

RESOLUTION NO. 23-07-64

**A RESOLUTION OF THE VILLAGE COUNCIL OF ISLAMORADA,
VILLAGE OF ISLANDS, FLORIDA, DECLINING TO RENEW THE
EMPLOYMENT AGREEMENT WITH THOMAS T. YATES AS
VILLAGE MANAGER; AND PROVIDING FOR AN EFFECTIVE
DATE**

WHEREAS, Islamorada, Village of Islands (the "Village"), is a duly constituted municipality having such power and authority conferred upon it by the Florida Constitution and Chapter 166, Florida Statutes; and

WHEREAS, Section 7(3) of the Village Charter requires that there shall be a Village Manager, who shall be the Chief Administrative Officer of the Village; and

WHEREAS, on May 6, 2022, at a special meeting, the Village Council selected Mr. Thomas T. Yates to serve as Village Manager; and

WHEREAS, Mr. Yates executed an Employment Agreement with the Village on June 9, 2022, which is attached hereto as Attachment "1", and commenced employment as the Village Manager on August 1, 2022; and

WHEREAS, pursuant to Section 17.1 of the Employment Agreement, the term of the Agreement is from August 1, 2022 through August 1, 2023 "unless terminated by either the Village Council or Village Manager, as provided for in Sections 18-21 of [the] Agreement;" and

WHEREAS, the Employment Agreement does not prevent, limit or otherwise interfere with the right of the Village Council to terminate the Village Manager's employment at any time; and

WHEREAS, as noted in the legal opinion attached hereto as Attachment "2," a majority vote of the Village Council is needed to terminate the Village Manager at a properly posted and duly authorized public meeting; and

WHEREAS, the Village Council finds that it is in the best interests of the Village not to

renew the employment contract with Mr. Yates as Village Manager.

**NOW, THEREFORE, BE IT RESOLVED BY THE VILLAGE COUNCIL OF ISLAMORADA,
VILLAGE OF ISLANDS, FLORIDA, AS FOLLOWS:**

Section 1. Recitals. The above recitals are true and correct and incorporated into this Resolution by this reference.

Section 2. Non-Renewal Of Employment Agreement. The Village Council hereby approves the non-renewal of the employment agreement with Mr. Thomas T. Yates as Village Manager.

Section 3 . Effective Date. This Resolution shall take effect immediately upon adoption. Motion to adopt by Council Member Jolin, second by Council Member Rosenthal.

FINAL VOTE AT ADOPTION

VILLAGE COUNCIL OF ISLAMORADA, VILLAGE OF ISLANDS, FLORIDA:

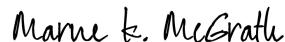
Mayor Joseph B. Pinder III	<u>No</u>
Vice Mayor Sharon Mahoney	<u>Yes</u>
Councilman Mark Gregg	<u>No</u>
Councilwoman Elizabeth Jolin	<u>Yes</u>
Councilman Henry Rosenthal	<u>Yes</u>

PASSED AND ADOPTED this 6th day of July, 2023.

DocuSigned by:

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JOSEPH B. PINDER III, MAYOR

ATTEST:

DocuSigned by:

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MARNE MCGRATH, VILLAGE CLERK

APPROVED AS TO FORM AND LEGALITY
FOR THE USE AND BENEFIT OF
ISLAMORADA, VILLAGE OF ISLANDS ONLY

DocuSigned by:

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JOHN J. QUICK, VILLAGE ATTORNEY



Alison F. Smith
asmith@wsh-law.com

MEMORANDUM

To: Councilmember Elizabeth Jolin
FROM: Alison F. Smith, Esq.
DATE: June 14, 2023
RE: Implications of Involuntary Separation of Village Manager

ISSUES

Councilmember Elizabeth Jolin and Councilmember Henry Rosenthal of Islamorada, Village of Islands (the “Village”), have posited questions concerning the Village Manager’s existing contract of employment (the “Employment Agreement”), as follows:¹

- 1) May the Council renew the Employment Agreement by taking no action?
- 2) May the Council, by majority vote, opt not to renew the Employment Agreement?
- 3) If there is a vote of nonrenewal prior to the expiration date of the Employment Agreement, will the Village avoid having to pay severance to the Village Manager?
- 4) May the Council terminate (as opposed to renew/nonrenew) the Village Manager’s employment at any time?

