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# M A P E R S

# RECENT LEGAL ISSUES AND DECISIONS

## SPRING 2015 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

**Irla v. Public School Employees Retirement System**
***Michigan Ct. of Appeals – Decided December 23, 2014*** *2014 WL 7338900*

A retiree worked for a school as a psychologist for 30 years, retired in 2010 and was later re-hired to work as a psychologist in several schools in the same school district over the next 2 years. However, before he had retired, Governor Snyder signed 2010 PA 75, which took immediate effect and amended the Public School Employees Retirement Act. Under the statute, a retiree will forfeit his or her retirement allowance and health care benefit during any period that he or she performs core services for a reporting unit through a third-party or as an independent contractor. Pursuant to the statute, the Retirement System demanded that the retiree repay the pension and insurance payments paid to him while he was working in the school district.

The retiree sued the Retirement System, arguing that the Legislature did not have the authority to enact the forfeiture provision of the statute because it impaired or diminished his accrued pension benefit in violation of Art. IX, Sec. 24 of the Michigan Constitution. The trial court ruled in favor of the Retirement System and the retiree appealed to the Michigan Court of Appeals. Although the Court of Appeals agreed that the application of the forfeiture provision in this case was "draconian" (because the retiree was forced to forfeit more than $34,000 in benefits for supplementing his income by $5,000), the Court agreed with the trial court and held that the statute did not violate the Michigan Constitution.

Specifically, the Court found that the State "may impose conditions on the receipt of benefits so long as the conditions are not 'unreasonable' or 'subversive of the constitutional protection'" and that the forfeiture provision does not unreasonably diminish or impair retiree's accrued pension benefits. The Court noted that nothing in the statute prevented the retiree from retiring or obtaining his full benefit - the statute simply did not allow him to *both* collect his retirement benefit *and* continue to work for the public school system, albeit indirectly.

**Rhoades v. Bd. of Trustees of the General Retirement System of the City of Detroit**
***Michigan Ct. of Appeals – Decided December 23, 2014*** *2014 WL 2753674*

After retiring from the City in 2006, a retiree began receiving a pension, and was then re-employed by the City in 2009-10. The Retirement Ordinance contained provisions that would not allow a retired former employee to continue receiving pension benefits while re-employed by the City. The Board erroneously continued to pay the retiree's pension benefits while he was re-employed. Once the Board discovered its error, the Board, pursuant to the City Ordinance, stopped payments and recouped the pension payments paid in error. The retiree sued, arguing that the applicable City Ordinance provisions were unconstitutional and that the Board had violated his right to substantive due process. The trial court ruled in favor of the Board, finding that the retiree's benefits were only suspended during his re-employment, not taken away, diminished or impaired. The Court of Appeals agreed with the trial court and dismissed the case.

**Wayne County Employees' Retirement System v. Wayne County**
***Michigan Supreme Court – Decided December 18, 2014*** *497 Mich 36*

This case involved the enactment of an ordinance which placed a cap on assets and distribution limitations from the Wayne County Employees' Retirement System's ("WCERS") Inflation Equity Fund ("IEF"), a reserve account for the payment of 13th checks to retirees. The ordinance also required that the assets held in the IEF in excess of the new cap be credited to the defined benefit plan assets, effectively reducing the County's annual required contribution thereto. WCERS challenged the constitutionality of the ordinance under Article IX, Section 24 of the Michigan Constitution, and the Public Employee Retirement System Investment Act, Public Act 314 of 1965, as amended ("Act 314"). The Court of Appeals held that the County's enactment of the challenged ordinance violated the exclusive benefit rule of Act 314, and stated:

> There can be no dispute that, before the 2010 ordinance went into effect, the IEF assets were held and used for the exclusive benefit of participants and their beneficiaries. With the enactment of the 2010 ordinance, the "excess" IEF assets in the amount of $32 million, as created by the newly-imposed $12 million IEF cap on a preexisting $44 million IEF balance, absolutely had to retain their status as assets "for the exclusive benefit of the participants and their beneficiaries" to comply with [Act 314]. We find, however, that as a result of the 2010 ordinance, the County obtained the authority to use the excess IEF assets advantageously and for its own financial good and benefit. . . . Accordingly, it cannot be said that the assets of the system were held or used "for the *exclusive* benefit of the participants and their beneficiaries."

