

# D.S. O'CONNOR & ASSOCIATES, P.C.

---

ATTORNEYS AT LAW

March 13, 2023

**Via e-mail: [jpender@morganbrown.com](mailto:jpender@morganbrown.com)**

James M. Pender, Esq.  
Morgan, Brown & Joy  
200 State Street, Suite 11A  
Boston, MA 02109

**Via e-mail: [EFlynn-Poppey@mintz.com](mailto:EFlynn-Poppey@mintz.com)**

Elissa Flynn-Poppey, Esq.  
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.  
One Financial Center  
Boston, MA 02111

**Via e-mail: [KCMortimer@mintz.com](mailto:KCMortimer@mintz.com)**

Kevin Mortimer, Esq.  
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.  
One Financial Center  
Boston, MA 02111

Dear Jim, Elissa and Kevin:

## **I. Introduction**

The University of Massachusetts Amherst ("University" or "UMass Amherst") has created confusion by failing to maintain sensible reporting lines in the advancement teams and integrating University of Massachusetts Amherst Foundation ("UMAF" or "Foundation") managers into government organization structures. The unions have, on several occasions, negotiated agreements to address the confusion and allegedly non-compliant structure created by the University. Notwithstanding those efforts, the University failed to eradicate the problem.

## **II. Negotiations**

In the fall of 2022, the University presented information about the University fundraising operation, the role of the UMAF, and asserted that the MSRB had concerns about the pension eligibility of certain fundraising employees. As part of the presentation, the University expressed concern that the March 2020 agreement between the University and Professional Staff Union ("PSU") could not be enforced because of these concerns. The University wished to negotiate with PSU and University Staff Associates ("USA") over potential restructuring of the Advancement teams and the changes to terms and conditions for bargaining unit members. The University reiterated several times that the proposed changes were necessitated by regulatory and legal requirements. In essence, the University was very concerned that the regulatory issues, if not addressed through a restructuring, would lead to a large number of current and retired fundraising employees losing their pensions and prior creditable service towards a pension.

Taking that representation at the time, the parties looked to negotiate an agreement concerning rights for members who were subject to potential dismissal due to planned restructure. In addition, the unions requested proposed restructure plans in order to evaluate them and obtain feedback from members. Over the succeeding weeks the parties continued to negotiate the terms of a potential transfer agreement while discussing the three scenarios presented by the University for a proposed “restructuring.”

The unions evaluated Scenario C, which eliminated the fewest positions, by meeting with dozens of staff members to review job functions to test the premise that these positions were legally required to be restructured. The unions submitted an information request to the university to secure documents related to this matter. The unions reviewed the responsive documents as part of its evaluation. The unions also secured additional resources to research the legal and regulatory requirements.

On February 18, 2023, the University contacted Advancement staff and asserted that the “majority of advancement positions will need to move to the UMass Amherst Foundation.” This was followed by a submission to the MSRB in which the University rightfully asserted that the Advancement staff were pension eligible in the past and the pensions should be preserved. The University claimed, however, that the regulatory and legal requirements mandated the “transfer” of positions to the UMAF. As expressed in the submission to the MSRB, the University proposes to eliminate all but six out of 130 Advancement positions and completely privatize the University’s fundraising apparatus in the form of the UMAF. The parties continue to engage over the so-called transfer proposal, but given the evolution of the situation, there is not a shared understanding of what is required and therefore a vastly different perspective on an appropriate outcome. The unions assert that it is consistent with legal and regulatory requirements to maintain the present structure with minor alteration and would agree to a transfer proposal to address the members in the small number of positions that may need to be eliminated. The purpose of this document is for the union to provide its legal analysis and rebut the University’s claims that the elimination of fundraising as a state function is necessary.

