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Municipal Law News

January 2012

LABOR CORNER

2011 LABOR LAW CHANGES IMPACT MUNICIPALITIES

- Michael R. Blum

The Michigan legislature was active in 2011, passing or amending several laws that will impact public sector labor relations. A summary of some of the significant changes follows.

Public Act No. 54 of 2011 Amendment to Public Employment Relations Act (PERA)

The principal statute governing public sector labor law is the Public Employment Relations Act (PERA). On June 8, 2011, PERA was amended by PA No. 54, which requires Michigan public employers to freeze unionized employee wages and benefits at their current levels upon expiration of a collective bargaining agreement (CBA) until a successor agreement is reached.

So new unionized employees whose CBA provides them with automatic increases in pay and benefits (vacation/sick/PTO) at specified times cannot receive the increases following expiration of the CBA until a new agreement is ratified. Additionally, public employees who receive health, dental, vision, prescription, or other insurance benefits under a CBA must bear any increased cost of maintaining these benefits after the agreement expires. Employers may also execute payroll deductions necessary to pay any increased costs of maintaining employee benefits.

PA No. 54 also prohibits parties to a CBA from agreeing to, or an arbitration panel from ordering, retroactive wage or benefit increases. Similarly, the parties may not circumvent this compensation freeze by agreeing to extend the expiration date of the CBA during negotiations.

Public Act No. 152 of 2011 Publicly Funded Health Insurance Contribution Act

For medical plan years beginning on or after January 1, 2012, public employers are prohibited from paying more of the annual costs or illustrative rate (and any payments for reimbursement of co-pays, deductibles, or payments into health savings accounts or similar accounts used for health care costs) than a total of $5,500 times the number of employees with single person coverage, $11,000 times the number of employees with individual and spouse coverage, plus $15,000 times the number of employees with family coverage. Allocation of payment for medical benefit plan costs among the employees and elected officials is solely within the discretion of the employer.

As an alternative to the hard cap requirements, a public employer may instead limit payment to no more than 80 percent of the total annual costs of the medical benefit plan it offers, with employees and elected officials paying 20 percent or more of the annual costs. Allocation of the employee share of the medical benefit plan costs is solely within the discretion of the employer, but elected public officials must pay 20% or more of the total costs of the plan in which they participate.

Unionized employees covered under a CBA may continue to receive benefits as provided for in the contract until it expires. However, any CBA or other contract executed on or after September 15, 2011 cannot include terms inconsistent with the hard cap or 80/20 provisions of PA No. 152.

Public employers who fail to comply with the requirements of PA No. 152 must permit the state treasurer to reduce each Economic Vitality Incentive Program payment (for cities, villages, and townships) by 10 percent, and the Department of Education will assess a penalty equal to 10 percent of each payment of any funds for which the public employer qualifies under the State School Aid Act, during any period of non-compliance.

Public Act No. 258 of 2011 Municipal Partnership Act

The Municipal Partnership Act authorizes two or more local governments, or one or more local governments and a public agency, to enter into a contract to form a joint endeavor that can exercise the functions of the local government or public agency. As to labor matters, PA 258 eliminates provisions that require labor agreements to be recognized, require employees to have the same seniority and benefits, or require members and ■►

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beneficiaries of pension systems or other benefits to have the same rights and benefits, following a transfer of personnel.

Also, the law prohibits bargaining over whether the local government will enter into a contract for a joint endeavor; the procedures for obtaining a contract for a joint endeavor; and the identities of the parties to such a contract. However, the contents or language of a joint endeavor contract is a permissive subject of bargaining. In addition, upon request, the local government must bargain over the effect of the joint venture on the employees.

Conclusion

These changes will significantly change the dynamic of labor negotiations, including limiting the potential financial exposure for public employers and limiting the topics of bargaining between unions and management. The new laws are certain to have an immediate effect on public sector collective bargaining.

If you have any questions about any of these changes, please contact Mike Blum.

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VERIZON SUES A MUNICIPALITY OVER ALLEGED UNREASONABLE DELAYS IN DECIDING CELL TOWER SUP REQUEST:

A Test Case For The FCC's "Shot Clock Order" For Municipalities To Decide Wireless Cellular Facilities Siting Applications

- Ronald D. Richards Jr.

Our April 2011 newsletter summarized the FCC's "Shot Clock" Order. That Order, among other things, set timelines for how long a municipality has to decide a request to locate wireless cellular facilities. For example, the FCC set out these new rules on the time a municipality has to resolve requests:

- A municipality must act on a wireless facility siting request for "personal wireless services" (1) within 90 days from submission of the request for collocations, and (2) 150 days from submission of the request for all other wireless facility siting applications.

- If the municipality fails to act within that relevant time frame, then a presumptive "failure to act" has occurred and wireless providers may seek relief in court within 30 days of the failure to act per the Federal Communications Act. However, the municipality will have the opportunity to rebut the presumption of reasonableness.

Recently, Verizon Wireless sued the Town of Irondequoit (New York) in federal court in Buffalo over alleged inaction and unreasonable delays in deciding a wireless facilities application. The case stems from these facts: In June 2010, Verizon applied for a special use permit to replace a 20-year old tower and equipment shelter with a new monopole shelter. Verizon's purpose was to resolve a gap in wireless coverage. Several neighbors opposed the application. Seven months after it filed its application, the Town filed a Positive Declaration – which triggers the need for an environmental impact assessment. A month later, in March 2011, Verizon sued. It alleges that the Town delayed it from providing service where a gap in coverage exists.

