October 2, 2011

Dear Alderman:

You have the following question: Can the utility board superintendent be terminated by the city's governing body without financial penalty to the city?

Pursuant to Ordinance 86-2011, the city's governing body became the city's utility board, which it had the authority to do under the Municipal Electric Plant Law of 1935, codified at Tennessee Code Annotated, § 7-51-101 et seq.

As I understand the facts, the genesis of your question is the employment contract entered into by the City's separate utility board and Mr. X, on October 2, 2006. Paragraph 1 of the contract provided for a four year term, beginning October 1, 2006, but immediately provides that, "This agreement, after October 1, 2010, shall renew annually thereafter, unless either party notifies the other party in writing at least sixty (60) days prior to the annual expiration date of October 1, 2010." Paragraph 9 of the contract provides that, "The parties hereto agree that if the Employee shall be terminated without "just cause" as herein referred to, the Utility will pay Employee the unpaid balance of salary due him for this Contract period as liquidated damages." The same paragraph provides that the general manager of the utility can be terminated for "just cause," in which case his salary terminates at the end of the month next succeeding that determination month. The term "just cause" is defined as "a violation or lack of performance of duties as stated in this Contract, the Tennessee Municipal Electric Plant Act, as amended, Board Polices, appropriate State Law, or any other documents referring to the General Manager's duties.…"

You included with your question a list of things that presumably you believe constitute grounds for removal for just cause. The best I can say about those grounds is that some of them, individually or in combination, may constitute grounds for removal for just cause, but I am not remotely familiar enough with actual utility operations there to pass judgment on any of those grounds. The general manager undoubtedly has an answer for some or all of those allegations that may or may not be satisfactory to a court. Indeed, the city attorney's opinion letter opines that, "Unless there are matters of which I am not informed, the Board has no significant justifiable cause upon which to predicate the termination of Mr. X's contract." I would certainly give heavy weight to the city attorney's opinion.

However, there appears to me a strong possibility that under the Tennessee Supreme Court case of Allmand v. Pavletic, 29 S.W.3d 618 (Tenn. 2008), the City did not have the authority to enter into the contract at issue with Mr. X, and that at for that reason the contract is unenforceable.

In that case Allmand, the superintendent of the Ripley Utility Board, was trying to recover pay he alleged he was due under two separate contracts, both of which provided that if

he were terminated with, or without, just cause, during the terms of those contracts, he was entitled to his pay. The term of one of those contracts was eight years, the other 14 years! Allmand had sued in federal court, and the U.S. District Court for the Western District in Tennessee, certified a question to the Tennessee Supreme Court, which that court framed this way:

> Whether the Boards of the Ripley Gas and Electric Departments had the authority to enter into contracts with a superintendent who served at the will and pleasure of the Board and Mayor and Aldermen, whereby the superintendent was entitled to salary and benefits for multi-year periods of time [8 and 14 years] after the employment was terminated. [sic]

No, held the court, "any provisions establishing an entitlement to salary and benefits for terms of years were beyond the powers of the respective departments." [At 625] The Court reasoned that the utility board was established under the Electric Plant Law of 1935, codified in Tennessee Code Annotated, § 7-52-101et seq. Under § 7-52-111(b) of that statutory scheme, "*The superintendent shall serve at the pleasure of the supervisory body and may be removed by that body at any time*." [At 628] [Emphasis the court's]. The Court concluded that nothing in the other provisions of that statutory scheme that authorized such utilities to enter into contracts, or in the City of Ripley's charter (which also contained an at will provision for department heads) superseded the at will status of the superintendent. It was aided in its conclusion by its application of Dillon's Rule. The Court declared that it had previously held that under Dillon's Rule:

> [w]hen a municipality fails to act within its charter or under applicable statutory authority, the action is *ultra vires* and void or voidable. [*City of Lebanon] v. Baird*, 756 S.W.2d at 241 (citing *Crocker v. Town of Manchester*, 178 Tenn. 67, 157 S.W. 383, 384 (1941); see also *Marshall & Bruck Co*., 71 S.W. at 818-19. In summary, under Tennessee law a municipal action may be declared *ultra vires* (1) because the action was wholly outside the scope of a city's authority under its charter, or (2) because the action was not taken consistent with the mandatory provisions of its charter or statute." *Baird*, 756 S.W.2d at 241. [At 626]

The Court also drew heavily on Arnwine v. Union County Board of Education, 120 S.W.3d 804 (Tenn. 2003) in which, in its own words, "the court set aside a four-year contract for an assistant superintendent of schools (or a teacher) because the length of the term, absent specific statutory authority, was beyond the power of the school board. [At 626] The Court said in that case and repeated it in Allmand v. Pavletic:

> [e]xcept as otherwise authorized or provided by law, municipalities are … authorized to enter into long term