Additionally, the Court of Appeals found that the challenged ordinance violated Act 314's prohibited transaction rule, concluding:

> We conclude that, in violation of [Act 314], the 2010 ordinance effectively forced the Retirement Commission to knowingly cause the Retirement System to engage in a transaction that directly or indirectly permitted or authorized the County to use or benefit from the use of assets in the IEF absent any consideration. Stated otherwise, the 2010 ordinance required the Retirement Commission to breach a fiduciary duty, engaging the Retirement System in a prohibited transaction.

It is noted that although the Court of Appeals determined it unnecessary to address the constitutionality of the challenged ordinance under Article IX, Section 24 of the Michigan Constitution, the opinion did acknowledge as follows:

> The IEF, in and of itself, can be accurately characterized as a vested reserve belonging and in relationship to the Retirement System's participants as a whole, outside the reach of [the County], to be used to assist retirees and survivor beneficiaries in fighting the devaluing of the dollar by inflation.
>
> Indeed, from a broad perspective, taking into consideration not individual retirees or survivor beneficiaries but all of them together as a group, the 13th check program itself could arguably be viewed as an accrued financial benefit for purposes of the first clause contained in Const 1963, art 9, § 24, which benefit was diminished and impaired by the transfer of $32 million out of the IEF.

In accordance with the foregoing conclusions, the Court of Appeals invalidated the specific provisions of the challenged ordinance which were applied retroactively and resulted in the transfer/reallocation of $32 million of IEF assets, the $32 million offset to the County's annual required contribution, the amortization caps, and the annual required contribution formula. The remaining provisions of the ordinance were prospectively upheld, including the provisions regarding the IEF funding and disbursement caps. Wayne County appealed the ruling to the Michigan Supreme Court.

In a unanimous opinion, the Michigan Supreme Court upheld the portions of the Court of Appeals opinion holding the transfer of $32 million from the IEF to the Retirement System's Defined Benefit Plans and corresponding offset against the County's ARC obligation in this case violated Act 314 and the transferred funds must be returned to the IEF. The Supreme Court also agreed that the remaining provisions of the ordinance were prospectively upheld, including the provisions regarding the IEF funding and disbursement caps. The Court vacated the portions of the Court of Appeals opinion discussing the constitutional implications of the amended ordinance in relation to Art. IX, Sec. 24 of the Michigan Constitution because the case was decided applying Act 314, making it unnecessary to consider any potential constitutional implications. The Court left open the question of whether the transfer of IEF funds, even without a corresponding offset to the County's ARC, would violate Act 314, stating:

> In keeping with our decision to leave open the question whether the mere transfer of retirement assets without a corresponding offset to a plan sponsor's ARC violated [Act 314], nothing in our decision to affirm the Court of Appeals remedy in this case should be read as necessarily allowing or precluding any municipality, including the county, from enacting an ordinance that directs the intrasystem movement of assets. As stated within, we decline to determine whether, or under what conditions, such a transfer is permissible under [Act 314].

## RETIREE HEALTH CARE

**Nightingale v. Township of Shelby**
***Michigan Ct. of Appeals – Decided May 27, 2014*** *2014 WL 2218978*

Two retirees each remarried after retirement from the Shelby Township Fire Department and sought healthcare benefits for their spouses. The Township argued that only the spouses of the retirees at the time of retirement were eligible for healthcare coverage. The trial court ruled in favor of the Township, finding that the definition of spouse found within the Fire Fighters and Police Officers Retirement Act ("Act 345") controls over the definition of spouse in the collective bargaining agreement ("CBA") (in Act 345, under this subsection, healthcare benefits were limited to the spouse of the retiree at the time of retirement). The Michigan Court of Appeals determined that a mere general reference to Act 345 in the CBA, without explicit language adopting Act 345's definition of spouse, was not enough to import that definition into a CBA. Consequently, the Court of Appeals ruled in favor of the retirees.

**AFT Michigan, et al. v. State of Michigan**
***Michigan Supreme Court– Decided April 8, 2015*** *2015 WL 1578785*

The American Federation of Teachers and its membership ("AFT Michigan") 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 either 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. AFT Michigan appealed.

