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M A P E R S

RECENT LEGAL ISSUES AND DECISIONS

SPRING 2017 CONFERENCE

This summary is presented to provide a general reference to recent legal decisions of interest to Michigan public retirement and healthcare plans.

BENEFITS ADMINISTRATION

Peterson v. City of River Rouge, et al.
Michigan Court of Appeals ***2017 WL _____***
May 11, 2017

A former city police officer was granted a duty disability retirement in 1994. The Pension Board was required to recalculate his benefit to a normal service retirement when he reached his voluntary retirement age. The City Charter defined voluntary retirement age as age 55. However, the applicable collective bargaining agreement ("CBA") in effect when he was granted his disability pension provided that his voluntary retirement age was age 50. The Pension Board recalculated his benefit pursuant to the terms of the CBA and the former police officer sued. The trial court dismissed his claims and upheld the Pension Board's decision. The Michigan Court of Appeals agreed with the trial court, noting that where a city charter and a CBA conflict with respect to retirement benefits, the terms of the CBA control for members subject to that CBA. The Court, applying the substantive evidence test, upheld the Pension Board's decision which it found to be "supported by the evidence, was not contrary to law, was not arbitrary and capricious, and was not an abuse of discretion."

Tibble v. Edison International
United States Court of Appeals for the Ninth Circuit ***820 F.3d 1041***
April 13, 2016

The plaintiffs were beneficiaries of a defined contribution plan who attempted to assert that the defendant plan fiduciaries had an ongoing duty to monitor investments and remove imprudent investments. The plaintiffs alleged that the defendants offered retail-class mutual funds and plan investments when the plan, as a plan with billions of dollars, should have offered institutional-class investments, which would have resulted in materially lower administrative costs for nearly the identical investments. The court of appeals ruled that for "claims asserting imprudence in the design of the plan menu," the six-year statute of limitations begins at "the act of designating an investment for inclusion[.]" However, there is also an ongoing duty to monitor investments, which is a separate cause of action, that is subject to a different statute

of limitations period. In this case, the plaintiffs did not raise an issue regarding ongoing duty to monitor the plan investments on appeal; therefore, it was waived and plaintiffs' claims were dismissed.

Duncan, et al. v. Muzyn, et al.
United States District Court, Eastern District of Michigan ***833 F.3d 567***
August 12, 2016

Participants of a retirement system sued their pension board for its decision to cap or eliminate cost of living adjustments (COLAs). The participants argued that COLAs were vested rights. The U.S. District Court agreed with the pension board's decision to eliminate COLAs, as its governing rules leave the amounts to the complete discretion of the pension board. In addition, the pension board rules stated that vested benefits do not include COLAs. Therefore, the court dismissed the participants' claims that the board violated retirement system rules by reducing vested benefits.

Puckett, et al. v. Lexington-Fayette Urban County Government, et al.
United States Court of Appeals, for the Sixth Circuit ***833 F.3d 590***
August 15, 2016

The state legislature of Kentucky, at the request of the Lexington-Fayette Urban County Government (the "LFUCG"), passed emergency legislation to reduce the annual cost of living adjustment ("COLA") paid to members of the State of Kentucky Police and Fire Retirement fund. The retirees of that fund claimed that they had a contract with the State of Kentucky (via the applicable retirement act) entitling them to have their base pension benefit annually adjusted by the specific COLA formula in existence at the time they retired. The court agreed with the defendant Fund and determined that the retirees had no contractual right to an unchangeable COLA formula and that the legislature's action was rationally related to its legitimate governmental interest (i.e., of keeping the retirement fund financially sound).

Costella v. City of Taylor
Michigan Ct. of Appeals ***2016 WL 4375657***
August 16, 2016

Costella sued from a decision of the Taylor Police & Fire Retirement System Board of Trustees ("the Board") that held he was not entitled to have his severance pay included in the final average calculation (FAC) of his pension benefit amount. Costella's former lawsuit against the Board, which the upheld the Board's decisions, was affirmed in this lawsuit. The court reasoned that because all claims against the City of Taylor in most recent litigation contained allegations that the Board improperly failed to include the severance pay in his FAC calculation, (i.e., that it breached its contract with Costella), all claims were precluded, as they were decided already. The court also dismissed Costella's fraud claim against the City for not including the severance pay calculation in his FAC, as it was barred by governmental immunity.

