

A Review of the History, Issues and Future of Town Manager Contracts

By D.M. MOSCHOS

Prior to 1983, town managers, town administrators, and executive secretaries did not have contracts with their communities. They held appointments usually for some term, and their conditions of employment were governed by various sources—state statutes, town bylaws, or town personnel board rules and regulations. Over time, this setup proved to be inadequate to attract competent individuals into public administration. It was difficult for selectmen to recruit town managers without the ability to negotiate the manager's conditions of employment because the major aspects of those conditions were not under their control. In addition, because the town manager's office is political, managers had no security because severance pay was not legal. (Under Massachusetts common law, municipalities are not authorized to pay for work not performed without a statutory authorization.)

Attorney D.M. Moschos is chair of the Labor and Employment Law Department of Mirick, O'Connell, a former assistant city manager in Worcester, and the drafter of the managers contract statute.

In 1980, the Massachusetts Municipal Management Association authorized the filing of legislation that would provide for a statutory contract for town managers, town administrators and executive secretaries. The proposed legislation was referred to the Public Service Committee, and a major issue was whether the new law would be superior to town charters.



Though the committee had no qualms about managers' contracts being superior to town bylaws, they rejected the original draft's provision providing for contracts to supersede town charters. Committee staff argued that towns asserted the right of home rule and the right to create their own charters, and such charters should be supreme to a manager's contract. The committee's view prevailed in the final version of the legislation. The legislation

was passed as Chapter 279 of the Acts of 1982, amending Chapter 41 of the Massachusetts General Laws by inserting a new section, 108(N).

The major issues that have developed since 1982 have been multi-year funding of a contract, the right to have indemnification clauses broader in scope than provided for in Chapter 258, and severance pay where a town charter provides for termination allowances. Some town counsels have taken the position that a manager's contract has to be appropriated every year, which in effect makes a manager's contract for a term of only one year. Initially, the Department of Revenue had a similar view. Such a view, however, is contrary to the specific language of Section 108(N), which allows for a term of multiple years for a manager's contract. It is also not consistent with the intent of the Public Service Committee, that if a contract was funded in its first year, it is binding for the remaining years, like a collective bargaining agreement. The prevailing view is that funding an agreement in the first year will bind the town meeting in the subsequent years of the agreement.

continued on page 35

LAW

Continued from page 30

As far as the indemnification provisions, some town counsels have argued that this matter is exclusively governed by Chapter 258, even though that law has a notwithstanding clause. Town counsels have pointed to the language of Section 108(N), which only authorizes the purchase of insurance for indemnification and not for the town itself to provide indemnification. The Management Association has taken a broader view, saying the authorization for liability insurance also means a town could be a self-insurer.

On severance pay, some town counsels have argued that such a provision is not applicable if the charter has a similar provision. Some town charters have two- or three-month termination allowances. Severance pay is for service of the manager, however, and not strictly for termination. Since the provision of severance pay is specially mentioned in Section 108(N), a charter should not affect that provision unless the charter specifically provides for severance pay.

While the original opponents of the legislation that became Section 108(N) argued that the legislation would generate conflict between managers and boards of selectmen, this fear has not materialized and most observers believe that employment contracts for managers have enhanced the profession. Most observers would agree that Section 108(N), known as the Town Manager Contract Act, has been a success. A measure of that success is the fact that others have copied the act. In 1995, a statute was passed for police chiefs that mirrors the language of Section 108(N). In 2000, fire chiefs amended the police chiefs statute to be included within Section 108(O). Town auditors and

Ten Key Elements of a Manager's Contract

1. Salary for each year of the contract
2. Length of contract
3. Applicability of just cause to termination of employment
4. Availability of severance pay for an at-will termination
5. A non-renewal notice prior to contract termination date
6. Indemnification of manager from claims during and after the contract
7. Extent of vacation and sick leave benefits if new to the community
8. Disability insurance
9. Reimbursement for expenses, including travel, conference, official events, and professional associations
10. Deferred compensation

—D.M. Moschos

accountants were able to attach themselves to Section 108(N) in 1996, even though such contracts create challenges because the board of selectmen negotiates the contract but the appointing authority usually is the town manager.

Some towns have adopted home rule bylaws providing for department contracts based on Section 108(N). As municipal government becomes more complex, the managers have had to recruit professional department heads from outside the

community. These professionals also seek stability in their employment with the community and the recognition of their professional status, resulting in the need for an employment contract. Particularly in the areas of public works and planning, towns have sought to provide contracts to department heads in order to recruit qualified persons for the positions. A remaining question in this movement is whether assistant town managers and assistant town administrators should have employment contracts.

A corollary to the managers' contract movement has been the amendment of the executive secretary law allowing communities to re-title executive secretaries as town administrators. Generally, the town manager title has been reserved for individuals who are the chief executive officer of the community, and town administrators are generally individuals who are the chief administrative officers. Those persons serving as the administrative officer of the board of selectmen have generally been known as executive secretary. But the title of executive secretary could have a connotation of a clerical rather than executive position, so Section 23 of Chapter 41 was amended in 1996 to allow towns to rename their executive secretaries as town administrators.

Looking back, the fear of conflict in the 1980s between town managers and boards of selectmen over employment contracts has not materialized. Town manager contracts have stabilized the profession and have enhanced the professionalism of public administration. They have given security to town managers and allowed boards of selectmen the flexibility to recruit and retain competent and professional persons as town managers. ❁