The Michigan Supreme reviewed the case and held that, as amended, PSERA does not violate the Takings Clauses, Contracts Clauses, or the Due Process Clauses of the Michigan and US Constitutions. Public school employees may opt out of the retiree healthcare program and avoid making the salary contributions, thus, there is no compensable taking when the employee voluntarily relinquishes property to the government. The Court further held that the contributions were voluntary and not the product of "coercion by an unconstitutional condition" and that there can be no impairment of a contract when the complaining party "can freely avoid the alleged impairment altogether." Here, the public school employees can simply opt out of the program and choose not to participate. Finally, because AFT Michigan did not allege that the amendments to PSERA violated any fundamental rights, the Court was able to conclude that the law was reasonably related to a legitimate government purpose (i.e. the State may reasonably request that public school employees assist in funding a retiree healthcare benefit system to which they belong to ensure a fiscally responsible system).

**City of Wyandotte v. Police Officers Association of Michigan**
***Michigan Ct. of Appeals – Decided January 13, 2015*** *2015 WL 160282*

In 2011, the City elected to implement the 80% cap on healthcare benefit costs allowed under amendments to the Publicly Funded Health Insurance Contribution Act (PFHICA). In 2012, the collective bargaining agreement ("CBA") between the Union and the City expired, and a successor agreement was not reached. Accordingly, the City began charging employees 20% of the monthly health care premium payments pursuant to the PFHICA amendment, and 100% of healthcare cost increases pursuant to the Public Employment Relations Act ("PERA") amendment. The Union challenged the City's actions and the dispute went to arbitration. An arbitrator determined that the City could not impose 100% of healthcare cost increases and 20% of monthly premium payments, as the statutes must be read together. The City sued the Union and the trial court vacated the arbitrator's decision.

The Union appealed the trial court's decision to the Michigan Court of Appeals, which determined the arbitrator did not exceed his authority. The Court agreed that the City's arrangement to charge employees 100% of healthcare cost increases plus the 20% of premiums would violate PERA. Under PERA, the increase in healthcare costs must not cause the total amount of healthcare costs to employees to exceed the employee's share under PFHICA. Consequently, the City could not charge Defendant 100% of cost increases plus 20% of their healthcare costs, because it would be charging employees over 20% of their total healthcare costs in violation of PERA.

**Wayne County v. Michigan AFSCME Council 25**
***Michigan Ct. of Appeals – Decided October 9, 2014*** *2014 WL 5066057*

In this case, the County intended to discontinue payments for health insurance to future disability retirees, contending that its reservation of rights and "zipper" clauses permitted it to do so without any collective bargaining. The Michigan Employment Relations Commission ("MERC") determined that because the collective bargaining agreement ("CBA") was silent on disability retirees, the MERC had jurisdiction to settle any disputes, and thus found that the County breached its duty to bargain. However, the Michigan Court of Appeals stated that if the disputed issue is covered by the CBA, the MERC is not the appropriate avenue to address the issue, as the grievance and arbitration procedures within the CBA are controlling. The Michigan Court of Appeals noted that a CBA does not need to explicitly reference an issue to be considered a covered topic under the agreement. The Court found that the CBA did mention health care coverage requirements, which included disability retirees. Moreover, a CBA can be modified through past practice, if properly assented to by both parties. Therefore, the Court sent the case to arbitration, pursuant to the CBA, to determine if the parties created an established past practice based on a 30-year history of providing health coverage to disability retirees.

**Board of Trs. of the Pontiac Police & Fire Retiree Prefunded Health Ins. Trust v. City of Pontiac**
***Michigan Ct. of Appeals – Decided March 17, 2015*** *2014 WL 1214687*

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 issued by the City's Emergency Manager ("EM"), which purported to amend the trust to remove the City's annual obligation to contribute to the trust agreement "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 such action remains "valid and enforceable despite the subsequent repeal by referendum of the act." The question remained whether Executive Order 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 Executive Order 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.

## COLLECTIVE BARGAINING

**Board of Trs. of the Pontiac Police & Fire Retiree Prefunded Health Ins. Trust v. City of Pontiac**
***Michigan Ct. of Appeals – Decided March 17, 2015*** *2014 WL 1214714*

The City was responsible for making contributions to the Police and Fire Retirement System and the Police and Fire Retiree Prefunded Group Health and Insurance Plan (the "Trust"). The City's Emergency Manager ("EM") entered into collective bargaining agreements ("CBAs") with the police and firefighter unions that modified the nature and extent of police and firefighter retiree benefits. The EM later issued Executive Orders that further modified those benefits. The Board of Trustees of the Retirement System sued the City, challenging the actions of the EM. The City argued that under the doctrine of standing, the Board was not a proper party to assert the claims made in this case. The Court of Appeals agreed with the trial court that the Board had standing to enforce the terms of the trust agreement. Under the "terms of the trust agreement, the trustees have a right of action to compel payment of contributions that are specified in the agreement."