Kennard v. Means Industries, Inc.
United States Court of Appeals, for the Sixth Circuit ***660 Fed.Appx. 333***
August 19, 2016

The plaintiff was a member of Means Employee Retirement Income Security Act Plan (the Plan). The plan administrator determined that the member was not permanently disabled and denied him a disability benefit. The appeals court reversed the Plan's decision, as it offered "no evidence" to support the decision and ordered the Plan to pay the member a disability benefit. The Plan found that after offset of his workers' compensation claim redemption, the plaintiff was entitled zero dollars in disability benefits. The court affirmed the plan administrator's decision even though it was zero dollars, which is consistent with its prior decision in this case, as it remanded the case in favor of plaintiff because he was entitled to disability retirement benefits, which he is getting in the amount of zero dollars.

Saunders v. Procter & Gamble Health and Long-Term Disability Plan
United States District Court, Eastern District of Michigan ***659 Fed.Appx. 272***
August 23, 2016

A member of the P&G Health and Long-Term Disability Benefit Plan (the Plan) received disability benefits for about 15 months for a total disability. After the Plan changed plan administrators, the new administrator concluded that the member "had not furnished objective medical evidence establishing her disability." Accordingly, it terminated her benefit payments. The member appealed and stated her condition as "complex regional pain syndrome, but d[id] not specifically explain how this condition disabled her." The Plan denied her disability claim and she appeal to the district court. The court stated that she must provide objective evidence that she is disabled and that "her pain is considered totally disabling and that she is receiving regular recognized treatment for it." However, the member did not provide evidence of physical restrictions when she was working or any medications that she was taking for the disability. Therefore, the court concluded that the member did not provide evidence that she was totally disabled and it affirmed the Plan's decision to terminate her disability benefits.

Deschamps v. Bridgestone Americas, Inc. Salaried Employees Retirement Plan, et al.
United States Court of Appeals, for the Sixth Circuit ***840 F.3d 267***
September 12, 2016

An employee worked for ten years at a Bridgestone plant in Canada and then transferred to a Bridgestone facility in the United States, which offered a pension governed by Employee Retirement Income Security Act (ERISA). Before his transfer, the employee expressed concern about losing pension credit for his ten years working in Canada, but received assurances from members of Bridgestone's management team that he would keep his ten years of pension credit. After the transfer, his employment records reflected that his date of service for pension purposes would be the hire date of when he started work in Canada. The employee raised concerns in the interview and was told by the pension analyst Bridgestone that he would receive credit from the time in the Canadian office, but nothing in writing from the pension analyst confirming that information was provided to him.

Thereafter, the corporate office approved the employee's employment offer including the representation that his pension would be calculated using the Canadian hire date, and various benefit estimates after that included the Canadian hire date. Subsequently, Bridgestone changed his hire date for pension calculations to date he began working at the American plant (i.e., losing 10 years of service credit). The employee sued Bridgestone's retirement system to ensure the retirement system used his original hire date in Canada. The court agreed with the employee, determined he reasonably relied on Bridgestone's multiple assertions and communications to his detriment, and forced Bridgestone to use his original hire date as expressly represented by the employer.

Andrew Halttunen v. City of Livonia, et al.
United States Court of Appeals, for the Sixth Circuit ***664 Fed.Appx. 510***
November 21, 2016

A member of the City of Livonia Employees Retirement System ("Retirement System") sought declaratory relief regarding proposed set off amounts against his pension benefits from a pending workers compensation claim. The member's sole basis for federal jurisdiction was the Employee Retirement Income Security Act (ERISA). Governmental plans generally are exempt from ERISA: these plans are defined as, "one established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." The plaintiff argued that the court must decide if the Retirement System is subject to ERISA because the statute is unclear as to the Retirement System's classification. The court rejected the

plaintiff's arguments and concluded " that the City [of Livonia] is a political subdivision of the State of Michigan, making the pension plan at issue a governmental plan excluded from the scope of ERISA." Plaintiff has re-filed his claims in the state court and that case is currently pending.

