

## Exit Agreements and Contract Enforcement

Introduction. “City Managers” serve in a perilous profession<sup>1</sup>. City Managers are apt to lose their jobs for a number of reasons unrelated to performance or competency: differences in policy or direction, management style, budgeting issues. City Managers may also lose their positions for less rational reasons: jealousy, power plays, retaliation for ordinance enforcement, disagreeing with a strong-willed elected official, scapegoating or other political reasons.

“Job security”, as provided to the police officers, maintenance workers and clerks that City Managers supervise, is a fantasy. Most City Charters in Michigan provide that the City Manager serves “at will” or “at the pleasure of” the City Council, and thus, may be terminated without cause. Even in those situations where the City Manager formally has “job security” because he/she is only terminable for cause, that “job security” may be lost informally by elected officials through public criticism, compressing compensation or other means of harassment.

In order to manage their careers as carefully as they manage their communities, City Managers must constantly assess their elected officials’ and community’s evaluation of them. They must also take advantage of whatever opportunities within ethical boundaries are available to them to protect their financial interests in the event of termination.

Warning Signs. City Managers should constantly have their antenna up to determine if the elected officials’ assessment of them has changed. On some occasions, that assessment will come in the form of a scheduled performance evaluation or a one on one meeting. More frequently, those assessments (publicly or privately) change unexpectedly in reaction to any number of events, including:

- (1) cost overruns;
- (2) budgetary problems;
- (3) errors by subordinates;
- (4) going “by the book”; or
- (5) discipline taken against a popular employee.

“Red flags” that the satisfaction with a City Manager’s evaluation may or will decline include:

- (1) change in elected officials due to an election;
- (2) recommendations by the City Manager being rejected or ignored on an increasing basis;
- (3) end runs of the City Manager to subordinate employees for information or gossip;
- (4) the elected official(s) spends an increasing amount of time in City Hall “helping” or checking up on what is going on;
- (5) criticism of the City Manager, in public or private, becomes more biting and frequent.

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<sup>1</sup> “City Managers” shall refer to public administrators who serve at the local level, regardless of the form of the unit of government: city, village, township, and county.

The Contract. The fundamental protection to the City Manager is in the contract he/she negotiates. If possible, the City Manager should attempt to negotiate a contract with some job security, that is, termination for just cause. However, because it is unlikely that the City Manager will be unable to attempt to negotiate meaningful job security, the contract should provide the following provisions, in descending order of priority:

- (1) Severance pay – Simply put, the more, the better. Although there is no norm, the most common practice is three (3) to twelve (12) months.
- (2) Termination procedures – due process, definitions of “just cause”, amount of notice.
- (3) Term and renewal – If the contract is terminable at will, the duration of the contract is irrelevant. An automatic renewal clause, coupled with a just cause provision, may gain additional time for the City Manager, if termination proceedings do not start before the automatic renewal kicks in.
- (4) Resolution of disputes – Arbitration in lieu of litigation has three advantages: it is cheaper, faster and ensures the City Manager of a hearing, without pre-hearing dismissal of the claim due to a technical defense.
- (5) Basic compensation – If possible, negotiate guaranteed raises at scheduled periods of the contract.
- (6) Benefits upon termination – Health insurance continuation, payoff of sick leave, vacation, comp time, reciprocity of pension credits.

Statutory Protections. Various laws provide either some benefits or partial protection from termination:

- (1) Unemployment compensation – Under Michigan law, an employee may not waive his/her right to benefits. If severance pay is paid in a lump sum, the City Manager becomes eligible for benefits, subject to the standard waiting period. If severance pay is paid out in regular intervals, such as the employer’s regular pay cycle, the City Manager’s eligibility for benefits is deferred until the end of the severance period.
- (2) COBRA – The employee retains the right to pay for continuation of health insurance benefits for at least eighteen (18) months. The employer may charge a 2% surcharge for administrative costs.
- (3) Vacation, sick leave and comp time – The Michigan Wage and Fringe Benefit Act guarantees payment of these types of benefits, according to the terms of a written contract or the employer’s written policy.
- (4) Open Meetings Act – Prohibits actions by a public body to be held in private. Performance evaluations may only be held in closed session, if requested by the employee.
- (5) Freedom of Information Act – Employment agreements, severance/release agreements and performance evaluations are public documents, which must be made available, upon request, to the media and public.

- (6) Whistleblower Protection Act – Prohibits retaliation against a public employee for reporting illegal activity. Note that the statute of limitations to file a Whistleblower claim is only ninety (90) days after a claim arises.
- (7) Age Discrimination In Employment Act – Provides that employees who are forty (40) or older must have twenty-one (21) days to consider a release agreement offered on an individual basis, in order to bar a claim for age discrimination under federal law. That Act also provides that employees have seven (7) days after they sign a release agreement to revoke it.
- (8) Federal and Michigan Civil Rights Acts – These Acts prohibit retaliation against an employee for making a claim of discrimination, even if that initial claim of discrimination is deemed unfounded.

Conclusion. Through effective contract negotiations and realistic assessment of the elected officials' appraisal of them, City Managers can develop some level of financial security in case of termination, even if they ultimately cannot develop effective job security.

Steven/Website/Exit Agreement