### **III. Legal Framework**

G.L. c. 75, § 1A, provides that the University of Massachusetts Board of Trustees is required to “(e) seek, accept and administer for faculty research, programmatic and institutional purposes grants, gifts and trusts from private foundations, corporations, federal agencies, alumni and other sources, which shall be administered under the provisions of section two C of chapter twenty-nine and may be disbursed at the direction of the board of trustees pursuant to its authority...” *Id.* The University and UMAF posit that the power to seek, accept and administer gifts, grants and trusts “for faculty research [and] programmatic and institutional purposes” provides a limitation on the scope of fundraising. There is no support for this position in the text of the statute. In fact, fundraising for “faculty research, programmatic purposes and institutional purposes” encompasses every type of fundraising performed by the University of Massachusetts. The law makes it clear that the University through its employees has **the primary responsibility** for performing fundraising.

Public higher education foundations are a creature of statute. G.L. c. 15A, § 37. Bridgewater State University Foundation v. Board of Assessors of Bridgewater, 463 Mass. 154 (2012) dealt with a real estate tax issue concerning a higher education foundation under Section 37. The BSU Foundation case expressly states that the “words of the statute itself reflect its purpose of providing a means of *assisting public universities* and other ‘institution[s] of public higher education’ with fundraising in particular.” *Id.* at 159, f.n. 9 (emphasis supplied). Read together, the provisions of G.L. c. 75, § 1A, and the provisions of G.L. c. 15A, § 37 and the court’s articulation of a Foundation’s role make it clear that the University is the primary fundraising organ and the Foundation assists in that role. The purpose of the UMAF as outlined in the Articles of Organization “is to operate for the exclusive benefit of the University of Massachusetts by raising funds for the University of Massachusetts Amherst and distributing such funds to the said University.” The proposed restructuring turns this scheme on its head and makes the Foundation the principal fundraising organ of the University with the University and its state employees having only marginal involvement in the process. This proposed restructuring is very much a case of the tail wagging the dog.

It should also be noted that Massachusetts law reflects a general skepticism of the privatization of state work. The legislature has found “that using private contractors to provide public services formerly provided by state employees does not always promote the public interest.” G.L. c. 7, § 52. In this instance, the University is destroying a fully functioning and highly effective fundraising program staffed by state employees with union rights and plans on recreating the operation with UMAF. Doing so will not only eliminate state jobs and privatize state work in contravention of the public policy against such action but will also result in a less effective fundraising operation.

#### **IV. Agreements between University and UMAF**

Consistent with the legal framework set forth above, the University and the UMAF entered into a Master Agreement on February 6, 2003. The entire agreement is predicated on the UMAF **assisting** with fundraising, implying an existing university program of fundraising activities including individuals, corporations, and other organizations. At the time of this agreement, University employees in Development performed fundraising for the University (later renamed Advancement).

In its February 16, 2023, submission, the University and the UMAF suggest that it is problematic that government workers and foundation workers do similar work. The Master Agreement, however, provides UMAF employees the same privileges to use University facilities as “similarly situated University employees” which strongly implies a similarity in role and function between the two groups of employees. In the Master Agreement, the University provides UMAF with access to space, university mail system, computers and office equipment,

and access to records.<sup>1</sup> There is also a recognition of the 25% rule and the obligation of the parties to the agreement to remain faithful to that limit.

The University and the UMAF have postulated that the University positions that are frontline fundraisers would “likely” be found by MSRB to be dedicating more than 25% of their work to services benefiting the Foundation. There is no legal authority cited to support this proposition. A fundraiser employed by the University may cultivate gifts on behalf of the University and if, at the end of a fundraising campaign, a donor elects to have the gift processed by the UMAF or UMF, that does not necessarily transform the work that preceded that choice into private work. The union maintains that much of the work that goes into fundraising for the University is government work routinely conducted by development/advancement offices within the organization of the University.

Based upon interviews with the staff in Advancement, it is not possible to engage in successful fundraising without the fundraisers being embedded within the University structure. The fundraisers need to be able to promote the University and its successes, and in order to effectively discharge their duties, they must work closely with the deans and other staff to be adequately informed.