The remaining claims attempted to assert "the right of third parties, police and firefighter retirees. The retirees' rights to assert lifetime, unchanging healthcare benefits must, if they exist, be based in contract." As their "rights to healthcare benefits flow from the pertinent CBAs, they are governed by ordinary contract principles." The Board asserted "no damages to itself as the governing corporate entity of the trust as a result of modifications to the CBAs that affect retiree benefits." Rather, it tried to assert the retirees' rights. The Board was "neither a party to the CBAs, an assignee of a party to the contracts, or a third-party beneficiary of the CBAs." It was not vested with, nor did it own, "a cause of action with respect to the city's alleged breach of contract regarding retiree benefits provided in the pertinent CBAs. Just as trust beneficiaries may not enforce rights owned by the trust, the trust through its board of trustees may not enforce contract rights of the beneficiaries who are determined outside the terms of the trust." The Court of Appeals thus held that the Board was not the real party in interest and did not have standing to assert claims as to modifications of the CBAs affecting the nature and extent of police and firefighter retiree benefits.

## FOIA/OPEN MEETINGS ACT

**Citizens United Against Corrupt Government v. Troy City Council**
***Michigan Ct. of Appeals – Decided December 4, 2014*** *2014 WL 6852960*

A requester sued the City Council, arguing that the City Council violated the Open Meetings Act ("OMA") when it reviewed applications and selected finalists for City Manager in a closed session and later denied those meeting minutes to the requester. The trial court dismissed the case because it failed to establish an actual controversy and the Michigan Court of Appeals agreed. Under Michigan law, an actual controversy exists if plaintiff pleads and proves "facts that demonstrate an adverse interest necessitating the sharpening of the issues raised." Therefore, if the injury is merely hypothetical, an actual controversy does not exist.

In this case, the requester only requested to see the meeting minutes from the closed council meeting. The requester did not intend to protect any future rights or to challenge the City Council's decision to hire a new City Manager. Moreover, the Court stated that even if the case included an actual controversy, the case is moot: the requester only wanted to view the minutes of the closed session, not invalidate the City Manager's appointment, as permitted under the OMA. Consequently, the Court found that a mere declaration at this point that the City Council violated the OMA, without wanting to invalidate the decision from the violation, cannot have "practical legal effect" on the controversy.

**Ader v. Delta College Board of Trustees**
***Michigan Ct. of Appeals – Decided April 21, 2015*** *2015 WL 1814150*

The requester sued the Delta College Board of Trustees for alleged violations of the Open Meetings Act ("OMA"). At that time, there was pending litigation by a Trustee against the Board. The requester claimed that the Board improperly allowed a Trustee, who was suing the Board and his attorney into a closed meeting with the Board and its attorney to discuss the pending lawsuit, which violated the OMA. The Board argued that exception in the OMA that allows public bodies to consult with their attorneys regarding trial or settlement strategy in connection with specific, pending litigation applied. The trial court ruled in favor of the Board and found no violation of the OMA and that "future violations of the OMA by the Board were speculative." The Court of Appeals disagreed with the trial court and found that because the Board did not acknowledge its alleged violation of the OMA, it was "possible defendant would behave in the same manner in the future" and thus injunctive relief would have been appropriate to compel compliance with the OMA if the Board had violated the OMA. However, the Court of Appeals agreed with the trial court and concluded that preventing "a public body from meeting in a closed session with its attorney and opposing litigant in all circumstances would seriously limit the exception in a manner not prescribed by the legislature." Accordingly, the Court dismissed the requester's claim.

