

**VANOVERBEKE
MICHAUD &
TIMMONY, P.C.**

ATTORNEYS AND COUNSELORS

MICHAEL J. VANOVERBEKE
THOMAS C. MICHAUD
JACK TIMMONY
FRANCIS E. JUDD
AARON L. CASTLE
ROBERT J. ABB

79 ALFRED STREET
DETROIT, MICHIGAN 48201
TEL: (313) 578-1200
FAX: (313) 578-1201
WWW.VMTLAW.COM

M A P E R S

RECENT LEGAL ISSUES AND DECISIONS

SPRING 2014 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

Costella v. Taylor Police and Fire Retirement System

Michigan Supreme Court – Decided Feb. 5, 2014

Michigan Ct. of Appeals – Decided Aug. 27, 2013

495 Mich. 939

2013 Mich. App. WL 4525894

The former Fire Chief challenged the Retirement Board's refusal to include severance pay in its calculation of his Final Average Compensation ("FAC"). The Michigan Court of Appeals determined that the Fire Chief's Personal Services Contract was ambiguous because it was silent with respect to the inclusion of severance in FAC and held that the parties intended for the severance payment to be included in his FAC. The Michigan Supreme Court summarily reversed the Court of Appeals and reinstated the trial Court's order, holding that the Retirement Board's decision was supported by competent material and substantial evidence, and dismissed the case.

Whitsitt v. Public School Employee Retirement System

Michigan Ct. of Appeals – Decided July 25, 2013

2013 Mich. App. WL 3836003

Plaintiff worked for Saline Area Schools for 30 years and retired, effective August 1, 2007. She later accepted an offer to teach part-time and began work again for Saline Area Schools on August 27, 2007. Two years later, the Public School Employee Retirement System's Office of Retirement Services determined that the Plaintiff returned to work less than 30 days after her effective date of retirement from Saline Area Schools and ordered her to repay a year's worth of retirement benefits. The Court of Appeals agreed that the petitioner returned to work too early, but held that the remedy imposed by the Retirement System, charging petitioner a year's worth of benefits for improperly working a total of four half-days, was arbitrary and capricious. Instead, the Court held that the petitioner need only repay the salary received for the four days she should not have worked.

Michigan Coalition of State Employee Unions v. State of Michigan
Michigan Ct. of Appeals – Decided Aug. 13, 2013

302 Mich. App. 187

State employees' unions brought an action against the State, challenging the constitutionality of statutory amendments to the State Employees' Retirement Act, MCL 38.1 *et seq.* (Public Act 264 of 2011) which required employees hired before April 1, 1997, who had maintained membership in the state defined benefit pension plan, to choose either to contribute 4% of their income to that plan or switch to the 401(k) defined contribution plan. The Unions also challenged the change in the way overtime was applied to the calculation of Final Average Compensation ("FAC"). The Michigan Court of Appeals held that those challenged portions of Public Act 264 of 2011 were unconstitutional because they violated Article 11, Section 5 of the Michigan Constitution which governs the State Civil Service Commission. Specifically, the Court held that the statutory amendments changing the nature of state employees' contribution-free retirement plan constituted a change in "rate of compensation" or a "condition of employment" without the approval or consent of the State Civil Service Commission, thus violating the civil service amendment to the State Constitution. The Court further held that the statutory amendment changing the treatment of overtime pay in calculating FAC also invaded the authority of the Commission in violation of the State Constitution's civil service amendment.