Steele-Brown v. Public School Employees Retirement System
Michigan Ct. of Appeals ***2016 WL 6992513***
November 29, 2016

A member retired after 31 years of service with a public school system and "realized that she made a terrifying mistake in 2012, when she elected to change her retirement health care plan to a portable healthcare fund [as opposed to the current subsidy in place] in response to changes to legislation surrounding public school employee retirement benefits." The retiree requested an administrative hearing from the Office of Retirement Services (ORS). The hearing resulted in a denial of the retiree's request to change her election. She explained that she did not understand what the election meant and therefore should not be bound by her decision. She appealed to the circuit court and it agreed that the retiree was confused when she elected to change her retiree health care benefit and ordered the board to reinstate the retiree's healthcare benefits subsidy. However, on appeal, the court reinstated the board's decision and noted that it was based on substantial, material and competent evidence and not contrary to the law. As a result, the retiree was unable to change her health care election.

Dodd v. City of Chattanooga, Tenn., et al.
United States Court of Appeals, for the Sixth Circuit ***846 F.3d 180***
January 18, 2017

A member of the Chattanooga Fire and Police Pension Fund ("Fund") sued the City of Chattanooga ("City") and the Fund because the requirements for a survivorship benefit were amended. Prior to the amendment, the Fund allowed employees to elect a joint and survivorship benefit without any cost to employees that were hired before 1992. In 2012, the Fund adopted a new rule that removed this "default death benefit" for members who were not eligible to retire as of January 1, 2013. The member was not eligible to retire as of that date and "therefore opted for a five-percent reduction in current, lifetime benefits so that his wife could receive an additional benefit upon his death." The member claimed that the because of the 2012 amendment, he incurred a five percent reduction of benefits and sued the City and the Fund under the "Federal Contract Clause, Due Process Clause, and Takings Clause, as well as Tennessee's Law of the Land Clause." The court ruled that the member did not have a contract or property right to a default death benefit and dismissed his claims.

Hitchcock, et al. v. Cumberland Univ., et al.
United States Court of Appeals, for the Sixth Circuit ***851 F.3d 552***
March 14, 2017

Employees of a university's defined contribution plan were offered a five percent matching employer contribution whereby the university would match an employee's contribution up to five percent of the employee's salary. The university amended its plan and announced via email to its employees that it would retroactively reduce the employer matching contribution to zero, and prospectively the matching amount would be discretionary to the employer. The employees argued that in violation of ERISA and its own Plan document, the university had not produced an updated summary plan description and had not provided formal written notice regarding the matching provision change. The university argued that the employees did not exhaust their administrative remedies and that the case should be dismissed. The court determined (in a case of first impression) that because the employees' claims were directed at the legality of the plan amendment (i.e., statutory violations under ERISA) and were not a mere interpretation of the plan benefits, the employees did not have to exhaust their administrative remedies before suing the university for its amendment to employer contribution provision.

INVESTMENTS

Ohio Public Employees Retirement Sys. v. FHLMC, et al.
United States Court of Appeals for the Sixth Circuit ***830 F.3d 376***
July 20, 2016

The Ohio Public Employees Retirement System ("OPERS") "filed a class action suit alleging securities fraud against the Federal Home Loan Mortgage Corporation and four senior officers (collectively Freddie Mac)." The lower court dismissed OPERS' complaint for lack of causation. In a securities fraud claim, a plaintiff must prove a loss causation that is "the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff." OPERS claimed that it lost a significant value of its pension fund when the price of Freddie Mac's stock declined sharply in 2007 and that Freddie Mac concealed its increased exposure to subprime mortgages that led to the 2007 stock decline. The court of appeals agreed that lower court should not have dismissed OPERS' claim based on its novel loss causation theories. The case currently pending in the lower court on remand.

RETIREE HEALTH CARE

Tackett v. M&G Polymers*
United States Supreme Court ***135 S. Ct. 926***
January 21, 2016

Retirees entered into various Collective Bargaining Agreements (CBA) with their employer which provided that the employer would make "full Company contributions towards the cost of retiree health care benefits. " From 1991 until 2005, the retirees received healthcare benefits at no cost. In 2006, the employer announced that retirees would have to make contributions to their health care costs or they may be dropped from the plan. The retirees sued claiming they had a vested right to lifetime contribution-free health care benefits. The employer argued that the retirees always had been expected to contribute to their health care costs, but the employer never required them to do so until 2006.