**Anklam v. Delta College**
***Michigan Ct. of Appeals – Decided June 26, 2014*** *2014 WL 2935950*

The requester filed a complaint against the College alleging that it violated the Freedom of Information Act ("FOIA") when it denied part of her request for information regarding the compensation and benefits of the College's president. The trial court ruled in favor of the College but the Michigan Court of Appeals disagreed and held: (1) the College's written notice denying part of plaintiff's request because it fell under the attorney-client privilege exception did not "describe or otherwise identify the information that was separated or deleted based on the attorney-client privilege" and thus failed to comply with the FOIA exception; and (2) the FOIA coordinator did not describe the substance of withheld emails or redacted information on the basis that the "withheld information reflected confidential communications made to counsel for the purpose of obtaining legal advice." The Court further held that although the disclosure of salary and benefits of the College's president would constitute information of a personal nature, it would not be an "unwarranted invasion of her privacy" because the public interest outweighed any invasion of privacy. The Court also found that College's partial denial was deficient because it informed the requester that she could appeal the decision to the president of the College, who was not the "head" of the college. Finally, the Court held that the requester did not have standing to argue that the College failed to establish and publish procedures and guidelines for charging fees under FOIA because the College waived the requester's FOIA fees and that question is "only relevant if fees have actually been imposed on the party."

**Amberg v. City of Dearborn**
***Michigan Supreme Court – Decided December 16, 2014*** *497 Mich 28*

The Michigan Supreme Court overruled the Court of Appeals and held that copies of video surveillance recordings created by third parties received by the City during the course of pending criminal misdemeanor proceedings constitute "public records" within the meaning of the Freedom of Information Act ("FOIA") and that their disclosure was required. The Court reaffirmed that a "public record" is defined as a "writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function" and that a "writing" is defined broadly to include "any means of records, including pictures and sounds or combinations thereof." The Court remanded the case for further proceedings to determine whether the requester is entitled to fees and costs, noting that disclosure of the records at issue does not render the requester's claim moot and that the requester could still "prevail" in the FOIA action if the court concludes that the action was "reasonably necessary to compel disclosure" and the action had a "substantial causative effect on the delivery of the information."

**Bitterman v. Village of Oakley**
***Michigan Ct. of Appeals – Decided January 22, 2015*** *2015 WL 278680*

The requester made three Freedom of Information Act ("FOIA") requests to the Village seeking: (1) records, documents, and information about Village police reservists from the previous three years, (2) a copy of an audio recording from a Village council meeting, and (3) a list containing the names, full addresses, and telephone numbers of every donor of the Village of Oakley Police Donation Fund for the previous five years. The Village denied the first two requests citing the civil litigation exemption under the FOIA, which was later supplemented with a letter to Plaintiff that her first request failed to sufficiently identify the information she sought and the tape for her second request had been destroyed before her request was made. The Village denied the requester's third FOIA request citing the privacy exemption under the FOIA. The requester claimed the three requests were wrongfully denied. At the trial court, the Village further argued the police reservist list was also subject to the privacy, investigative records, and law enforcement exemptions under FOIA.

The Court of Appeals disagreed with the trial court and held that the donor names are not exempt under the privacy exemption and must be disclosed because the public's interest in knowing the source of non-tax funds that support Village operations outweigh the risk of donor's being vulnerable to unwanted solicitors. The Court, however, did agree that the council meeting request was properly denied because the record did not exist at the time of the request. The requester's reservist request was remanded to the trial court to determine if the police reservists qualify as law enforcement officers under the law enforcement exemption in FOIA, as the court record was void of any facts regarding the reservist's powers and duties to determine the issue.

**Swiger v. City of Ludington**
***Michigan Ct. of Appeals – Decided January 15, 2015*** *2015 WL 205201*

News reporters for an online blog submitted numerous Freedom of Information Act ("FOIA") requests to the City. The City denied one such request as duplicative of prior FOIA requests by the reporters. Consequently, the reporters filed an action to compel the City to produce the documents in the request and for attorney fees and costs. However, while pending in the trial court, the City produced all documents related to the request and submitted a counterclaim for unpaid costs associated with producing the documents. The trial court ordered the reporters to pay the City the unpaid FOIA fees and denied costs. However, the Court of Appeals found, while attorney fees were properly denied because the reporters represented themselves, the reporters were the "prevailing parties" in a FOIA action and, therefore, were entitled to costs.