Macomb County v. AFSCME Council 25 Locals 411 and 893
Michigan Supreme Court – Decided June 12, 2013

494 Mich. 65

The Macomb County Employees Retirement Commission adopted an actuarial table used to calculate joint and survivor retirement benefits for employees retiring after July 1, 2007. In response, union representatives filed unfair labor practice complaints with the Michigan Employment Relations Commission ("MERC"), arguing that the Retirement Commission's 24-year past practice of using the same actuarial table to calculate benefits created a term or condition of employment. The hearing referee recommended that MERC dismiss the unfair labor practice charges, finding that the underlying collective bargaining agreements ("CBAs") contained extensive provisions covering pension benefits and the parties were "satisfied, and agreed, to have these benefits calculated as provided in the ordinance." The hearing referee thus concluded that the respondents had already fulfilled their statutory duty to bargain over the Retirement Commission's actuarial assumptions. MERC rejected the hearing referee's proposed decision, finding that the actuarial assumptions at issue were never memorialized in the Retirement Ordinance or any of the CBAs and that the parties "tacitly agreed that joint and survivor benefits would continue to be calculated as they had been in the past." The MERC decision was upheld by the Court of Appeals but reversed by the Michigan Supreme Court which held that the unambiguous language in a CBA dictates the parties' rights and obligations even in the face of a conflicting past practice, and that this past practice was not so widely acknowledged and mutually accepted that it could create an amendment to the contract. The Supreme Court opined that the party seeking to overcome an unambiguous CBA provision must present evidence establishing the parties' affirmative intent to revise the CBA and establish new terms and conditions of employment. Finally, the Supreme Court held that the grievance process contemplated in the CBA was the appropriate avenue to challenge the Retirement Commission's actions.

RETIREE HEALTH CARE

Tackett v. M&G Polymers USA, LLC
6th Circuit U.S. Ct. of Appeals – Decided Aug. 12, 2013

733 F.3d 589

The U.S. Court of Appeals held that the collective bargaining agreement language that provided for "full Company contributions" towards the cost of retiree health care benefits indicated a vested right to free, lifetime retiree health care benefits. The Court further held that subsequent concessions by the Union for active employees did not apply to retirees without prior consent.

Trzil v. Village of Chesaning

Michigan Ct. of Appeals – Decided Nov. 26, 2013

2013 Mich. App. WL 6182645

Retirees brought this action against their former employer, the Village of Chesaning, claiming breach of contract and promissory estoppel because of changes to the retiree health coverage. A memorandum of understanding provided retirees with a specific Blue Cross Blue Shield plan “or its substantial equivalent” until Medicare coverage began. The employer changed health plans and retirees sought a preliminary injunction to prevent the change. However, the Michigan Court of Appeals held that a plan with higher co-pays and deductibles did not amount to irreparable harm and denied the request for an injunction, reasoning that monetary damages would be available at trial to compensate for any economic losses suffered by the retirees. The matter was returned to the trial court for further proceedings.

Hardaway v. Wayne County

Michigan Supreme Court – Decided July 26, 2013

494 Mich. 423

A former appointed employee of the County sought lifetime retiree health care benefits pursuant to a resolution of the County Commission which provided for retiree health care benefits to appointees who were confirmed by the County Commission. The County denied benefits because the individual’s appointment was never confirmed by the County Commission. However, the Court of Appeals determined that the individual was entitled to benefits because the resolution was ambiguous and the County’s interpretation was inconsistent with rules of statutory construction. Accordingly, the Court concluded that retiree health care benefits were available to all appointees. The Michigan Supreme Court reversed the Court of Appeals and granted summary disposition in favor of Wayne County. The Supreme Court held that the language in Resolution No. 94-903, adopted by the Wayne County Commission in 1994, was unambiguous and extended additional insurance and healthcare benefits only to appointees who were confirmed by the county commission and not members of a board of commissioners.