> contracts for such periods or duration as the municipality may determine for any purpose for which short-term contracts not extending beyond the term of members of that governing body could be entered. Tenn. Code Ann. § 7-51-903 (2005). We concluded however, that section 7-51-903 did not apply because "there are specific statutes referring to personnel and employment contracts in education," and those with more specificity prevail over the general rule of section 7-51-903. Arnwine, 120 S.W.3d at 809. Because Arnwine's contract was governed by the specific statutory authority governing teachers rather than by the general terms of section 7-51-93, we considered whether those more specific statutes permitted a multi-year contract in the context of "Dillon's Rule," which requires a "strict and narrow construction of local governmental authority" and allows a municipality to act only when (1) the power is granted in "express words" of the statute, private act, or charter creating the municipal corporation; (2) the power is "necessarily or fairly implied in, or incident to[,] the powers expressly granted"; or (3) the power is one that tis neither expressly granted nor fairly implied from the express grants of power but it otherwise implied as "essential to the declared objects and purposes of the corporation." Id at 807-08 (quoting S. Constructors, 589 S.W3d at 710-11). After confirming Dillon's Rule as a fundamental canon of construction, this Court emphasized that "[a]ny fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied." [Citation omitted by me.] Our conclusion was that the relevant statutes confirmed that there was no authority for a multi-year contract for an assistant superintendent of schools. [At 627]

With respect to Arnwine's application to the contracts in Allmand v. Pavletic, the court declared that:

> As in Arnwine, whether a multi-year employment contract would be permissible in this case depends upon the authority granted under the law. In our view, neither the City Charter nor the relevant statutes empower the Electric Department or Gas Department to enter an agreement containing the terms at issue. [At 627]

It is difficult to see any reason why the contracts at issue in the City and in Allmand v. Pavletic are any different as to the authority (or rather lack of it) of either utility board to enter

into a multi-year contracts. The utility boards in both your City and Ripley are organized under the same statutes, which contain the same state statutory at will provision with respect to the utility superintendent. Likewise, as was the case in the Ripley City Charter, your City Charter, § 3.7 provides that all employees of the city are at will employees. The contracts at issue in Allmand v. Pavletic were 8 and 14 years, but the contract in Arnwine was four years. The City Attorney has opined that while the original contract with the general manager was four years beginning October 1, 2006, it is now five years, a year each having been added in 2007, 2008 and 2009, and two years in 2011. I think the city attorney's analysis on that question is accurate. It is true that the contracts between the Ripley Utility Board and Allmand provided that if the board fired him with or without cause he was entitled to his compensation until the end of the term of his contract, but that the contract between the Utility Board and the general manager provided that the general manager is entitled to his compensation until the end of the term of the contract only if he is fired without cause. It appears that is a difference without a distinction because on the question of multi-year contracts that go past the term of the utility manager, the results would be the same under the Court's analysis of such contracts.

It was simply an *ultra vires* act for the Utility Board to enter into a multi-year contract with Mr. X, and that contract is not enforceable.

But Allmand also argued that the compensation to which he was entitled under those employment contracts was "severance pay," citing the North Carolina Case of Myers v. Town of Plymouth 522 S.E.2d 122 (1999), in which that court held that severance pay was not in conflict with the at will doctrine, that the employee could still be dismissed at will, only that severance pay was due him upon dismissal. The Tennessee Supreme Court rejected that argument, declaring that, "The specific [statutory] provisions at issue not only are inconsistent with the at-will nature of the employment, but also do not authorize an award of severance." [At 630] "By the terms in each of the two contracts," the court continued:

> Allmand would have been entitled to continuing pay and benefits upon termination for any reason other than the "voluntary abandon[ing] his job or engag[ing] in intentional conduct that operated to the specific detriment of the [City's] welfare." If those provisions are enforceable, the Electric and Gas Departments will undergo the full cost of a superintendent but receive no benefit from Allmand's services for a period of years. Such an onerous requirement would have the practical effect of establishing precisely the type of long-term obligation that the City Charter forbids. See Haynes v. City of Pigeon Forge, 883 S.W.2d 619, 622 (Tenn. Ct. App. 1994). One cannot do indirectly what is prohibited directly… [At 630]

But the Court did not stop there; it drew a significant distinction between severance pay, and liquidated damages, but as we will momentarily see, that distinction did not help the Ripley Utility Manager, and will not even help the Utility Manager.

For the distinction the Court cited Guillano v. Cleo, Inc., 995 S.W.2d 88 (Tenn. 1999), in which an employee had a three year contract with his employer, Paragraph 9 of which provided that if the employer terminated the employee without cause, the employee "shall continue to receive [his] then current salary from the date of termination through [the contract expiration date.]." [At 630] "Severance pay," said the Guillano Court is:

> A form of compensation paid to an employee at a time when the employment relationship is terminated through no fault of the employee. Black's Law Dictionary, 1374 (6th ed. 1990)….We emphasized that severance, unlike liquidated damages, is not conditioned upon a breach of contract or a reasonable estimation of damages in consequence thereof, but is instead an absolute entitlement to recovery regardless of any breach. Because under Paragraph 9 the employee's recovery was a fixed amount and predicated on the employer's breach of contract, it was liquidated damages, not severance. [At 631]

Paragraph 9 of the contract between Mr. X and the City labels the recovery to which Mr. X is entitled in the case of a breach of contract by the city "liquidated damages." But the reason that fact does not help Mr. X is that the Allmand v. Pavletic Court also declared that:

> Here the parties crafted employment agreements in which the post-termination payment provisions were dependent on a breach of the purported employment terms of eight and fourteen years. *The practical effect of the provisions would have granted liquidated damages to Allmand for the breach of the very terms that the Departments had no authority to approve*. [At 632] [Emphasis is mine.]

For that reason, calling damages arising from such contracts "liquidated damages" does not save the City contract.

Sincerely,

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