## **V. Alumni Donor Database**

The UMass Alumni Database is relevant to the discussion of the issues. There should be no confusion about who owns the alumni/donor database. On December 11, 2007, the UMass Amherst Alumni Association (“UMAAA”) Board passed a resolution stating the following: “[t]he UMass Amherst alumni/donor database is jointly owned by the UMass Amherst Alumni Association and the UMass Amherst Campus.” Based upon our investigation, there have never been other substantiated claims of ownership of the UMass alumni/donor database.

Since purchasing the SunGard BSR Advance database application in 1987, the UMass Amherst campus has paid for this application for approximately 30 years. The UMass Amherst campus houses the database on campus, the University populates the database with University data, including protected student records, and the University maintains the database and secures the database. This is all done with public resources and University staff. The UMAAA has never paid for the database, it has no staff and no access to the database other than what is permitted by the University. Transferring this valuable and important University resource to a private foundation would cause potential legal and regulatory problems. Without access to the information in this database, the fundraisers would be significantly hampered in their jobs. The database must remain a University property and must be maintained and serviced by university employees.

Based upon a review of the documents produced, there has been no subsequent resolution from the UMAAA challenging or overturning the 2007 resolution. There was a 2017 Memorandum of Understanding discussing a database consolidation with the five campuses, but

---

<sup>1</sup> There is a 2014 memorandum of understanding between the University and UMAF, but that MOU expired in 2017.

that resolution was not only inaccurate in its claims of database ownership, but it was also a preliminary agreement and there is no evidence that the contract was executed. Because the database remains jointly owned, UMass Amherst staff have full access to the entire database as needed to do their jobs. These public employees are adding value to a campus asset.

The Donor Information Systems (“DIS”) team works almost exclusively in the database. The DIS team conducts daily tasks to fulfill support requests across the entire campus. The team administers, loads, cleanses, creates reports, pulls lists, manages security, ensures data integrity, monitors usage/performance, within this database and other systems.

DIS is the sole source of alumni information and the primary source of donor information for the entire UMass Amherst campus. The team provides alumni/constituent information to all of the schools, colleges, units and departments at UMass Amherst. The constituents in the database include alumni, donors, parents, students, current/retired/former faculty and staff, friends and organizations. The constituent lists and information that the team provides are used for communications, engagement, and Annual Giving solicitations. Some examples include: the UMass magazine, donor acknowledgements, department newsletters, event invitations, on-campus mailings to current faculty and staff, mailings to retired faculty and staff, Institutional Research & University Relations alumni geographical stats, the President’s Office aggregation of UMass alumni and they provide the Advancement Marketing and Communications team with email addresses for all email communications. The portion of DIS devoted to Foundation issues is small and far less than 25% of the time.

## **VI. Tax Rules**

### **A. General rule regarding tax treatment**

In support of the elimination of the University’s fundraising operation and the positions that support that operation, the University has represented that it must do so for tax reasons. There is a representation that there are exclusive tax benefits available to donors giving to UMAF that are unavailable to donors giving to the University directly. The University has not shared any data on the number and size of donations that are impacted by the alleged favorable tax treatment.

Section 501(c) of the Internal Revenue Code specifies which organizations are exempt from Federal income tax. There are approximately 28 categories of organizations exempt from federal income tax. Section 170 of the Code governs the deductibility of contributions to these entities. Only contributions to one category of tax-exempt organization, 501(c)(3) public charities, may be deducted from the Federal income tax of the donor. Both sections 501(c)(3) and Section 170(c)(2)(B) define public charities as: “corporations and any community chest, fund, or **foundation organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes**,...or for the prevention of cruelty to children or animals.” A “foundation” may be a corporation or a trust, and it is regularly

understood to be a philanthropic organization that makes grants for charitable purposes. A “foundation” must prove, in its application to the IRS for tax free status, that its purpose is charitable. A church or university “automatically” qualifies as a 501(c)(3) charity since those entities are expressly provided for in the statute.