AFT Michigan, et al. v. State of Michigan

Michigan Ct. of Appeals – Decided Jan. 14, 2014

303 Mich. App. 651

The American Federation of Teachers and its membership originally challenged the constitutionality of an amendment to the Public School Employees Retirement Act (“PSERA”) which required that public school districts withhold 3% of each employee’s wages as “employer contributions” to the retirement system’s trust that provides retiree health care benefits. In a prior case, *AFT Michigan v State*, 297 Mich App 597 (2012), the Michigan Court of Appeals concluded that the statute violated federal and state constitutional protections against the impairment of contracts by the state because the statute required school employees be paid 3% less than the amount they and their employers freely negotiated in contracts. The prohibition against the taking of private property was also violated because the statute directs that unique and definable monies be confiscated by governmental employers for the payment of statutorily mandated employer contributions to a state trust fund. Finally, the Court held that the statute violated the employees’ due process rights by requiring current employees to fund health care benefits to current retirees without any vested right themselves to receipt of healthcare benefits upon their own retirement.

Following the Court of Appeals’ decision, the State amended PSERA so the retiree health care contributions at issue would be *voluntary*, and also lowered health and pension benefit levels prospectively. A number of employee groups challenged the law on the basis of the 2012 Court of Appeals opinion (cited above) regarding the *mandatory* contribution. This time, the Court of Appeals ruled in favor of the State, finding that health care benefits are not constitutionally protected retirement benefits under Article IX, § 24 of the Michigan Constitution. It also ruled that future accruals of retirement benefits were not diminished as increased contributions to keep the current benefit was not an impairment. As members had the choice to keep the current benefit and pay more or to keep the current contribution and accrue less, Article IX, § 24 of the Michigan Constitution was not violated.

Welch v. Brown

6th Circuit U.S. Ct. of Appeals – Decided Jan 3, 2014

2013 Mich. App. WL 25641

Retired municipal workers brought an action against Flint’s Emergency Manager’s (“EM”) unilateral modification to their collectively bargained lifetime health care benefits. The U.S. Court of Appeals affirmed the District Court’s grant of a preliminary injunction against the EM, finding that the alteration of their lifetime health insurance benefits violated the Contract Clause and Due Process clause of the U.S. Constitution. The Court further held that the modifications constituted a substantial impairment because they required retirees to pay significantly increased amounts for health insurance and such action was not reasonably necessary for the City to avoid bankruptcy or balance the budget.

COLLECTIVE BARGAINING

AFSCME Council 25 Local 1103.14 v. Charter Township of Harrison

Michigan Ct. of Appeals – Decided Jan. 16, 2014

2014 Mich. App. WL 198804

The Harrison Township Retirement Board adopted a policy for the calculation of pension service credit which addressed breaks in Township service. Plaintiffs filed grievances on behalf of several employees who were negatively affected by the policy. Pursuant to the language of the collective bargaining agreements, the Township was required to respond to the grievances, in writing, within 10 days, and failure to do so would cause the grievances to be automatically decided in Plaintiff’s favor. The Township did not respond to the grievance within 10 days, but the arbitrators determined that the grievances were not arbitrable because the underlying challenged actions were done by the Retirement Board and not the Township itself. The Michigan Court of Appeals reversed the arbitrators’ decision, holding that the “calculation of retirement benefits is a mandatory subject of collective bargaining” and that the grievance procedure was appropriate. The Court ordered that because of the default provision in the collective bargaining agreement, the Township’s failing to respond to the grievances within 10 days required the grievance to be decided in Plaintiff’s favor.

FOIA/OPEN MEETINGS ACT

Moran v. Risser

Michigan Ct. of Appeals – Decided Dec. 19, 2013

2013 Mich. App. WL 6693198

The former executive director of the Manistee-Benzie Community Mental Health Board (“MBCMH”) claimed that private discussions by members of the MBCMH regarding his termination violated the Open Meetings Act (“OMA”). The Michigan Court of Appeals found that there were deliberations and discussions about the plaintiff and his possible termination by members of the Board, but held that those deliberations did not involve a constructive quorum and without a quorum, there was no violation of the OMA.

