TIES THAT BIND OR WOUND: THE POWER OF THE CONTRACT AND THE CONTRACT PROCESS

Posted on August 1, 2015

We have written extensively for boards and heads of schools and non profit CEO's on the importance of benchmarking compensation packages in order to comply with the Intermediate Sanctions Act and to ensure that the Head/CEO is paid fairly and competitively within the limits of the school's or other non profit's resources. This article addresses the intangible benefits of that process to both the head/CEO and the board and about closing it with a contact that protects all parties.*

1. The Process

Many Chairs and Heads and CEO's of other non profits have remarked to this consultant that this Firm's benchmarking and contract facilitation process yielded far more than a salary or benefit change and assurance that the package is appropriate and documented in accordance with IRS regulations. Even when the changes to the package are very modest, the process which this consultant facilitates in a four hour meeting feels like a "marriage renewal". The head feels valued and heard and the compensation committee of the board feels gratified for having done its due diligence and served its head well.

Yet at times despite the best intentions of all involved, the good feelings and atmosphere of professionalism generated by this process can dissipate. Too much time may lapse between the facilitation of the contract and the execution of the actual document or the final contract language may obscure, or in the worst case, negate the initial good will on both sides.

A few heads (and more often female heads) write with disappointment to this consultant that the agreement that was reached verbally to the satisfaction of both parties at the time has yet to be put to paper and signed three or more months later. Usually this lapse is a function of a combination of factors: the head's self-effacing nature; the hectic professional schedule of the board member charged with this task; and excessive lawyers' time expended in drafting the contract.

In one example, this consultant was retained to benchmark the package of an internally promoted female Head to ensure that having been a long time loyal administrator she was not at a
disadvantage financially compared to a potential "outside" hire. In this matter, the Board was unusually conscientious and proactive in seeking outside benchmarks.

This benchmarking and contract facilitation began according to the process used by Littleford and Associates, always hired by the Board on behalf of the School, not the Head. We adhere to this standard in order to avoid any conflicts of interest.

We began with a meeting with the Head to explore her background and goals. A meeting followed between this consultant and the compensation committee including the Board Chair. We reviewed first this Firm's proprietary benchmarking data compared to the Head's package and reviewed her evaluation. This is for a sitting head. In the case of a new contract for a search finalist the goal is to "land" the candidate with appropriate and competitive compensation.

Then the Head rejoined the meeting to share her view of her accomplishments, future challenges and aspirations. After she left, this consultant and the Committee discussed her remarks and how the School could meet her needs given its financial resources and "safe harbors" limits. The Head rejoined the meeting and the Chair, on behalf of the Committee and Board, conveyed the collective decisions and sought the Head's reactions. Our Firm followed up with a summary of the meeting and two documents: the Rebuttable Presumption of Reasonableness Checklist and the "safe harbors" letter.

This supportive and mutually helpful process encounters difficulties only if the committee cannot come to a consensus (which is exceedingly rare) or does not follow through expeditiously with closure and contract signing. When delays occur, they almost always make the head feel "slighted", as in the case of the female Head above. This typically happens either because the chair unintentionally is not persistent in the follow through or because the proposed contract language is not what was agreed upon verbally and necessitates further discussion. Sometimes a pro bono attorney, who must put the contract low on his or her priority list, is charged with the task.

The drafting of a deferred compensation agreement also may slow the process further. Due to the complexity of the laws that govern non qualified deferred compensation plans, often the committee is mistaken in thinking that the school's regular attorney is sufficiently knowledgeable about these plans.

1. **The Contract Language: The Key is Balance**

What is most worrisome is the over involvement of the attorney drafting either a revised or initial employment contract. If the school's attorney become bogged down in legal jargon, in many cases that language becomes heavily weighted in favor of the school thereby losing some of the original intent of the contract facilitation. This may come back to haunt both parties but especially the
head.

It is the responsibility of the Committee on Trustees, the Head Support Committee and the Executive Committee to ensure that the head is treated fairly and that the written contract is neither too much in favor of the head nor too much in favor of the school. If the time were to come for a healthy separation of head and board, it is important that this occur with a reasonable degree of remaining trust among the parties AND a sound balanced contract.

We emphasize "either party" because we have knowledge of at least one school Head who has a contract that calls for lifetime employment. Such an agreement clearly suggests that this Board works for the Head rather than the other way around, but this occurred when a founder anointed his successor and a very appreciative Board agreed to such a contract. While this situation is indeed rare, there are a few school heads who have ten year or longer contracts. Such a length is highly questionable in terms of the message it conveys about where the ultimate power resides. The IRS might challenge whether such a contract violates the Intermediate Sanctions Act.