Both the UMF and the UMAF have been granted 501(c)(3) status by the IRS. They are both listed in the Federal Government’s list of “Qualified Organizations” to which tax-free donations may be made. Since the University and the Foundations are 501(c)(3) entities, **donations to either are treated identically by the IRS.** The general rule for the 2023 tax year is that donations to 501(c)(3) charities may be deducted up to 60% of the donor's adjusted gross income. Internal Revenue Code, Section 170.

In the February 20, 2023, submission to the State Retirement Board (“SRB”), the University, refers to the University of Massachusetts Amherst Foundation (UMAF) as a “private nonprofit foundation” and the general category of foundations that fundraise for public colleges and universities as “independent private foundations.”

Public Foundations have a different legal standing than Private Foundations. A Private Foundation (or private operating foundation) is a very specific type of nonprofit. It must identify itself as such by answering specific questions in form 1023, the Application for Recognition of Exemption under section 501(c)(3) of the Internal Revenue Code. A Private Foundation is one in which the donations come from a particular family or donor, such as the Bill and Melinda Gates Foundation or the Ford Foundation. If an organization is a “Private Foundation” a donor to it may only “write off” its contribution up to 30% of the adjusted gross income of donor. If the UMass Foundations were Private Foundations, the donor would actually get less favorable tax treatment than it could obtain by contributing to the University itself.

An analysis of the IRS filings of both Foundations supports the fact that the UMass Foundations are simply public foundations and not private foundations. They are therefore public charities and donations to the University and the Foundation receive the identical tax treatment. Every nonprofit, public charity or not, files a version of IRS form 990, an informational tax return for a nonprofit organization. A nonprofit with assets of at least \$500,000 and receipts above \$200,000 files the standard 990. Both the UMF and UMAF filed the 990. However Private Foundations file a 990PF. In addition, in its fiscal 2020 tax returns, each Foundation asserts that it's a 501(c)(3) entity and not a private foundation. There is no legitimate basis for asserting that the UMAF is a private foundation.

## **B. Reversion argument**

The University has claimed that the fundraising assets must be held by the UMAF in order to protect against the assets reverting to the state. In its submission to the SRB, the university cited to Bridgewater State Univ. Found., 463 Mass. at 155 n. 4, for the proposition that M.G.L Chapter 15A, Section 37, entitles donors making gifts to those Foundations greater benefits under federal law than the donors would receive by making gifts directly to educational institutions and that such foundations are also able to ensure that real property donated for the

specific benefit of such institutions does not revert to the Commonwealth for general use. That assertion was taken from a footnote in the Bridgewater case but was not annotated. It makes no reference to any statute or judicial decision to support its position. The Bridgewater decision was about local real estate tax and not Federal income tax.

A donation to the Foundation is automatically deductible by a donor while a donation to a governmental unit must be “for a public purpose” in order to be deductible.<sup>2</sup> In charitable giving literature it is recommended that a gift to a government entity should be designated “for the use of” in order to establish that it is for a public purpose. It's hard to imagine that any donation by an individual to the government or governmental entity, particularly directly to a public university, would not be deemed to be for a public purpose. Most contributions to the University, as opposed to a Foundation, are made directly to the institution rather than to the Commonwealth. Many would be accompanied by a written agreement, especially if the donation were substantial. The University's statement that real property would revert to the Commonwealth for general use is misleading. Any property that is donated for the specific use of the University or with a specific restriction cannot revert to the Commonwealth for general use. The University itself, on its website states the following:

UMass is described under both section 170(b)(1)(A)(ii) of the Code as an “educational organization” and under section 170(b)(1)(A)(v) as a “governmental unit,” and as such, is classified as a public charity, and cannot receive a determination letter as to our tax-exempt classification from the Internal Revenue Service. Therefore, this is a Declaration of Status signed by our President, our Chief Legal Officer, and our Chief Financial Officer.