Bellfy v. City of East Lansing

Michigan Ct. of Appeals – Decided June 18, 2013

2013 Mich. App. WL 3024851

Prior to a meeting of the East Lansing City Council, the city attorney advised the Mayor that the Council could not convene a closed session to consider the Plaintiff’s ethics allegations against the city attorney. The Mayor subsequently relayed the city attorney’s advice to other members of the Council. Plaintiff sued, claiming that the communications prior to the Council meeting violated the Open Meetings Act (“OMA”). The Michigan Court of Appeals found that the city attorney’s advice to the Mayor and subsequent discussions prior to the meeting were not evidence that the Council deliberated privately in violation of the OMA. The City was entitled to dismissal and sanctions against plaintiff and his attorney.

Trudel v. City of Allen Park

Michigan Ct. of Appeals – Decided Nov. 14, 2013

2013 Mich. App. WL 6037152

The Michigan Court of Appeals held that the Retirement Board’s late response to the Plaintiff’s FOIA request was sufficient to render Plaintiff’s lawsuit moot. Once the Retirement Board had submitted the documents requested, the substance of the controversy was resolved and the case was moot.

Lawrence v. City of Troy

Michigan Ct. of Appeals – Decided Jan 30, 2014

2013 Mich. App. WL 354704

The Michigan Court of Appeals held that the maximum amount of punitive damages available under the Freedom of Information Act is \$500 per *requester*, not per record requested.

Caffey v. Gladwin Community Schools

Michigan Ct. of Appeals – Decided Dec. 26, 2013

2013 Mich. App. WL 6921541

Gladwin Community Schools provided its superintendent with a cell phone for school business, allowing personal use of the phone subject to review by the school board. Plaintiff submitted a Freedom of Information Act (“FOIA”) request for the phone records. The Michigan Court of Appeals held that because the school board did not possess the records or use them in the course of official business, they were not “public records” as defined under MCL 15.232(e) and, accordingly, the school board was not obligated to provide them to Plaintiff. The school board obtained some of the cell phone records before responding to the FOIA request, at which point they became public records, and were provided to plaintiff in a redacted form. The Court held that the telephone numbers were properly redacted because their disclosure would have constituted a clearly unwarranted invasion of privacy.

Speicher v. Columbia Township Board of Trustees

Michigan Ct. of Appeals – Decided Feb. 25, 2014

2014 Mich. App. WL 783833

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 open meetings provided ample opportunity for the public to voice any concerns. The Court of Appeals agreed that the hiring decision should not be invalidated, but reversed the trial Court and awarded attorney’s fees to Plaintiff, holding that the mere finding that a defendant violated the OMA, without more, is sufficient to find that a plaintiff succeeded in “obtaining relief” in an OMA action.

DISABILITY

Trudel v. City of Allen Park

Michigan Ct. of Appeals – Decided Nov. 14, 2013

2013 Mich. App. WL 6037152

Plaintiff, a former district Court judge, was granted a disability pension from the State of Michigan Judges Retirement System, which does not differentiate between duty and non-duty disability. Plaintiff subsequently sought a duty disability retirement from the Allen Park Retirement System and was denied. The Michigan Court of Appeals held that the fact that the Plaintiff was granted a disability pension by the State Retirement System failed to establish that he was entitled to a duty disability retirement from the Allen Park Retirement System. The Court further opined that a finding by other entities that Plaintiff was totally and permanently disabled fails to establish that his injury, illness, or disease resulted from the performance of his judicial duties. The matter was returned to the trial court for further proceedings.

Flanagan v. Macomb County Employees Retirement System
Macomb County Circuit Court – Decided October 25, 2013

Case No. 2010-3943-CK

A disability retiree subject to periodic re-examination, was determined capable of resuming her employment with the County. The individual refused the County's offer of re-employment and commenced a lawsuit against the Retirement System alleging breach of contract and constitutional violations. The trial court refused to dismiss the case and the Retirement System appealed. The Court of Appeals concluded that the trial court failed to apply the proper standard of review because the Retirement System is a quasi-judicial agency entitled to judicial review of its decisions under the substantial evidence test. The Court returned the matter to the trial court for proceedings as a complaint for superintending control and judicial review under the substantial evidence test. The trial court subsequently found that the Retirement System's decision was supported by competent, material, and substantial evidence on the whole record and was not arbitrary or capricious and summarily dismissed the case.

