps it would be better to record a voice vote to accomplish this action immediately so as to continue with other matters at the next Board meeting including the next Chair. There is no attempt to "end run" the Board on this matter. As a number of Trustees have remarked, the openness of this Chair in the performance of his duties has taken the Board to a new level of discussion, due diligence and disclosure which has been sorely lacking in the past. Most importantly, I have already been in touch with a Board members who felt the need to be heard on this matter. In the long run, this action is long over due and will prevent us from overstepping our boundaries..... Not to be included, like BL's contract..... Please look this over and feel very free to re-write. Its late at night and I am sure I overlooked, overstated etc. Thanks, GJC

----- Original Message -----
 From: "Benjamin Ladner" <ladner@american.edu>
 To: <[redacted]>
 Sent: Sunday, March 06, 2005 7:51 AM
 Subject: Exec. Committee and outside counsel

> (See attached file: Collins ltr.re A&P appt. 3-05.doc)



Collins ltr.re A&P appt. 3-05.doc

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March 6, 2005

George,

I appreciate your stopping by the alumni reception in Miami last week. I'm sorry we didn't get a chance to talk about several issues that are still on the agenda.

Thanks, too, for your email letting me know that you will be asking the Executive Committee to approve the appointment of Jim Joseph as counsel to the Board. As I pointed out earlier, I believe such an appointment has the potential to create a great deal of confusion and uncertainty unless the assignment is made more specific. Therefore, I would like to raise several issues that I believe you and the Committee or Board should consider.

- 1) For decades the university has had a General Counsel whose responsibility it is to represent the Board, the President, and the university in legal matters. The relationship of a new outside counsel to AU's General Counsel would need to be clarified to prevent overlapping and competing responsibilities.
- 2) The university routinely employs outside counsel in cases for which a specific in-depth expertise is needed to protect the Board and the university. For example, we have relied upon Hogan and Hartson for the past seven years to represent the university and the Board in cases involving the Army Corps and munitions. Similarly, we rely upon other firms for assistance in cases involving zoning, real estate, discrimination, labor relations, employment, copyrights, etc.—all of which involve representing the Board. I believe bringing in another outside counsel specifically to represent the Board in these and other cases in which the Board's interest is at stake would be more complicating and confusing than helpful. Moreover, it is not clear that Jim Joseph has expertise in any of these areas.
- 3) Since I am responsible for decisions relating to legal affairs as described above, we would have to clarify not only the scope of responsibilities of a new Board counsel but also his reporting obligations, the source and limits of his authority; his relation to vice presidents and deans who relate to legal affairs in their divisions and colleges, and who report to me; who negotiates and monitors his fees (including the educational discount); and what his relation is to me as president.
- 4) It seems that your intention in using Joseph so far has been to gain additional expertise with respect to executive compensation. Specifically, you have indicated that he will review AU's executive compensation and determine the guidelines that would permit him to provide a "comfort letter" for the Board to approve compensation. In light of the above observations, it might make sense to limit his involvement only to this area.
- 5) If his responsibility is primarily that of advising the Board with respect to executive compensation, I see two problems. First, by his own admission, this

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is not his area of expertise. As he explained to the committee and privately to me, because this is not his area of expertise he employed Margaret Handmaker of Mercer who is an expert in this field. His own materials were in fact a summation of Mercer's work and advice—which raises the question of why he is needed as a middle-man when the Board could simply deal directly with Mercer as the company with the expertise. IRS regulations do not require that the Board employ or have a letter from an attorney. They require only that an outside expert in executive compensation compile comparative data independent of the Board prior to the Board making its own decisions. That is what Mercer has done for the Board. The additional cost of retaining a lawyer with little expertise in the field seems unnecessary, both from the standpoint of actual compensation advice and from the standpoint of significant additional legal costs. Second, since the Board was seeking specific expertise in compensation matters, it did not do the usual background research that the university regularly relies upon prior to retaining outside counsel. In this case, Leslie Bains indicated that she went to her neighbor who works for Arnold and Porter and asked him to provide a name we could use. The assumptions that (a) we need a lawyer rather than a compensation expert (a la Mercer), and (b) that a neighbor recommending someone in his own firm is a sufficient basis for determining the person and expertise that are needed, do not meet AU's usual standards for seeking outside legal assistance.

- 6) Since trustees raised questions at the meeting regarding the appointment of an outside counsel to the Board and the issue was set aside to be discussed later, I'm concerned that having the Executive Committee decide this issue without further Board discussion will appear to be an "end run" around the Board. Since the next Board meeting is only eight or nine weeks away, wouldn't it be better to take this up with the Board then?

I offer these comments not to be obstructive but only in the spirit of what I think are issues that need to be discussed and thought through as part of the Committee's or Board's consideration.