¹ To the extent any queries were similar in nature or overlapped, they were combined to avoid duplication.

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- 5) What are the financial implications if the Council terminates the Village Manager with and/or without cause?
- 6) What is the process that the Village Council must follow in order to separate the Village Manager from the Village, regardless of the manner in which the separation is couched (i.e., nonrenewal, termination with cause or termination without cause)?
- 7) Is there a notice requirement for a termination of the Village Manager's Employment Agreement?

BACKGROUND INFORMATION

By way of background, Village Manager Ted Yates entered into the Employment Agreement with the Village on June 2, 2022. The Employment Agreement contains the following pertinent terms:

- “[T]he Village Manager shall serve at the pleasure of the Village Council. Nothing in [the] Agreement shall prevent, limit or otherwise interfere with the right of the Village Council to terminate this Agreement at any time.” (Employment Agreement, Section 18.1).
- The term of the Agreement is from August 1, 2022 through August 1, 2023 “unless terminated by either the Village Council or Village Manager, as provided for in Sections 18-21 of [the] Agreement;”² (Employment Agreement, Section 17.1).
- “...[T]ermination shall occur when the majority of the Village Council votes to terminate the Village Manager in accordance with the provisions of Section 7(2) of the Charter at a properly posted and duly authorized public meeting.” (Employment Agreement, Section 18.2).
- “If [the] Agreement is not terminated prior to the Anniversary Date, then it shall automatically be renewed on its Anniversary Date for one (1) year terms unless terminated in accordance with the provisions of Section 18-21 of this Agreement.” (Employment Agreement, Section 17.4).

² Sections 18-21 are respectively titled “Termination,” “Termination Without Cause,” Termination For Cause” and “Resignation.”

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The inquiries made by Councilpersons Jolin and Rosenthal are outlined below, with the pertinent analysis immediately following each inquiry.

ANALYSIS

Issue #1:

May the Council renew the Employment Agreement by taking no action?

Yes. The Employment Agreement contains what is colloquially known as an “evergreen” clause or an automatic renewal clause (Employment Agreement 17.4), requiring that the Village express a desire to end the Employment Agreement before its expiration date of August 1st failing which, the contract will automatically renew. In particular, the Employment Agreement provides as follows: “If this Agreement is not terminated prior to the Anniversary Date, then it shall automatically be renewed on its Anniversary Date for one (1) year terms unless terminated in accordance with the provisions of Section 18-21 of this Agreement.” (Employment Agreement, Section 17.4).

Issue #2:

May the Council, by majority vote, opt not to renew the Employment Agreement?

Yes. If the Council desires **not** to have the Village Manager continue within the employ of the Village, it is imperative to affirmatively act to cause his employment to be separated. Pursuant to the Village Charter (Section 7(2)(a)), and the Employment Agreement (Section 18.1), the Village Manager serves at the pleasure of the Village Council. This implies that the Village Manager will serve until some affirmative action is taken by the Village Council to cause the Village Manager’s services to be discontinued. In fact, in Section 7(2)(b) of the Village Charter, the Village Manager can only be “...removed from office...by a majority vote

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of the full council" (emphasis supplied). In other words, an affirmative vote by three (3) Councilmembers is required. The Charter further provides that, "[u]pon demand by a charter officer, a public hearing shall be held prior to such removal."

Issue #3:

If there is a vote of nonrenewal prior to the expiration date of the Employment Agreement, will the Village avoid having to pay severance to the Village Manager?