Town v. Genesee County Employees' Retirement System
U.S. District Court – Decided Mar. 31, 2014

2014 Mich. App. WL 1319690

Plaintiff applied for non-duty disability benefits, claiming that she was totally and permanently incapacitated for duty. The Retirement System's Medical Director examined Plaintiff and determined that she was not disabled and was capable of resuming her employment with the County. Plaintiff then requested to be re-examined multiple times for multiple reasons, including alleging a second claimed disability. After additional medical examinations and medical opinions, the Retirement Board reaffirmed its denial of Plaintiff's disability retirement benefits. The U.S. District Court found that the Retirement System's decision was supported by competent, material, and substantial evidence on the whole record and was not arbitrary or capricious and summarily dismissed the case. Plaintiff's appeal is pending before the 6th Circuit Court of Appeals.

DOMESTIC RELATIONS

Caudry v. Caudry
Michigan Ct. of Appeals – Decided Jan. 30, 2014

2014 Mich. App. WL 354653

A Plan Participant and his former spouse divorced in 2001 and the judgment of divorce contained a provision awarding the former spouse a 50% share of the Participant's pension upon his retirement from the Adrian Public School System. Shortly after the parties remarried in 2004, the Participant retired and received a \$52,000 early retirement buyout. At trial for their second divorce in 2011, the former spouse claimed that the entire \$52,000 buyout was an extension of the marital property from the first marriage. However, the Michigan Court of Appeals disagreed, noting that only the portion of the pension that actually accrued during the marriage must be considered part of the marital estate. The Court held that the early retirement buyout accrued during 29 years he worked for the School System prior to the second marriage. The portion of the Participant's pension that accrued during the first marriage but before the second marriage constituted a separate asset that was not part of the second marital estate. Accordingly, the Court held that the accrual of the Participant's pension during the first marriage was already adjudicated and that the early retirement buyout should not be treated as an extension of marital property from the first marriage.

Presley v. Kirk

Michigan Ct. of Appeals – Decided Mar. 11, 2014

2014 Mich. App. WL 953606

A Plan Participant and his former spouse divorced in 1994 and the judgment of divorce awarded his former spouse 50% of his retirement benefit. The parties subsequently submitted a Qualified Domestic Relations Order (“QDRO”) that nominated the former spouse as the Participant’s surviving spouse. The Participant subsequently remarried and identified his widow as his spouse when he applied to start receiving retirement benefits. Following the Participant’s death, his widow’s application for surviving spouse benefits was denied because his former spouse was already receiving benefits in accordance with the QDRO. The trial Court granted the widow’s motion to amend the QDRO to eliminate the former spouse’s right to receive survivorship benefits because the original judgment of divorce did not nominate the former spouse as the surviving spouse. The Michigan Court of Appeals reversed the trial Court’s order because the parties were free to modify a judgment of divorce by mutual consent with a subsequently entered QDRO and the QDRO contained language indicating its incorporation into the judgment of divorce. The Appellate Court held that the entry of the QDRO, which included survivorship benefits, was valid and ordered that the original QDRO be reinstated. The matter was returned to the trial court for further proceedings.

THE FOREGOING SUMMARIES ARE PRESENTED FOR GENERAL INFORMATION PURPOSES ONLY AND ARE NOT TO BE CONSIDERED LEGAL ADVICE. PLEASE REFER TO THE TEXT OF THE FULL OPINION OR CONTACT VANOVERBEKE, MICHAUD & TIMMONY, P.C., AT THE ABOVE ADDRESS IF YOU HAVE ANY QUESTIONS OR COMMENTS CONCERNING THIS MATERIAL.