MEMORANDUM

TO: The School Board of Flagler County, Florida

FROM: Daniel E. Nordby, Esquire and Paul J. Scheck, Esquire

DATE: October 13, 2023

RE: School Board Attorney Employment Agreement of Kristy J. Gavin

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Our firm has been asked to conduct a legal review of the School Board Attorney Employment Agreement (the "Employment Agreement") of the current School Board Attorney, Kristy J. Gavin ("Ms. Gavin"), and to provide potential options for the termination of her employment. The following is a summary of the relevant provisions of the Employment Agreement, the methods by which the Employment Agreement may be ended, and the consequences of each such approach.

I. Terms of the Agreement

Ms. Gavin and The School Board of Flagler County, Florida (the "School Board") entered into the current version of the Employment Agreement, effective as of July 1, 2022. The "Term" of the Employment Agreement, as defined in Section 1, is from July 1, 2022 through June 30, 2025. As a result, this version of the Employment Agreement has approximately twenty (20) months remaining until it expires on its own terms. It would then renew for an additional three year term unless a vote is taken by the Board no later than December 30, 2024 not to extend the Employment Agreement.

II. Ms. Gavin's Duties and Responsibilities

Pursuant to the Employment Agreement, Ms. Gavin's duties are defined by her Job Description, attached to the Employment Agreement as Exhibit "A". This document sets forth a number of "Knowledge, Skills and Abilities" that Ms. Gavin is required to demonstrate and perform in order to fulfill the responsibilities of her position as School District Attorney. The Job Description also sets forth twelve (12) specific "Performance Responsibilities" that Ms. Gavin is required to perform in order to fulfill the responsibilities of her position. She is also required to devote her "full time and effort to the performance of her duties and responsibilities" as School Board Attorney. (*See* Section 2D).

III. Potential Termination of Agreement

Pursuant to the provisions of the Employment Agreement, there are four separate methods by which the Employment Agreement may be terminated. If the School Board attempts to terminate the Employment Agreement by any other method, it could potentially face a breach of contract claim from Ms. Gavin.

A. Mutual Agreement

Pursuant to Section 6(A) of the Employment Agreement, the Parties can mutually agree to terminate the Employment Agreement at any time during the existing Term. This mutual agreement could be the result of a lack of confidence and trust between the School Board and Ms. Gavin. The specific provisions of such a mutual resolution would be subject to negotiations between the parties. This option could be a favorable resolution for the School Board for a number of reasons, including providing the greatest amount of control in how the relationship is resolved, providing a fairly quick closure to the relationship, avoiding having to resolve issues in a public setting, and avoiding attorneys' fees and costs related to potential litigation.

B. Death or Extended Disability

Pursuant to Section 6(A) of the Employment Agreement, if Ms. Gavin either dies or is suffering from an extended disability, the Employment Agreement may be terminated. This is not applicable to the present situation.

C. Voluntary Resignation

Pursuant to Section 6(E) of the Employment Agreement, Ms. Gavin may resign without the consent of the Board by providing sixty (60) days advance written notice. It does not appear that Ms. Gavin intends to voluntarily resign her employment at this time.

D. Just Cause

Pursuant to Section 6(A) of the Employment Agreement, Ms. Gavin may be terminated "for cause", but only under four limited and delineated categories: (1) dereliction of duty; (2) failure to report to work; (3) misconduct in office; or (4) violation of criminal law.

(1) As for "**dereliction of duty**", this is a somewhat vague and ambiguous term, without any established definition. In general, a "dereliction of duty" refers to an employee's willful failure to conform to the established rules and expectations of her position. It normally consists of a failure or refusal to perform the assigned duties in a satisfactory manner, and often must be a material failure that would otherwise be cause for disciplinary action. It may also consist of a failure to abide by the standing rules of an employer's constitution or by-laws.

This alleged "just cause" determination will largely be based on an assessment of Ms. Gavin's performance of the specific responsibilities and duties as set forth in her Job Description. It also must be considered that the Employment Agreement provides in Section 2(A) that Ms. Gavin has "the discretion to operate her office in the manner she determines to be most efficient and effective, and in the best interests of the Board". Based on this language, Ms. Gavin has had a great amount of latitude and discretion in determining how to perform her duties, and as long as she has been satisfying the basic duties of her position, it will be difficult to challenge the methods by which she accomplished the designated goals.

It is also relevant to review Ms. Gavin's most recent annual evaluation, as referenced in Section 4 of the Employment Agreement. These evaluations are intended to evaluate the "performance of her duties". These evaluations were completed by the School Board members in September and early October of 2023, and provided ratings for Ms. Gavin in five different designated categories. The five separate evaluations provide very disparate scores and feedback. In addition, the "Total Raw Score" given to Ms. Gavin by each of the Board members ranged from a low score of 2.4, which would equate to an overall rating in the "Needs Attention" range, to a high score of 7.4, which would equate to an overall rating in the "Outstanding" range. An aggregate of the five "Total Raw Score" ratings is 4.52, which would equate to an overall rating in the lower end of the "Effective" range.

(2) As for "**failure to report to work**", this requirement is somewhat self-explanatory, and would depend on whether or not Ms. Gavin has had attendance issues. This would include missing Board meetings, workshop meetings, or other designated functions. It does not appear that Ms. Gavin has demonstrated any attendance issues.

(3) As for "**misconduct in office**", the Employment Agreement specifically references "misconduct" being defined by Fla. Stat. § 443.036, which is the Florida unemployment compensation statute. It also states that she would not be owed any severance pay after her termination if it is based on this finding.