The trial court awarded the reporters actual costs for the motions they filed in the trial court but did not award them costs for their subsequent filings in the Court of Appeals. The reporters appealed the trial court's decision, arguing that it erred by denying the reasonable costs of their appeal. Under the FOIA, a party prevails and is entitled to reasonable costs and attorney fees if: (1) the action was reasonably necessary to compel disclosure, and (2) the action had the substantial causative effect on the delivery of information to the plaintiff. The Court of Appeals stated that the City complied with FOIA by providing the requested information to the reporters *before* first appeal commenced. Accordingly, the reporters were not the "prevailing parties" at the appellate level because their appeal was not "reasonably necessary" to compel the City to provided the requested information.

**Edwards v. Oakland Township**
***Michigan Ct. of Appeals – Decided March 19, 2015*** *2015 WL 1277009*

The requester submitted a Freedom of Information Act ("FOIA") request to the Township's FOIA coordinator requesting electronic copies of all electronic communications sent by or to members of the Board of Trustees that relate to the Board's November 20, 2012 meeting. In response, the Township

produced 8,918 pages of documents, charged the requester $2,229.50, and withheld 263 pages under the attorney-client privilege and another 117 pages under other exemptions, notably the "frank communications" exemption. Although the requester was provided additional documents after appealing the response to the Township Supervisor, he filed suit under the Open Meetings Act ("OMA") and FOIA claiming that: (1) exempt communications made by members of a subcommittee were "deliberations" and subject to the requirements of the OMA, and (2) the withheld material did not come within the "frank communication" exemption and should have been provided in electronic format to reduce the costs.

The trial court ruled in favor of the Township, finding: (1) the subcommittee was "merely advisory and only capable of making recommendations" and thus not a "legislative or governing body" and not subject to the OMA ,and (2) the "frank communications" exception was properly asserted because the withheld communications were of an "advisory nature" and that the Township "properly weighed the interests" of the public when making its determination. The trial court further found that the requester did not produce any evidence to contest the affidavit of the Township's FOIA coordinator that providing paper copies of the requested documents was "the most economical means" of responding to his FOIA request. The Court of Appeals agreed with the trial court and upheld the trial court's ruling.

## DISABILITY

**Pollock v. Chesterfield Township**
***Michigan Ct. of Appeals – Decided January October 30, 2014*** *2014 WL 5500397*

A retiree, while still working for the Township, sued the Township for gender discrimination and the two parties reached a settlement agreement in which the Township agreed not to impede her pending application for a duty disability retirement through the Michigan Employment Retirement System ("MERS"). Her application was approved but the Township denied her request to pay her a stipend for health and life insurance, which would have normally been provided. The trial court held that the settlement agreement was ambiguous with respect to whether the Township was responsible to pay any health or life insurance to the retiree. The trial court looked to extrinsic evidence to determine the parties' intent with respect to health or life insurance but found that the parties never discussed health or life insurance. Thus, the trial court concluded that the settlement agreement should be interpreted in favor of the retiree because the Township drafted the document. The Court of Appeals agreed and the Township was ordered to pay health and life insurance benefits to the retiree.

**D'Angelo v. Public School Employees Retirement Board**
***Michigan Ct. of Appeals – Decided January May 13, 2014*** *2014 WL 1921238*

A retiree worked as a custodian for Southfield Public Schools for 24 years. She fell from a ladder while on duty, injured her back and applied for disability retirement benefits. She did not return to work after her accident. During her absence, the custodian position was eliminated and she was reclassified as a paraprofessional/teacher's assistant. She never began working in that position. The Public School Employees Retirement Board ("Board") denied her application for disability retirement benefits, finding that she could perform some of the tasks of a paraprofessional. The retiree appealed the Board's decision to the trial court which found that she was totally and permanently disabled from her job as a custodian and that she should not have been evaluated as a paraprofessional, "something she never did." The Court of Appeals found that the Board's decision was supported by competent, material, and substantial evidence and reversed the trial court's ruling. The Court of Appeals noted that Plaintiff's position at the time she applied for disability retirement benefits was paraprofessional/teacher's assistant and the applicable statute did not "reference the employee's position at the time of injury or event that precipitated the disability."

