



CHAPTER 8

ELECTED OFFICIALS' INVOLVEMENT IN PERSONNEL MATTERS

By Tami A. Tanoue, CIRSA Executive Director and
Sam Light, CIRSA General Counsel

Introduction

CIRSA doesn't take many member cases all the way through trial. When we do, it's usually because we expect a jury verdict in our member's favor. But one area where we've sometimes been disappointed by a jury has been in the area of employment liability.

CIRSA members' experience with employment claims in the judicial system reflects certain realities. Every juror has probably had to deal with a "bad boss" at some time in his or her working life. It's much harder to find a juror who's had to deal with "bad employees" as a manager or supervisor. So juries are naturally tilted in the employee's favor rather than the employer's.

Another reality is that employment litigation is extremely stressful. Careers and reputations are at stake. The supervisor's and manager's (and sometimes elected official's) every move is subjected to scrutiny, and the documents they've generated are nit-picked by attorneys and blown up into super-sized exhibits. One's fate is entrusted to the decision of a group of complete strangers. Sometimes, that fate is a dire one, indeed. One mayor in New Mexico (which is in the same federal circuit that encompasses Colorado) was handed a verdict in which a jury determined that his retaliatory and discriminatory conduct in an employment matter warranted a punitive damages award of \$2,250,000 against him.¹

Even when the stakes aren't that high, no one who's ever been through employment litigation relishes the thought of ever going through it again. The suggestions in this chapter are intended to help you, as an elected official, to minimize the chances that you'll be caught up in employment-related litigation and, if you are, to maximize the chances of a better outcome than that faced by the New Mexico mayor.

Establish a Structure That Allows Delegation of Personnel Functions

In a word, the single most important suggestion is: *delegate!* The chances that you'll be pulled into an employment claim, much less sued successfully, go way down if you've appropriately delegated the responsibility to hire, train, evaluate, supervise, manage, and discipline all but your key employee or employees. To do this, you need to have an administrative structure in place that will permit delegation, such as a manager or administrator form of government.

If your entity is fortunate enough to have a manager/administrator, the governing body should take full advantage of the organizational structure this position allows. The manager/administrator should be the **only** position (except for city/town attorney, municipal judge, and similar positions) that reports directly to the governing body. All other personnel should be accountable to the organization solely through the manager/administrator. Every organization that has more than a few employees should strive to put such a structure into place.

Honor the Structure

Once you've achieved a manager/administrator form of government, you must honor it. These types of actions, if allowed, would violate your commitment to that form and waste the resources that you've allocated to it, and encourage dysfunction and disorder:

- Elected officials reaching down below the level of the manager/administrator to influence what goes on with personnel administration below that level.
- Elected officials reaching down below the level of manager/administrator to give orders to employees below that level on how to do their job, particularly if the orders are contrary to the established policies and/or the direction of their supervisors.
- Elected officials permitting an employee below the level of manager/administrator to bypass his/her own supervisor and take personnel issues directly to them.

Thus, for instance, if your entity has committed to a manager/administrator form, there's no call for elected officials, individually or collectively, to demand the hiring or firing of a specific employee below the level of manager/administrator. Such an action raises questions of propriety from several perspectives:

- **Do your personnel enactments reserve any such authority to the elected officials?** If you have a manager/administrator, your charter, ordinances and/or personnel handbook probably don't (and shouldn't) call for you to be involved in decisions involving subordinate employees. If you get involved in such decisions, you may be outside the scope of your authority and could get in trouble (see "Be aware of the scope of your authority" below).
- **What's the reason for doing an "end run" around the manager/administrator?** Do you have a "favorite" candidate for employment, or an employee who's on your "hit list"? Why are you championing or condemning someone rather than trusting your manager/administrator to make the right decision? Do you question his or her judgment or ability to make the right choice? If so, confront that concern;

don't skirt it with an "end run." And, if the governing body does not share your concern about the manager/administrator, don't "end run" your governing body's collective decisions on oversight of its direct reports.

- **Could what you're doing be perceived as retaliatory?** Along with all the other reasons why involvement in personnel matters can be very risky, consider the retaliation claim. Everyone is potentially in the category of persons who are legally protected from acts of retaliation. Retaliation claims are among the most difficult to defend. And, these kinds of claims can lead to massive liability.

But often, it's not the elected official who seeks, in the first instance, to become inappropriately involved in a personnel matter. Rather, there's pressure put on the official from outside. For instance, a department head may have curried disfavor with a segment of the citizenry because of the perceived manner in which a service or program is being carried out. Either way, though, such involvement is the wrong thing to do. Don't be pressured by a member of the public, for instance, to interfere in a personnel issue that's been delegated to the manager/administrator. That citizen's not going to be around to help you if you get into trouble at his or her urging!

