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## Coates' Canons Blog: Denying the Manager a New Contract in Closed Session

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A North Carolina city manager's contract term is ending. (Or maybe it's the county manager. The issues are the same.) After June 30 she will have no further contract protection. If she remains employed by the city after that date, it will be in an unadulterated at-will status

Over coffee, the manager tells the board chair that she would like a new contract for a new two-year period. At the next scheduled meeting, on the motion of the chair, the board goes into closed session to discuss the performance of the manager (and, really, to discuss whether to enter into a new contract with the manager). In the closed session, the board decides not to offer the manager a new contract. That vote result is put into the minutes of the closed session and the closed-session minutes are sealed.

Two questions immediately arise. Could the board lawfully make that decision in closed session? If the newspaper asks a board member about the manager's contract, may the board member comment on the request and the closed-session contract denial?

### Could the board lawfully decide in closed session not to offer the manager a new contract?

The answer to this question is not perfectly clear. To get even to the unclear answer takes several steps. The first step is to consider the general requirement that, under North Carolina's open meetings law, meetings of public bodies must be open, so that anyone who wants to attend and observe the deliberations and actions may. The second step is to consider that the open meetings law allows for some exceptions. It allows boards to go into closed session for particular purposes. One of those purposes is to "consider" the qualifications, fitness, and performance of an employee. The board could clearly go into closed session to consider the fitness of the manager for continued employment. But the third step is to consider the reservation related to that closed-session purpose. By that reservation, "Final action making an appointment or discharge or removal [of an employee] . . . shall be taken in an open meeting." This reservation clearly implies that there are some kinds of actions related to an employee's qualifications, fitness, or performance that could be taken in closed session, just not those that are "final actions" making an appointment or discharge.

So, what about a decision by the board not to offer the manager a new contract when the current contract ends? May it lawfully take that action in closed session?

David Lawrence, in his excellent publication *Open Meetings and Local Governments in North Carolina, Some Questions and Answers*, Seventh Edition 2008 (which every local government manager and attorney should have in easy reach), says that a board should not vote to ask for an employee's resignation in closed session, but should take that vote in open session, since in most cases "asking for a resignation is effectively the same thing as firing that person." David's book, p. 28. He also says that the decision not to renew the employment contract of a public school superintendent is a decision that must be voted on in open session, since by law the school system cannot employ a superintendent except under a contract. In effect, voting not to offer a new contract amounts to a dismissal decision.

But the situation is a little different with a city manager (or a county manager or a community college president or many other kinds of public executives). The manager serves, by statute, at the pleasure of the council. That is, her employment is at-will. There is no requirement that a manager have a contract and no requirement that the manager must be dismissed when the contract ends. So, a decision not to renew a manager's contract is not necessarily equivalent to a decision to dismiss the manager, though the relationship may be so poisoned by the action that either dismissal or resignation is likely to follow soon.

Could the board lawfully vote in closed session not to offer the manager a new contract? The question is a close one. If I

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were sitting on the North Carolina Court of Appeals and the question came to me, I would vote, Yes, the board could take that vote in closed session.

**Could a board member discuss in public the decision of the board, taken in closed session, not to offer the manager a new contract?**

This is another tricky question. A general principle is that the mere fact that a matter is discussed in closed session does not mean that a board member who was present at the closed session is prohibited from discussing the matter publicly. See Frayda Bluestein's blog post on this point here. It might be a bad idea to do so, but it is not necessarily unlawful. On the other hand, if a board member learns information about an employee from the personnel file, it is a violation of law for the board member to discuss that information publicly. In fact, in an extreme case it can even be a misdemeanor.

So, when the manager asks for an extension and the board considers it and decides not to grant it, can it be said that that is information that the individual board members have learned from the personnel file? If so, it is unlawful for board member to disclose it. On the one hand, it does not really seem, in this situation, like this is information learned from the personnel file. It was learned through discussion in the closed session. On the other hand, once the matter was put into the closed session minutes, those minutes no doubt became part of the personnel file (even though physically located somewhere else), so it could be argued that to discuss the matter would be to unlawfully disclose information from the personnel file. It is a close call.

A conservative reading of the situation would lead to the conclusion that the information about the request and its denial are part of the personnel file and should never be commented on by a board member. A less conservative reading would lead to the conclusion that the information, since it was learned in discussion and not from the personnel file, is fair game to be discussed.

If I were the city attorney advising the board and its members, I might recommend taking the conservative view, just to protect the board from any possibility of legal challenge. If I were sitting on the Court of Appeals, I would vote that the member is free to discuss the matter if he feels so compelled.

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