Contract Termination: The "Crazy Aunt" in the City Hall Attic

The Question of Governmental Versus Proprietary Contracts

Roy Rainey

On September 15, 1989, the mayor and city council of Brookings, Oregon, voided my employment agreement and fired me without cause.

The time has come, as Ross Perot recently reminded us, to begin to talk more openly about our "crazy aunt in the attic": contract termination. The circumstances of my contract termination are shared here because the ruling of the federal judge may have broad and unsuspected significance for other professionals.

In the fall of 1986, I responded to an advertisement in the *ICMA Newsletter* for the city manager position in Brookings, Oregon. I interviewed for the position in early December and within four days received an offer of employment. The mayor and I negotiated terms for employment, which were contained in an employment agreement, and I accepted the job offer.

The Case

Three years later, on September 15, 1989, a newly elected mayor and city council, after having determined my contract to be invalid, voted to fire me without cause. I could not have imagined the difficulty I would encounter in trying to find a competent law firm that had not had some direct or indirect dealing with myself and/or the city. Oregon's prohibition against even the "appearance" of conflict of interest made the task even more difficult.

To carry a contract dispute or wrongful discharge claim to trial can cost as much as $100,000. My billable attorney fees alone at settlement were $85,000.

Fortunately, my case had the elements of an age discrimination complaint with a consequent civil rights violation, which does provide for recovery of attorney's fees. I was able, eventually, to find excellent representation on a contingency basis. But I could not have afforded to pursue a claim otherwise, and I doubt that many managers would have been able to defend their rights in such a situation.

Brookings had employed a nontraditional procedure for establishing the position of city manager. The city's charter made no mention of such a position. The question of hiring a city manager had been referred to the voters and approved. An enabling ordinance that generally followed the League of Oregon Cities Model Charter was subsequently adopted by the council, but the charter was not amended. The manager did not have specific authority to make policy or to hire and fire employees.

In pretrial motions, attorneys for the defendant city argued that I had been a "governmental" employee, having traditional authority to hire and fire and to make policy, and that the city council could not enter into any "governmental" contract that exceeded the term of the council. My attorneys argued that the city had hired me as a business manager with "proprietary" but not "governmental" duties and responsibilities under the ordinance. The judge settled the argument by determining:

> The court reaches the following legal conclusion: plaintiff's job was proprietary in nature. Plaintiff functioned merely like a corporate officer carrying out the policies of the board, the city council in this case, while conducting the business of the corporation. Accordingly, under Oregon law, plaintiff's contract was not void because it extended beyond the term of the city council.

Consequently, a settlement was reached. The case never came to trial and no record is available except for the judge's decision in response to the Summary Judgment Motion.

Significance of the Employment Agreement

And therein lies a difficult realization for local government managers.

If they are true managers under a home rule charter with "governmental" authority to make policy or engage therein, to hire and fire employees and to perform other "governmental" services, then they may find themselves to be governmental employees. A council can not enter into governmental contracts that extend beyond its term. There is no such prohibition in relation to "proprietary" contracts or functions of government.

Considering the number of employment agreements in existence that have been drawn without any term limitations or renewal clauses, other managers may be subject to the same treatment I received if they have motivated detractors in the community, and if the opinion of this federal judge is any indicator.

If the governmental versus proprietary confusion can not be resolved, a reasonable alternative response must be developed. Professional managers and administrators must be able to examine intelligently the terms and conditions of individual employment agreements in relation to specific charters, ordinances, job descriptions, and appropriate laws so they may adequately protect themselves, their careers, and their families.

Implications for the Recognition Process

ICMA members can help the Association by providing understanding and much closer scrutiny in the process of recognition of council-manager or general management local governments. Pocatello, Idaho, recalled its charter nearly seven years ago and terminated an outstanding manager who is no longer in the profession. Soda Springs, Idaho, no longer employs a city administrator. Brookings, Oregon, has paid a substantial settlement for having voided and violated a member's employment agreement. Yet they are all still listed as recognized cities in ICMA publications. Elected officials and their cities are permitted to violate the precepts of ICMA without effect. Only members are held accountable. That should change.

Applicants are easily caught up in false expectations during recruitment. There is little time to research fully and understand completely the organizational structure of a municipality and the expectations of the community or its leaders. Unfortunately, it may be impossible to discover that the community violates or avoids the application of the basic tenets of the system, or hides or manipulates its practices, except by becoming an unwitting participant in those practices. Recognition serves no purpose when ICMA or state associations do not monitor and report on continuing compliance with the requirements for initial recognition.

One final point should be made. Even with a strong contract that appears to have taken every conceivable contingency into account, with an aggressive professional organization providing support and representation, and with well-developed networked relationships, every professional manager should have a plan to counter the absolute worst case scenario. As the Peter Principle reminds us, "Anything bad that can happen will." PM

Roy Rainey is the city administrator of Sun Valley, Idaho.