**Arbuckle v. General Motors, LLC**
***Michigan Ct. of Appeals – Decided February 10, 2015*** *2015 WL 557999*

A retiree began working for General Motors ("GM") in 1969, was injured during the course of his employment in 1991, and began receiving a total and permanent disability pension in 1993. He was also awarded workers' compensation benefits at a fixed, weekly rate in 1995. Pursuant to the collective bargaining agreement and a 1990 Letter of Agreement in place when he was awarded his disability pension in 1993, which was negotiated between his union, the United Auto Workers ("UAW"), and his employer, GM, the retiree's workers' compensation benefits were not to be reduced by his disability benefits. In 2007, the UAW negotiated a new Letter of Agreement, applicable to employees retiring after the effective date of the 2007 agreement, which permitted GM to offset a retiree's disability and workers' compensation benefits. Then, in 2009, the UAW and GM agreed that the 2007 Letter of Agreement would apply to all former employees who retired before 2010, which included the retiree in this matter. The retiree's workers' compensation benefit was, therefore, reduced under the new agreement. He appealed the decision and eventually the Court of Appeals found that when GM tried to amend the terms of the retiree's benefit structure, as a retiree, he had no representation. The Court found no evidence that the retiree had authorized the UAW to act as his representative to modify the 1990 CBA under which he retired. The Court opined that it was "simply not tenable that a contract could be amended with respect to a particular party when that party had no representation during the amendment process" and held that GM had no authority to coordinate the retiree's workers' compensation benefit and disability pension benefit.

## DOMESTIC RELATIONS

**Ruff v. Ruff**
***Michigan Ct. of Appeals – Decided July 24, 2014*** *2014 WL 3704903*

The Participant retired and began receiving pension benefits when he was married to his first wife in 1989. The Participant and his first wife were divorced in 1993 and their divorce judgment provided that each party was "individually awarded his or her own interest that either party may have" in "any pension, annuity or retirement benefits. The divorce judgment was silent with respect to surviving spouse benefits. The Participant married his second wife in 1997 and executed a beneficiary election form awarding her "any death benefits" to which he was entitled. The form was otherwise silent with respect to surviving spouse benefits. The Participant passed away shortly thereafter and his second wife was denied surviving spouse benefits because she was not the spouse at the time of the Participant's retirement, as required by the Pension Fund provisions. The first wife was the Participant's spouse when he retired and she was awarded surviving spouse benefits. The second wife sued and the trial court agreed that the first wife had voluntarily and intentionally waived her right to surviving spouse benefits through the provisions of the judgment of divorce. The Court of Appeals disagreed, finding that the judgment of divorce "explicitly states that each party 'is awarded his or her own interest that either may have in *any*' pension benefit, including any 'contingent right' in unvested pension benefits." Accordingly, the Court of Appeals reversed the trial court, finding that the first wife was entitled to the surviving spouse benefits pursuant to the terms of the Pension Fund and that the language of the judgment of divorce did not establish a waiver.

**Wolf v. Mahar**
***Michigan Ct. of Appeals – Decided November 18, 2014*** *308 Mich App 120*

Each party was entitled to a pension and when they divorced, the parties agreed, in their respective Eligible Domestic Relations Order ("EDRO") and Qualified Domestic Relations Order ("QDRO"), to split both pensions so that each party would receive 50% of the marital portion of the other party's pension. Specifically, the alternate payee was "allowed to elect or begin receiving benefits at the participant's earliest retirement age" and the parties agreed to split any administrative or actuarial cost for reviewing and administering the EDRO/QDRO equally. Defendant elected to receive benefits as soon as Plaintiff was eligible (at age 60) even though Plaintiff had not yet retired and planned to continue working

until age 65. Plaintiff was informed that her share of her pension would be reduced by the State's policy known as recoupment to account for the alternate payee's early receipt of benefits. Plaintiff thus made a motion for relief from the divorce judgment and argued that the recoupment policy was contrary to the pension provisions in the EDRO, and asked the court to set aside the earliest retirement age provisions.

The trial court found that the unambiguous language in the EDRO allowed Defendant to begin receiving benefits early and did not accept the parties' stipulation that "the issue of recoupment was not known to the parties" because the information was easily accessible on the State's website. The Court of Appeals disagreed and held that the trial court should have accepted the parties' stipulation because they were not aware of recoupment at the time the consent judgment of divorce or EDRO was filed. The Court of Appeals went on to hold that a mutual mistake existed because the parties did not know about the recoupment policy but intended to "split equally" any costs of administering the EDRO. Accordingly, the Court remanded the case for reformation of the consent judgment and EDRO to account for the parties' mutual mistake, and order that the parties share the cost of recoupment equally.