Ben



"George Collins"
<chessie1@bellsouth.net>

03/08/2005 06:27 PM

To James Joseph/Atty/DC/ArnoldAndPorter@APORTER
cc "Gary Cohn" <gary.cohn@gs.com>, <leslie.bains@afs.org>
bcc

Subject Fw: Note to Dr. Ladner

History

This message has been forwarded.

This went out today to Ben. Only one punctuation error, but I had computer problems all day today. GJC
----- Original Message -----

From: Sands, Linda

To: George Collins

Sent: Tuesday, March 08, 2005 9:57 AM

Subject: Note to Dr. Ladner

Ben, thank you for your comments and concerns regarding retention of Board counsel. First, let me say that I did not think that the fund-raising event in Miami was the proper setting to discuss your pending compensation matters. If we have learned one thing over the last year, it is that the Board and the Compensation Committee must deal with compensation matters in a more formal way, and not in one-on-one conversations that have lead to misunderstandings and misinterpretations in the past. I hope that you received Jim Joseph's letter from last week and will respond as soon as possible. I would like to get the compensation proposal to the Board to avoid further delay.

On Board counsel, it is important to remember that the environment regarding corporate governance has changed significantly over the last few years. In my opinion, the Chair of AU and the Board should have independent counsel to advise them. The Board should not rely on in-house counsel that reports to you and is under your direction and control. In this post-Enron environment, the Board needs independent advisors, including legal counsel. I do not believe the appointment of Jim Joseph of Arnold & Porter will cause any confusion. It is clear in the resolution that the Board of Directors will retain Jim and A & P to provide advice and counsel to the Chairman and to the Board of Trustees regarding issues relating to the Board's governance, responsibilities and fiduciary duties. The University may continue to employ in-house legal counsel, and in-house counsel, under your direction, will be able to retain outside counsel as needed to handle matters relating to munitions, zoning, real estate, etc. It is not the intent of the Board to replace counsel on these other matters or interfere with your management of day-to-day legal affairs of the University. Jim can coordinate

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directly with Mary to make sure that there is no confusion regarding his role. Counsel to the Board serves at the discretion of the Chair and will report directly to the Board and its Chairman. Fees will be handled by the CFO with the approval of the Chairman. This is an item that the Board can review on a regular basis.

It is clear that A & P is a large and very reputable firm with many areas of expertise. Jim has significant experience on corporate governance and other nonprofit issues. In your note, you somewhat mischaracterize what Jim said at the Board meeting. He did not say that executive compensation is not his area of expertise. He is in fact an expert in this area and serves as Vice Chair of the American Bar Association committee on intermediate sanctions. You also have your facts mixed up about how Arnold & Porter was retained. At my request, Leslie contacted Paul Wolff to see if his firm could represent the Board, but upon reflection we all felt it would be a potential conflict of interest if Williams & Connolly did so. He recommended Arnold & Porter and put Leslie in touch with Jim. I also talked with Paul myself. Leslie interviewed Jim and discussed our situation and Jim's experience. Leslie came back to me with a recommendation that we retain A & P. Paul Wolff and I both did our own research on A & P and Jim and were confident that he had the background and expertise necessary to assist us. I don't believe Leslie has a neighbor who works at A & P. I am very comfortable that we did our due diligence in retaining counsel. Also, I should point out that Jim is not a "middle man." He is an integral partner in our review of compensation matters. As I understand it, it is very common to have a lawyer retain and work with the compensation consultant to provide the board with privileged advice on compensation matters. The cost involved is a necessary expense in the ongoing functioning of the Board. In fact, I will not serve on this Board without the retention of outside legal counsel. There are others on the Board who also share this view. We intend to have A & P, through Jim Joseph, attend all Board meetings and should the Chairman need his expertise in matters of governance and in exercising our fiduciary duties, he will be on hand to so advise. We have not been represented by independent outside legal counsel in the past, and the time has come to change that.

Although the IRS does not require a "comfort letter", a substantial majority of the Board has indicated that it will require one to continue with the executive compensation approval process. The Board's need for counsel, however, extends beyond the current issue of executive compensation, which is why I am insisting on the Board retaining independent counsel.

The Executive Committee is only the first step in retaining counsel, as I intend to seek Board approval as the first agenda item at the next meeting – or possibly sooner, so we can start the next Board meeting with a discussion of the next Chair. There is no attempt to “end run” the Board on this matter. As a number of Trustees have remarked, my openness as Chair has taken the Board to a new level of discussion, due diligence and disclosure which has been sorely lacking in the past. Most importantly, I have already been in touch with Board members who felt the need to be heard on the retention of counsel. In the long run, this action is long overdue and will prevent us from overstepping our boundaries or failing to satisfy our fiduciary duties.

Thanks,

GJC

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