Based upon a review of the Code, our reading is that there is no legitimate risk that a specifically designated donation to the University will be reverted to the general use fund. The University has not specifically identified any situation in which this has occurred or is likely to occur.

**C. There is no favorable tax treatment for a donor to give to the foundation for the purposes of income tax, estate tax, or gift tax**

For income tax purposes, section 170 provides that donations made for exclusively public purposes, to or for the use of a state or political subdivision, are deductible against the taxable income of individuals, corporations, and other taxpayers, subject to various limitations.

For estate tax purposes, section 2055(a) provides that bequests, legacies, devises, or transfers made by an estate for exclusively public purposes, to or for the use of any state or

---

<sup>2</sup> The primary reason for this distinction is that government entities, as opposed to foundations, are *per se* tax exempt and therefore do not receive an “exemption letter” from the IRS whereas foundations do receive such letters.

political subdivision, are deductible from the value of the gross estate subject to various limitations.

For gift tax purposes, section 2522(a) provides that transfers made for exclusively public purposes, to or for the use of any state or political subdivision, are deductible in computing taxable gifts subject to various limitations.

The Internal Revenue Service has ruled that contributions to state universities qualify as being made for “exclusively public purposes” and “to or for the use of” a state. Private Letter Rulings 8336068, 8935012, and 9017014. Although private letter rulings cannot be relied upon as legal precedent, they give a good indication of how the IRS would rule on a similar fact pattern. **Note that not only is there no favorable tax treatment when donating to the Foundation rather than to the University itself, but there is no difference in gift tax treatment, Inheritance tax treatment, or Massachusetts State tax treatment between the two.**

#### **D. The donor privacy rationale**

Another claimed basis for the need to change the flow of funds from the present process to a new structure whereby all the money will flow through the foundation is purported concern for donor privacy. It is not clear what percentage of donors, if any, have expressed a desire to maintain the confidentiality of their donation. The Master Agreement between the University and the UMAF provides that “...any donor may request that that the donor's identity not be publicly disclosed.” It must be noted, however, that the IRS requires disclosure of the identities of all donors who contribute in excess of the greater of \$5,000 or 2% of the total revenue of the organization. This must be disclosed on Schedule B of Form 990.<sup>3</sup> The promise of donor privacy is available, but based on the pattern of intended donations over the past two decades, it appears not to be a particularly important issue to the vast majority of donors, and it might not fully exist for large donors to a public foundation. All donations are kept in the same system, and several major donations directly to the University were publicly acknowledged as anonymous in the last two years alone.

### **VII. Conclusion**

The University has asserted that there are legal and regulatory compliance reasons for the decision to eliminate Advancement functions within the University and allow a private entity to take over lock, stock and barrel the fundraising apparatus of the University. In support of the proposed restructuring, the University has made claims about the regulatory compliance issues implicated by the status quo. These arguments were also the basis for stating that the March 2020 agreement laying out the employment structures of the Foundation and University Advancement

---

<sup>3</sup> While the rules for confidentiality are different for a private foundation, the UMAF is not, as we have seen, a private foundation. While there is no requirement that the Schedule B needs to be published, there are instances where it can be accessed by other parties.



should be renegotiated by the parties. As set forth in this document, these compliance concerns are without merit.

The law contemplates that the University is empowered to perform fundraising through its state employees, and the Legislature created higher education foundations in order to aid in that fundraising process. Rather than maintain the existing highly effective fundraising operation, the University has chosen to raze the present Advancement structure and transfer all major functions to a non-profit corporation in the form of the UMAF. As our analysis shows that the University's decision is a *choice* not a *requirement*. This decision will have significant and deleterious effects to the scores of impacted staff and will materially harm the effectiveness of the entire fundraising operation.

Very truly yours,



Daniel S. O'Connor

cc: PSU/USA  
Miles Stern, MTA Consultant  
Rebecca Yee, Esq.  
MTA File #: 754-5003 (1.2)