Similarly, don't give in when a subordinate employee is trying to use you to get around his or her supervisor, or when an applicant is trying to get a leg up on employment through you. Let the process unfold the way it's meant to unfold. If you have a concern about the way the manager/administrator is handling things, address that concern directly. If you cave in to pressure to involve yourself inappropriately, though, you may be enabling someone who wants to "game the system," or unfairly disempowering a manager or supervisor.

Be Aware of the Scope of Your Authority, and Stay Within That Scope

From a liability standpoint, one of the worst things you can do is to act outside the scope of your legal authority. An area where authority issues often arise, particularly in smaller communities, is in the "committee," "commissioner" or "liaison" format for personnel administration. In this format, an individual councilmember or trustee is in a supervisory or oversight relationship with respect to a department, department head, or employee. Thus, a town might designate a trustee as "water commissioner," "police commissioner," etc.

What's troubling about this format is that it's often not described anywhere in the community's enactments, nor is the authority of each commissioner set forth in writing. Rather, this format seems to be a relic of oral history and tradition. But the lack of written guidelines means that there are significant personal risks to the commissioner. What if the commissioner takes an adverse job action, such as seeking to terminate an employee? Under what authority is the commissioner acting?

If the commissioner can't prove that the action was within the scope of his or her authority, there may be consequences from a liability and insurance coverage standpoint. The Governmental Immunity Act, for instance, provides protections for public officials only when in the performance of their *authorized duties*. Likewise, liability coverage

protections through CIRSA only apply when a public official is acting *within* the scope and performance of official duties. Finally, even if there is authority on the books, this format in particular can lend itself to uncertainty over who does what—“Is this a decision for the board, commissioner or department head?”

Similar questions arise when an individual elected official chooses to become involved in a personnel matter in a way that isn’t authorized by the entity’s personnel enactments. Where is the authority for such involvement? If you can’t find a firm source of authority, you may be heading for trouble. An individual elected official’s inappropriate action can not only create liability exposure for the official, but put him or her crosswise with the other members of the governing body.

Respect the Principle That Each Employee Should Have Only One Boss

This seems like an obvious principle that every organization should follow. You don’t want an employee confused by multiple directions from multiple supervisors. You also don’t want an employee playing one supervisor off against another. When elected officials become inappropriately involved in personnel matters, this basic principle is violated, and the result is chaos.

If you allow yourself to become embroiled in a personnel matter involving a subordinate employee, the employee may then feel that the word of his or her supervisor can be disregarded. You may have forever undermined that supervisor’s authority, or allowed the subordinate to do so. Likewise, if you were involved in lobbying for the hiring of a favorite applicant (even if it was for good reasons), that person may always feel that you, not his or her supervisor, are the go-to person on personnel issues.

Similar principles apply with respect to your governing body’s oversight of its manager/administrator and other direct reports. Elected officials should recognize the council/board is not a group of seven or other multiple number of bosses, but one boss. Therefore, members of the body should commit themselves to speaking with one voice to their direct reports and to exercising their oversight role—e.g. performance reviews, goal setting, etc.—as a group. Even when there are differences of opinion as to how to address an issue with the manager/administrator, the body should arrive at its position. If the governing body does not work to speak with one voice to its direct reports, it’s undermining its credibility as a board and its ability to gain accountability at the highest levels in the organization.

This is not to suggest that a militaristic chain of command is required in every workplace. In fact, flexibility in reporting relationships is desirable in some situations. For instance, you wouldn’t want to lock your employee into reporting a harassment claim only to an immediate supervisor, if the immediate supervisor is the one alleged to be engaging in the harassment. But you can maintain the needed flexibility without collapsing into the chaos that your inappropriate involvement in personnel matters will beget.

Conclusion

There's certainly a place for elected official-level decision-making in personnel matters, but those decisions should be reserved for the high-level issues that involve the entire organization. Examples of such high-level issues could include establishing overall policies for the entity; selection, evaluation, and discipline for the council/board's few "direct reports"; salary and benefits plan for the workforce; and overall goals and priorities for departments. But when these issues begin devolving into the details of hiring, training, evaluating, supervising, managing, or disciplining particular employees below the level of your direct reports, it's time to delegate them to your manager/administrator.

Footnote:

1. The award was later reduced to \$1,500,000 but affirmed by the 10th Circuit Court of Appeals. *Hardeman v. City of Albuquerque*, 377 F.3d 1106 (10th Cir. 2004).