There is a viable argument that no severance is owed to the Village Manager if the Employment Agreement is nonrenewed. The analysis for this conclusion follows.

In responding to the inquiry concerning any requirement to pay severance to the Village Manager, the first issue to assess is whether a nonrenewal constitutes a termination without cause.

The issue of whether a nonrenewal is synonymous with a termination without cause is a nuanced one. A review of Florida case law indicates that this analysis is very fact specific and turns on the specific provisions in the employment contract at issue. Two cases (one public sector and one private sector), are instructive here, as they involve employment contracts that contain language similar to the language used in the instant Employment Agreement.

In the first case, which involves the public sector (i.e., *White v. Fort Myers Beach Fire Control District*, 302 So. 3d 1064 (Fla. 2d DCA 2020)), a former fire chief brought an action for breach of contract arguing that he was terminated rather than nonrenewed. There were two key provisions to the Court's analysis: Section 2 and Section 3 of the employment agreement. Section 2 noted that the fire chief's employment existed from 10/1/12 through 09/30/15.

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Section 3 provided how the agreement could be terminated prior to expiration. On 09/30/15, the agreement was considered automatically renewed for a period of 2 years as long as neither party submitted a written notice of termination to the other party. In February 2015, the fire chief received a nonrenewal letter. The letter specifically said it was not a termination as covered by section 3 of the agreement. The court noted that “if the parties intended section 3’s termination procedures to apply to the nonrenewal option, they could have said so in section 2.” *Id.* at 1071. Accordingly, the court held there was no breach of the employment agreement (i.e., it was simply not renewed and not terminated).

In the second case, a private sector case (i.e., *Paladyne Corp. v. Weindruch*, 867 So. 2d 630 (Fla. 5th DCA 2004)), a former president of the corporation entered into an employment agreement that included a “term” provision. Pursuant to that provision, the agreement began on a specific date and ended on a specific date. The Agreement was subject to automatic renewal for successive one-year terms unless either party notified the other 30 days prior to the expiration of the then current term. A separate provision titled “termination” set out a number of ways the company could effectuate termination. Specifically, there were three ways: without cause, with cause, and termination by employee. The company elected to send the former president a notice of its intent to not renew the Agreement and declined to pay him any severance pay. The former president sued arguing he was effectively terminated and entitled to severance pay for one year. At trial, the trial judge found that the nonrenewal was equivalent to a termination. However, the Fifth District Court of Appeal did NOT agree. Instead, it held that “a facial reading of the two provisions leads us to the conclusion that the word nonrenewal was not meant to be synonymous with termination.” *Id.* at 633. Put

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simply, “there would be no point in having a nonrenewal provision if the effect of not renewing the contract is identical to the effect of termination the contact under paragraph 10(i).” *Id.*

Notwithstanding the foregoing, it should be noted that there *are* other cases in which courts in Florida have held that non-renewal of an employment contract is akin to a termination without cause. *See e.g., Medicomp, Inc. v. Alternative Physicians Solutions, LLC*, 2019 WL 11504458 *1, at *6 (M.D. Fla. July 19, 2019) (holding the non-renewal of the employment agreement in that case constituted a termination).

In this case however, whether a nonrenewal of the Employment Agreement is viewed the same as or different from a termination without cause, an argument could be made that the result should be the same as it relates to the payment of severance (i.e., that no severance is owed). This is because, under the Employment Agreement, it appears that only four instances are contemplated under which there is an obligation for severance to be paid if the Village Manager’s termination is without cause, and none of these four instances include a nonrenewal of the contract.

In particular, pursuant to the Employment Agreement, if the Village Manager’s contract is terminated without cause, the Village is responsible for providing the Village Manager with severance equal to twenty (20) weeks’ salary, as well as all sick leave, vacation leave, and paid holidays, *if any of the following four (4) circumstances occur:*

1. If the Charter is amended such that the Village Manager’s role, powers, duties, authority or responsibilities are substantially affected, in which case he/she can declare it a termination of the Employment Agreement.
2. If the Village reduces the Village Manager’s base salary, compensation or any other financial benefit, unless it is applied in no greater percentage than

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the average reduction of all department heads, in which case it would be deemed to be a termination.