Initially, the lower court found that the CBAs demonstrated an intent to vest the retirees with lifetime contribution-free health care benefits. The United States Supreme Court determined that the existing precedent required analysis of CBAs with a "thumb on the scale" in favor of vesting and was no longer appropriate. The Supreme Court stated that a collective bargaining agreement may provide in explicit terms that certain benefits continue after the agreement's expiration, but when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life. The Supreme Court remanded the case back to the lower court to analyze the CBAs applying "ordinary principles of contract law."

Harper Woods Retirees Association v. City of Harper Woods*[1]
Michigan Ct. of Appeals ***312 Mich. App. 500***
October 1, 2015

Retirees who had retired from employment with the city alleged that the city unlawfully changed health insurance benefits which were guaranteed under their collective bargaining agreements. The retirees argued that their collective bargaining agreements (CBAs) granted to them rights to healthcare benefits indefinitely after retirement, regardless whether the explicit terms of the contracts indicated that the parties intended those benefits to continue after the agreements expired. However, the Michigan Court of Appeals explained that the *Tackett* opinion and Michigan case law does not support the retirees' arguments because that

[1] **Please note that these two cases (*Tackett* and *Harper Woods*) were included in the Spring 2016 Legal Update

position is inconsistent with ordinary principles of contract law. Consequently, the Michigan Court of Appeals remanded the case to the lower court to determine: (1) whether the parties intended the retiree healthcare benefits identified in each respective agreement to survive the expiration of the CBA; or, (2) whether the retirees' rights to the specifically identified healthcare benefits terminated upon expiration of the agreement so that the employer was permitted to alter the benefits under future contracts.

Board of Trustees of the City of Pontiac Police & Fire Retiree Prefunded Group Health & Insurance Trust v. City of Pontiac
Michigan Ct. of Appeals ***2016 WL 6237446***
October 25, 2016

A trust was established in 1996 as a voluntary employees' beneficiary association ("VEBA") to hold and invest the contributions of the City and its employees pursuant to collective bargaining agreements ("CBAs") between the City and the various unions of the City's police officers and firefighters to provide health, optical, dental, and life-insurance benefits to police and fire employees who retired on or after August of 1996. At issue was the effectiveness of Executive Order 225 (EO 225) issued by the City's Emergency Manager ("EM"), which purported to amend the trust agreement to remove the City's annual obligation to contribute to the trust an amount "as determined by the Trustees through actuarial valuations." The trial court accepted the City's argument that the EM properly modified the city's obligation to contribute to the trust for the fiscal year ending June 30, 2012, by modifying the existing CBAs between the city and police and firefighter unions.

The Court of Appeals found that the legislature has provided that the "repeal of a statute will not affect a penalty, forfeiture or liability incurred before the statute's repeal." Consequently, the court held that if the EM "validly acted pursuant to the authority of 2011 PA 4 to amend existing CBAs" then the action remains "valid and enforceable despite the subsequent repeal by referendum of the act." The question remained whether EO 225, assuming it was properly adopted under the authority of 2011 PA 4, did, in fact, eliminate the City's actuarial required contribution to the trust for the fiscal year July 1, 2011, through June 30, 2012. The court held that it did not. Even assuming EO 225 was properly adopted, it did not retroactively eliminate the City's obligation to contribute to the trust for the fiscal year ending June 30, 2012.

The Board appealed to the Michigan Supreme Court, which instructed the Court of Appeals to determine whether the City of Pontiac, acting through its EM, may retroactively eliminate its accrued contract obligation to make its annual contribution to the City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Trust for the fiscal year ending June 30, 2012. The Court of Appeals determined that EO 225 may not be applied retroactively to extinguish defendant's accrued but unpaid 2011-2012 fiscal year contribution to the trust.

