



CAN YOU RELY ON YOUR NO FAULT SEVERANCE PACKAGE?

By Steven John Fellman
Galland, Kharasch, Greenberg, Fellman & Swirsky, P.C.

Picture this scenario. Joe Jones is the long time Executive Vice President of the Widget Manufacturers Association. He has an executive employment contract that essentially provides that he gets an eighteen months severance package if the association fires him without "cause" or if the association fails to renew his contract. In the "contract" in order to fire him for "cause," the association has to show that he was found guilty of a felony or that he used the association funds for his own personal gain.

However, Joe is not a happy camper. The Widget industry has changed. The small local and mid-sized regional companies that once formed the back bone of the association are no longer there. Consolidation has occurred and the industry is characterized by large national companies with varied business interests. The Board of Directors of the Widget Manufacturers Association is no longer made up of people who grew up in the Widget industry and had a real knowledge of what made the industry tick. The current Board is made up of what Joe called "bean counters" most of whom do not know one end of a Widget from another. Joe is not getting along with his Board. He feels that they are short sighted and not acting in the long term interests of the industry. He has expressed his views on numerous occasions. His Board's response was to thank him for his input but then adopt

strategies diametrically opposed to what Joe so passionately recommended.

Joe is very frustrated and is convinced that if he does what the Board wants him to do, he will be implementing the destruction of the association. So he decides on a course of passive resistance. He will do as little as possible and wait until a new Board comes in and makes some reasonable decisions. After all, he thinks . . . the worst thing that could happen is that the Board fires him and pays him his eighteen months salary.

Unfortunately, Joe is being very naive. While he is sitting in his office playing the waiting game, his Executive Committee is having a series of conference calls. The members of the Executive Committee are just as frustrated as is Joe. They have decided on a policy that they believe is in the best interests of the association and directed Joe to implement the policy. When he argued against doing so, they listened to his objections and discussed the issues but concluded that they were right and Joe was wrong. Again, they told Joe to implement the policy and again nothing happened. The Executive Committee has decided that since Joe cannot adapt to the current business conditions, he should be fired. They are angry because they believe (and correctly so) that Joe is not doing what they want him to do . . . simply because he does not agree with them. It is not that he can't do it . . . it is that he won't

do it. Under the circumstances they call a Board of Directors conference call (without Joe). The Board authorizes the Executive Committee to meet with Joe and fire him.

The Board is aware of the eighteen months severance package in Joe's contract. However, the Board believes that under the circumstances where Joe refuses to take their directions, he is not entitled to the full severance. The Board decides to offer him six months severance and play hardball. They think that Joe has been taking advantage of the association and the time has come for him to learn a lesson. One Friday afternoon, the Executive Committee shows up at the association office with the Association outside counsel. They meet with Joe and tell him that he has been fired. The Executive Committee and the Board have decided to let him go. He is being fired for failure to follow the Executive Committee's directions which is a breach of his duty to the association. He is told that he will be given a six month severance package and he is handed a written settlement agreement. He is told that he has an hour to pack up his office, hand in his keys and leave the building. The association will have his larger personal belongings delivered to his home. Joe can't believe what is happening. He tells them that under his contract, he is entitled to eighteen months severance. They tell him to read the settlement agreement that they gave him. If he doesn't accept the six month offer within ten days, the offer will be withdrawn and he will get nothing. The Executive Committee gets up, walks out of Joe's office and calls a meeting of the staff. The Association General Counsel is left in Joe's office. She tells Joe that she is sorry but there is nothing that she can do.

Joe packs up his office, goes home and calls an attorney who he used to help negotiate his contract. They meet the

following Monday and Joe admits that the Executive Committee told him what to do but that he intentionally did not do it. Joe's attorney tells Joe that he thinks that Joe would win in a litigated case but that there are no guarantees in litigation. Furthermore, litigation is expensive and the lawyer does not work on a contingency fee basis. He offers to find Joe a lawyer who might take the case on contingency basis. However, he recommends that they try to negotiate. After reviewing the situation, Joe recognizes that he can't afford to litigate. After a brief negotiation, Joe settles for a nine month severance package.

Is this an unusual scenario? Unfortunately, it is not. As an association executive, you must recognize that you work for the Board of Directors and/or the Executive Committee. You have an obligation to implement the policies that the Board establishes. You also must recognize that unless your contract has specific provisions that establish enforcement procedures such as alternative dispute resolution, your attempts to enforce your rights under the contract will be expensive and time consuming. In many cases, a lengthy litigation will cost you more than you could possibly recover.

We recommend that if you find yourself in the no win situation such as described above, don't do what Joe did. Instead, think about deciding to move on and talk to your President about possibly resigning with a negotiated settlement. You have to be subtle in introducing the subject and never suggest that you are offering to quit. However, you may find that the association is as anxious to get rid of you as you are to leave. You may end up getting less than your eighteen months package, but ultimately, you will have turned the no win situation into a win/win situation.