3. If the Village Manager resigns following an offer to accept resignation.

4. If the Village Manager is unable for a consecutive period of 60 days to perform his duties due to disability, sickness, accident, or injury, as certified by a physician, the Village Council may elect to terminate this Agreement. The Employment Agreement is also deemed terminated in the event of the Village Manager's death.

(Employment Agreement, Sections 19 &22).

Issue #4:

May the Council terminate (as opposed to renew/nonrenew) the Village Manager's employment at any time?

Yes. Pursuant to the Employment Agreement, as well as the Charter, as aforementioned, the Village Manager serves at the pleasure of the Village Council. (Employment Agreement, Section 18.1, Village Charter Section 7(2)(a)). The Village Manager may be terminated with or without cause. (Employment Agreement, Sections 19 & 20). Cause is defined pursuant to the Employment Agreement as: (i) breach by the Village Manager of any material term or condition of [the] Agreement; (ii) violation of any applicable laws or codes; (iii) misconduct; (iv) gross insubordination; (v) willful neglect of the duties specified in [the] Agreement; or (vi) conviction of a felony or plea of no contest to a felony. (Employment Agreement, Section 20.2).

Issue #5:

What are the financial implications if the Council terminates with and/or without cause?

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If the Village Manager's contract is terminated **with cause** (as defined immediately above in response to issue #4), the Village is under no obligation to provide the Village Manager with severance. (Employment Agreement, Section 20.1).

If the Village Manager's contract is terminated **without cause**, the Village is responsible for providing the Village Manager with severance equal to twenty (20) weeks' salary as well as all sick leave, vacation leave, and paid holidays in the event one of the four circumstances enumerated above in response to issue #2 occurs. (Employment Agreement, Section 19).

Issue #6:

What is the process that the Village Council must follow in order to separate the Village Manager from the Village, regardless of how the separation is couched (i.e., nonrenewal, termination with cause or termination without cause)?

If there is any intent to involuntarily separate the Village Manager from the Village, as discussed above in response to issue #2, affirmative action must be taken by the Council to do so. Indeed, there does not appear to be any genuine dispute that any nonrenewal or termination (for whatever reason), of the Village Manager's Employment Agreement would need to be added to a Council agenda and voted on by the Council at a public meeting, and that a majority vote of the full Council would be needed to discontinue the Village Manager's services, regardless of what that cessation of services is deemed to represent (i.e., a nonrenewal or termination of the Employment Agreement).³

³ The Employment Agreement contains a clause indicating that the Village Manager must be terminated in accordance with the provisions of Section 7(2) of the Charter at a properly posted and duly authorized public meeting. While the Employment Agreement uses the term "terminated" and "termination," the Charter uses broader language (i.e., removal). (Employment Agreement, Section 18.2).

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Issue #7

Is there a notice requirement for a termination of the Village Manager's Employment Agreement?

The Employment Agreement does not provide a certain number of days prior to its expiration by which the Village must announce its intent not to renew or terminate the Village Manager's contract.⁴ However, as mentioned above, since the last Village Council meeting before August 1st is on July 27th, it would be prudent to vote on the potential nonrenewal of the Village Manager's contract by this meeting.⁵

Sincerely,



Alison F. Smith, Esq.

⁴ Pursuant to the Employment Agreement however, the Village Manager must provide thirty (30) days' notice of his intent to resign. (Employment Agreement, Section 21.1).

⁵ There are currently two regular Village Council meetings scheduled for July – July 6 and 27, 2023. Accordingly, should the Council wish to have such a discussion, it could occur at either of those meetings.