Kozfkay, et al. v. County of Sanilac
Michigan Ct. of Appeals ***2016 WL 6905931***
November 22, 2016

Four current appointed and elected Sanilac County officials sued to enforce a contractual retiree health care provision. In 2000, the County's board of commissioners "agreed to pay the full premium to provide comprehensive health, dental, and vision insurance benefits to full-time and regular part-time appointed and elected officials, retirees, and their spouses and legal dependents." In 2005, due to interpretation issues, the County Officials and the County entered into another updated agreement regarding retiree healthcare. About nine years later the County modified the "2005 Agreement's buyout provision unilaterally limiting the post-employment health, dental, and vision buyout provision to $1,200 per year ($100 per month) for single coverage, and $2,400 per year ($200 per month) for double and family coverage." The County Officials sued arguing that the County's subsequent unilateral modifications to the terms in the 2005 agreement were unlawful. The lower court found the contract between the parties to be unambiguous and

"modification of the method of compensating those who opt out of the health insurance plan required the consent of the parties." The Court of Appeals agreed with the County Officials and the lower court and reasoned that the language of the 2005 contract language was clear and unambiguous; therefore, the County was estopped from unilaterally modifying the contract.

Kendzierski, et al. v. Macomb County
Michigan Ct. of Appeals ***2017 WL 1398769***
April 28, 2017

Retirees challenged the County's unilateral modification of healthcare benefits. The County appealed the lower court ruling that the retirees' benefits included an entitlement of lifetime healthcare benefits. On appeal were two issues: (1) whether plaintiffs have a vested right to lifetime healthcare benefits; and, (2) if so, whether the County was permitted to make unilateral changes to the healthcare benefits. Using traditional contract principles when examining the applicable collective bargaining agreements (CBAs), the court determined that the specific language in the Retirees' CBAs was ambiguous and used documents outside of the CBA to determine the intent of the parties. The County's bond funding proposal with a letter from the County Executive stated it offered vested employees lifetime healthcare benefits; therefore, the court determined the County's statements did in fact prove that it intended to offer vested employees lifetime benefits when reading the CBAs along with the bond proposal documents. As to the second issue of unilateral modification, the court determined that the County did not present any evidence indicating that the Retirees consented to the alteration of healthcare benefits and granted the Retirees' motion to dismiss the case.

COLLECTIVE BARGAINING

Arbuckle v. General Motors LLC
Michigan Supreme Court ***499 Mich. 521***
July 15, 2016

A retiree sued General Motors for its change to its coordination of benefits policy. Since 1990, the applicable collective bargaining agreement ("CBA") provided a prohibition against the benefit coordination of workers' compensation awards and disability pension benefits for its employees. In 2007, General Motors and the union replaced the prohibition to an agreed formula to which disability pension benefits are reduced by workers' compensation awards, but did not apply the amendment to those already retired. However, in 2009, after plaintiff retired, the parties amended the coordination of benefit provision in the CBA to include retirees (i.e., the plaintiff). When plaintiff's disability pension benefit was reduced by his workers' compensation according to the CBA amendment, he sued General Motors claiming that he was already retired, was no longer an active union member, and accordingly that the 2009 amendment was not applicable to him. The court disagreed and explained that a "union may represent and bargain for already-retired employees, but only with respect to non-vested benefits." The court determined that because the applicable CBA had a durational limitation, the "parties plainly intended to reserve the power to modify the policy regarding coordination at some point in the future." Therefore, the coordination of benefit provision was a non-vested benefit and the union could represent and bargain for already-retired employees like the plaintiff.

Traverse Bay Interm. School District v. Traverse Bay Interm. School District Ed. Ass'n.
Michigan Ct. of Appeals ***2017 WL 252245***
January 19, 2017

The Traverse Bay Intermediate School District Education Association, MEA/NEA (the Association), appealed the order of the Michigan Employment Relations Commission (MERC) dismissing its unfair labor

practice charge against Traverse Bay Intermediate School District (the District). The Association's chief complaint was that the "District's unilateral actions essentially rewrote Article XIII(E) of the collective bargaining agreement so that instead of requiring the District to pay 90% of the health insurance premium, the District only had to pay the hard caps amount for July and August 2012." In response, the District asserted, "there was a bona fide dispute over the contract language, so it did not repudiate the contract[.]" The court was not persuaded by the District's argument, highlighting that "the District d[id] not identify what the bona fide dispute over the contract is" and on appeal only argued that "the enactment of PA 152 prohibits it from honoring the health insurance provisions in Article XIII(E)."