1. How the Contract Provides for a "Healthy" Separation

What can happen when the head and the school part ways either suddenly and/or on not so friendly terms? While we often advocate that a school may need to be run more like a business, in the case of an employment contract for an independent school head, a corporate model is not suitable or especially relevant. While we are not attorneys, our Firm provides a good basic model from which boards and their attorneys can begin to draft a sound contract.

In the worst case scenario, the contract language heavily favors the school, and the head does not review it carefully through his or her own attorney. The ultimate effect upon the professional and personal life of a head is potentially devastating. Furthermore, while the board may not realize it at the time, the school's name in the small independent school world is likely to be damaged as well if a separation comes to pass.

Where a contract is biased against the head, the dangerous language is typically buried in the "termination not for cause" section of the contract. "Cause" is intended to convey a serious lapse of judgment, illegal behavior, moral turpitude or gross misconduct. However, many heads have signed contracts where they can be dismissed for "lack of performance" "not meeting the goals of the Board", "insubordination" or a range of other vague reasons open to interpretation.

When the board and head part company for any reason other than for "cause" (in the true sense of the word) the remainder of the contract term should be paid out, or an agreed upon sum or agreed upon number of months of salary should be paid in severance.
Alternatively, the head should be allowed to finish the upcoming school year. Thus, the outgoing head and the school have the full benefit of engaging in the typical search timetable, giving each a range of new attractive options.

A six month payment option and immediate dismissal is not appropriate, unless there was a "cause" dismissal, and in that case most employers limit their liability to 30 days.

Every year, this consultant hears from several heads whose position is terminated in July often without a full year's salary and benefits. Such dismissals often occur due to a change of board chair; a falling out of the head with key leadership of the board over the definition of their respective areas of responsibility; or the head's "crossing" of a powerful board member typically over a disciplinary action.

1. Unfortunate Dismissals, But All Too Common

This summer, this consultant has become aware of several abrupt dismissals of heads where a change in board leadership led to termination. The heads, upon seeking legal counsel, were notified that their contract was nebulous about their severance and related rights. Some were urged strongly to accept the offer on the table and to sign a "confidentiality agreement", stating they would not reveal the truth about their departure or anything unpleasant about the board, the chair or the manner in which they were dismissed. This consultant has heard of typical offers of six months of severance at most.

In one recent case, a relatively new Head was dismissed following a 360 evaluation which faculty used as a tool to undermine him. This Head had been hired as a change agent to implement goals set by the Board, but those changes upset the faculty accustomed to the status quo. The letter sent to community announcing the Head's immediate departure cited personal and family reasons, but the language was such that this Head will have difficulty explaining the abrupt departure.

Many board members, drawing on their business background, assume that a "fired" head cannot with integrity continue to run the school for an additional year while both the head and school go through a normal, healthy search process. They ask the head to leave immediately, and then quickly move to appoint an interim, or more strangely as in the case of not a few schools, appoint one or more board members who have the time to step in and run the School. This is not as unusual as it may seem.

Boards should realize, and most do, that there are serious intangible repercussions if they corner a head of school and terminate the relationship as "not for cause" but attempt to treat the dismissal AS IF it were "for cause" so as to avoid a larger severance payment. The board is not only acting in a grossly unfair manner but it is sending a negative message to prospective heads in the search
process and without doubt to the faculty and parents as well through the inevitable rumor mill. Thus, the effect is local and "global". Sometimes the dismissal follows an outstanding written evaluation or even public praise for achievements only a few months before.

It is essential that boards not allow the chair, the executive committee or a rump group of board members to dismiss a head or not renew his or her contract without a thorough understanding of the reasons including granting the head a private "hearing" to respond to the concerns about performance.

If the board wishes to move against the head, and to do so professionally, but without "cause" then it should pay out at least 12 to 18 months of salary and benefits, depending on the tenure of the head. In no case should a head be dismissed after July 1, of any calendar year, for the upcoming school year, without a full year of salary and benefits. Every day beyond July 1 of any year shortens the search timetable for both school and head.

On the other hand, our Firm believes that the best separations occur when the parties, perhaps after some initial anger and hurt, sit down and work out amicably the terms of departure. All search committees should insist, for example, that their head elect have an attorney examine the contract offered and even offer to pay the fee for that attorney. Wise boards do this even when existing contracts are substantially changed in amicable discussions regarding renewal terms. In the long run, the best interests of the school are served. Thus the head can never say that he or she was not counseled about the contractual terms, and the board can not be accused of acting unfairly or unprofessionally.

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