Pursuant to this statutory language, "misconduct" is defined to consist of:

"Misconduct," irrespective of whether the misconduct occurs at the workplace or during working hours, includes, but is not limited to, the following, which may not be construed with each other:

> (a) Conduct demonstrating conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50, or theft of employer property or property of a customer or invitee of the employer.

(b) Carelessness or negligence to a degree or recurrence that manifests culpability or wrongful intent, or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.

(c) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.

(d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.

(e) A violation of an employer's rule, unless the claimant can demonstrate that:

1. He or she did not know, and could not reasonably know, of the rule's requirements;

2. The rule is not lawful or not reasonably related to the job environment and performance;

3. The rule is not fairly or consistently enforced; or

4. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or invitee of the employer or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

The above statutory language is not necessarily the exclusive list of what could be considered "misconduct", but is clearly a starting point and provides useful guidance for an analysis for such a finding.

(4) As for "**violation of a criminal law**", this is also somewhat self-explanatory. Either such behavior exists or it does not exist.

If the School Board determines to pursue a "just cause" termination, it should base such a decision on articulated reasons set forth in writing, including factual support for each such reason.

IV. Ms. Gavin's Right to Challenge Termination

If Ms. Gavin is terminated "for cause" pursuant to the terms of the Employment Agreement, she would have the right to challenge that "just cause" termination by filing a Petition for Relief initially with the Board. The Petition would then be referred to the Florida Division of Administrative Hearings ("DOAH") to be heard by a designated Administrative Law Judge ("ALJ"). The DOAH procedures permit the parties to conduct an evidentiary hearing, including the calling of witnesses and the presentation of exhibits. Based on the ALJ's evaluation of the evidence presented at the hearing, the ALJ would render a finding as to whether or not "just cause" existed to warrant Ms. Gavin's termination.

If the ALJ were to determine that "just cause" did not exist to support Ms. Gavin's termination, then pursuant to Section 6(C) of the Employment Agreement, the ALJ would be entitled to award Ms. Gavin: (1) twelve (12) weeks of her base salary, without benefits, computed as of the date of her termination; and (2) accrued sick and annual leave as provided for under the Employment Agreement. The Employment Agreement specifically provides that if the ALJ awards these amounts, this payment "shall be in full satisfaction of any and all claims and causes of action ATTORNEY." In other words, this would be the maximum amount that she could be awarded by the ALJ. There is a possibility that if she were to hire an attorney she might be entitled to seek and obtain attorneys' fees and costs related to the DOAH hearing, but she personally would not be entitled to any more compensation than these two categories. This amount of 12 weeks complies with the parameters of Fla. Stat. § 215.425(4)(a)(1) which states that severance pay provided by a unit of government shall not exceed an amount greater than 20 weeks of compensation.

If, on the other hand, the ALJ were to determine that "just cause" did exist for the termination, then no payment would be due or owing to Ms. Gavin.

Pursuant to Fla. Stat. § 120.65(9), DOAH is to be reimbursed for administrative law judge services and travel expenses provided on behalf of school districts in DOAH hearings. The school boards are to contract with DOAH to establish a contract rate for services and provisions for reimbursement of administrative law judge travel expenses and video teleconferencing expenses attributable to hearings conducted on behalf of such school boards, and the contract rate must be based on a total-cost-recovery methodology. *See* Fla. Stat. § 120.65(9). DOAH's website currently lists its current hourly rate for ALJ's performing such services as $150 per hour, and also discusses the reimbursement of travel expenses. If a district school board fails to make a timely payment for the services provided by a DOAH administrative law judge, the Commissioner of Education shall withhold, from any general revenue funds the district is eligible to receive, an amount sufficient to pay for the administrative law judge's services, and shall transfer the amount withheld to the Division of Administrative Hearings in payment of such services. *See* Fla. Stat. § 120.655.

Thus, the payment of this DOAH hearing fee is another factor to be considered in potentially pursuing the "just cause" approach.

V. Procedures for Termination

If the Board makes the decision to terminate the Employment Agreement prior to the expiration of the existing Term, Section 6(B) requires that it must take such action at a duly noticed regular or special meeting of the Board. The Board Chairperson shall provide Ms. Gavin with written notice of termination, and her employment would terminate upon her receipt of such written notice. The notice may be provided in writing and be delivered by registered or certified U.S. Mail to Ms. Gavin. (See Section 8).

VI. Summary of Options

As set forth above, the Employment Agreement does provide the School Board with several options in addressing the potential termination of Ms. Gavin's employment. If the School Board decides to pursue a "just cause" basis for the termination of the Employment Agreement, it will need to be prepared to satisfy one of the articulated categories as the basis for that decision, and state reasons on the record for such a determination. On the other hand, if the School Board does not believe that is has "just cause", but still wants to terminate the Employment Agreement, then the language of the Employment Agreement itself seems to state that the maximum that Ms. Gavin should be paid is 12 weeks of base salary, without benefits, plus her accrued sick and annual leave.

In short, this amount of 12 weeks of base salary, plus accrued sick and annual leave, appears to be the maximum amount that will need to be paid to Ms. Gavin in order to conclude the School Board's relationship with her. Thus, if the School Board is prepared to negotiate a resolution that does not exceed the 12 weeks of base salary, plus accrued sick and annual leave, then the negotiation of a mutually agreeable separation agreement, including a general release of claims, would appear to be the best option available to expeditiously resolve this matter and limit the District's financial exposure.