In 2011, the Legislature enacted the Publicly Funded Health Insurance Contribution Act, (PA 152), "which set limits on the maximum amount that a public employer could contribute to an employee's health care costs. The statute provides that a public employer can only contribute to an employee medical benefit plan using the hard caps [ ] or the "80/20" option in §4 of the act." The relevant collective bargaining agreement (CBA) required the District to contribute to its qualifying employees' health care costs in excess of the amounts allowed under PA 152. However, PA 152 did not require immediate implementation, as it excluded existing agreements.

Therefore, the court found no dispute over the contractual language and held "it is clear that the parties' dispute centered solely on the application of the statutory language to the plain terms of their contract [and] that the parties did not have a bona fide dispute over the interpretation of the 2010-2012 collective bargaining agreement."

Wayne County v. Michigan AFSCME Council 25, AFL-CIO
Michigan Ct. of Appeals ***2017 WL 359730***
January 24, 2017

On review from the Michigan Employment Relations Commission ("MERC"), the Union contended that the MERC wrongfully dismissed its unfair labor practice charge against Wayne County ("County") regarding its elimination of the thirteenth check. First, the union argued that MERC erred where it concluded that the "parties had a bona fide dispute" concerning the terms of the collective bargaining agreement ("CBA") and that the County did not point to a specific provision in the CBA that gave it the authority to modify the terms of the CBA. The court disagreed with the union and determined that because the CBA language was ambiguous and the CBA incorporated the Wayne County Retirement System's retirement ordinance, which was subsequently amended to eliminate the thirteenth check, the court upheld the County's actions.

FOIA/OPEN MEETINGS ACT

Cramer v. Village of Oakley
Michigan Ct. of Appeals ***316 Mich.App. 60***
June 23, 2016

The plaintiff sent the Village six separate Freedom of Information Act (FOIA) requests, each seeking information pertaining to defendant's reserve police department unit. Five days later, the Village sent plaintiff six letters stating that the FOIA requests were granted and that it would conduct a search of the Village records and would provide the plaintiff with a copy of any documentation it was able to locate. That same day, plaintiff's lawyer sent an email acknowledging receipt of the six letters, but stated that simply providing a written statement granting the requests was not sufficient to comply with the FOIA, and that the Village also needed to produce the requested documents by a certain date. Three days after the date which the plaintiff claimed the documents were due, he brought a lawsuit against the Village alleging it did not comply with FOIA's timeframe to produce the document request (i.e., 5 days after the request when it granted the request). The court concluded that the Village complied with FOIA when it granted the request

and that the law does not require delivery of the requested documents within the same time period specified for responding to the FOIA request. The court did not set a specific deadline for document production after a public body grants the FOIA request, but noted that FOIA allows a court to award punitive damages for arbitrary and capricious refusal or delay in disclosing public records.

Citizens for a Better Algonac Community Schools, et al. v. Algonac Community Schools
Michigan Ct. of Appeals ***317 Mich.App. 171***
September 8, 2016

The Algonac Board of Education (the "Board"), working on behalf of the Algonac Community Schools (the "School") began searching for a new school superintendent for the school. At a special meeting of the Board, there was a unanimous vote to offer the superintendent position to the superintendent of a neighboring school district and the Board resolved to begin negotiations as soon as possible. The Board did not discuss or vote on the substance of any contract at that meeting. Thereafter, the Board president and members exchanged a series of emails regarding contract negotiations and drafts of proposed contracts relative to the new superintendent's employment, working out contractual details and settling on a final contract. At a subsequent regular meeting, the Board unanimously, swiftly, and without discussion, approved the terms and conditions of the employment contract for the new superintendent. The plaintiffs sued claiming that the Board's email communications were in violation of the Open Meetings Act (OMA). However, the court noted that the OMA empowers courts to do three things: to invalidate a decision that was made in violation of the open meetings law; to hold a person or entity liable for a deliberate violation of the law; or to stop a person or entity from continuing to violate the law. Therefore, because the plaintiff did not ask for one of those three things, the lawsuit was dismissed. BOARD capitalized

Tousignant v. City of Iron River and Iron River Police Department
Michigan Ct. of Appeals ***2016 WL 6038347***
October 13, 2016

The City of Iron River received a Freedom of Information Act (FOIA) request to disclose certain policies and manuals of the Iron River Police Department. The City elected the 10-day extension to respond and subsequently rejected the request claiming that the polices and manuals were law enforcement investigative procedures or law enforcement operational instructions and exempt from FOIA. The City argued that the balancing test under FOIA to determine if disclosure should be ordered starts in favor nondisclosure and that the plaintiff has the burden to prove that the public interest of disclosure outweighs the government's nondisclosure. The court held that there is no presumption of exemption under FOIA's balancing test and that it is the public body's duty to prove an exemption applies. The court directed the lower court to perform the balancing test and did not rule regarding if the records were exempt, but that the burden was on the City to prove an exemption applies.

Speicher v. Columbia Township Board of Trustees
Michigan Ct. of Appeals ***2016 WL 6638611***
November 8, 2016

The Columbia Township Board of Trustees ("Board") appointed a Fire Chief Review Committee ("Committee") to facilitate the hiring of a new fire chief. The Committee interviewed candidates in closed meetings and then held three meetings, open to the public, regarding the hiring of the new chief. The trial court found that the closed Committee interviews violated the Open Meetings Act ("OMA"). However, the court held that the hiring decision was not invalidated because the Board held three open meetings regarding the hiring of a new fire chief before the decision was made. The court reversed the trial court's award of attorney's fees to plaintiff, holding that the mere finding that a defendant violated the OMA, without more, is not sufficient to find that a plaintiff succeeded in "obtaining relief" in an OMA action. The OMA provides that "court costs and actual attorney fees . . . may only be awarded when a plaintiff

seeks and obtains injunctive relief." Therefore, on appeal (for the second time in this case), the court denied that the plaintiff was entitled to costs and actual attorney costs in his underlying OMA action because the court awarded declaratory relief and not injunctive relief.

OTHER CONSTITUTIONAL ISSUES

Phillips, et al. v. Snyder, et al.
United States Court of Appeals for the Sixth Circuit ***836 F.3d 707***
September 12, 2016

The plaintiffs in this case were the voters and elected officials from Detroit, Pontiac, Benton Harbor, Flint, and Redford Township. They alleged that Public Act 436 ("PA 436"), also known as the Emergency Manager Law, violates their right to elect legislative officials. Under PA 436, local government officials are replaced with temporary, non-elected officials until the applicable financial emergency is no longer present. The court agreed that the plaintiffs had standing to bring the suit, as they lived in the district in which emergency managers are in place (or were in place at the start of the litigation). However, the court disagreed that there is a fundamental right to have local legislative officials elected. The court concluded that PA 436 focuses on financial emergencies and the financial health of the citizenry of those localities, which is a legitimate governmental interest and passes the rational basis test. In addition, the court dismissed plaintiffs' First Amendment claims as "nothing in PA 436 abridges plaintiffs' rights to freedom of speech and to freedom of association. A removal or modification of government power can hardly be equated to a restriction on speech." Consequently, the court affirmed the lower court's dismissal of plaintiffs' complaint.

In re City of Detroit, Michigan
United States Court of Appeals for the Sixth Circuit ***838 F.3d 792***
November 17, 2016

Participants of the General Retirement System of Detroit ("Retirement System") sued the Retirement System based on the proceedings of the City of Detroit's Chapter 9 bankruptcy. The participants claimed that the bankruptcy plan reduced their pension benefits and that they wanted the benefits in place that were promised to them before the bankruptcy plan was approved. The court determined that the participants' claims were equitably moot, which is a "doctrine that protects the need for finality in bankruptcy proceedings and allows third parties to rely on that finality by prevent[ing] a court from unscrambling complex bankruptcy reorganizations when the appealing party should have acted before the plan became extremely difficult to retract." Therefore, the participants' claims were dismissed. On April 14, 2017, the participants of the Retirement System filed a request for review by the Supreme Court of the United States and the City of Detroit must respond to the request by May 5, 2017. The Supreme Court will likely determine if it will hear the case this summer.