Verizon Wireless and the Town have asked the Court to grant judgment in each of their favor. A hearing was held December 8, 2011, but no order has issued yet. It will be interesting to see how this case unfolds. On the one hand, the FCC's Shot Clock Order was fairly clear in its deadlines and in its intent to spur broadband deployment by creating a more efficient tower siting and collocation review process. On the other hand, the Town has argued that Verizon "jumped the gun" by suing too soon.

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The Town notes that Verizon sued even before the environmental impact statement was finished and even before the Town issued a formal decision on its SUP (Special Use Permit) application. The timing of Verizon's suit is curious, also, given that the FCC Shot Clock Order sets a 30 day window for applicants to sue after a "failure to act;" and Verizon's complaint was filed about 273 days (rather than within 180 days) from the date of the application.

If you have any questions about the Verizon lawsuit summarized above, the FCC's Shot Clock Order, wireless service siting applications, or related municipal telecommunications issues, please call Ron Richards of Foster Swift's Municipal Department.

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FEDERAL COURT HEARS CABLE FRANCHISE DISPUTE BETWEEN COMCAST AND CITY OF DETROIT

- Laura J. Garlinghouse

Many municipalities in Michigan have recently received requests from their cable operators to start formal cable franchise renewal procedures under the Federal Cable Act, 47 USC § 521 et seq. Although federal law sets renewal procedures that provide for extensive local review of franchise agreements, Michigan law prohibits such local review. This conflict between federal and state cable franchise law has now reached federal court.

Background

The Federal Cable Act creates formal and informal procedures to review and renew cable franchises. The formal procedure requires a local evaluation of future cable needs and review of the cable operator's performance under the existing franchise, among other things, in accordance with a particular timeline. See 47 USC § 546. Both the formal and informal procedures allow local review of cable franchises.

In 2006, Michigan adopted the Uniform Video Services Local Franchise Act, Public Act 480 of 2006, MCL 484.3301 et seq. ("Act 480"). Act 480 creates a uniform, statewide cable franchise agreement and effectively eliminates municipal-level cable franchise negotiations. Importantly, Act 480 prohibits franchise renewals other than renewals of the uniform franchise. MCL 484.3305.

The Federal Cable Act and Act 480 are plainly contrary to one another. While the Federal Cable Act creates a detailed method for renewing franchises, Act 480 prohibits renewals of franchises that pre-date Act 480 altogether.

Federal Lawsuit

In 2010, the City of Detroit sued cable operator Comcast in the United States District Court for the Eastern District of Michigan. (Case No. 2:10-cv-12427.) The lawsuit centers on whether Act 480 is invalid either because it is preempted by the Federal Cable Act or because it violates the Michigan Constitution, which reserves franchise matters to local governmental units. On December 19, 2011, the court heard oral arguments regarding these legal issues. As of the date of this article, the court had not yet issued its ruling.

The court's decision will likely determine whether Act 480 is unenforceable to the extent that it prohibits franchise renewals. A decision is expected in early 2012. Until a decision is rendered, the state of the law remains uncertain.

Municipalities should consult with their legal counsel if they receive franchise renewal requests from cable operators to determine the best approach for the municipality and its residents.

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MUNICIPALITIES GIVEN GREATER FLEXIBILITY TO SHARE SERVICES

- Nichole J. Derks & Ronald D. Richards Jr.

Governor Snyder recently signed into law several new laws, 2011 PA 258 to 263, that aim to remove confusion some felt existed in the current inter-governmental agreement laws and streamline how municipalities can work together to share services. These laws were given immediate effect. They are designed to give municipal officials improved options when deciding how to spend their limited resources and in collaborating to provide desired services.

Some of the highlights of the new laws are below:

- Allowing two or more local governmental units, or one governmental unit and one public agency, to enter into a "joint endeavor" contract to perform any function either could exercise individually; and identifying the funding options available for those functions. 2011 PA 258.

- Explaining what a joint endeavor contract must include, such as the purpose of the joint endeavor; the duration of the contract; a description of the authority created; and designating or selecting officers. 2011 PA 258.

- Clarifying what a shared service contract may include, such as how revenues will be allocated, the protocol for making claims for federal or state aid payable to the authority; how proceeds of grants, gifts or bequests to the authority will be invested; and division of surplus revenue. 2011 PA 263.

- Lifting the former requirement that prior labor contracts be retained when a new joint authority is created. Instead, employees who are transferred to a new joint authority will be subject to their previous employment terms until those terms are amended by law, or for six months after the transfer to the authority, whichever is earlier. 2011 PA 261 and 262.

The new public acts give municipal leaders greater flexibility to work together.

If you are considering sharing services and have questions about how to go about it, please contact Ron Richards or Nichole Derks.

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NOTEWORTHY 2011 FOSTER SWIFT EVENTS – A QUICK SUMMARY

FOSTER SWIFT WEBINARS

Foster Swift presented three free webinars for municipal officials in 2011:

- Mike Homier, Ron Richards and Laura Garlinghouse presented "The Medical Marijuana Act – And the Issues it Presents Municipalities." To view a recording of the webinar, visit: www1.gotomeeting.com/register/520163641

- Melissa Jackson and Samuel Frederick hosted a webinar entitled "Social Media: Developing and Implementing an Effective Policy for Your Municipality." To view a recording of the webinar, visit: www1.gotomeeting.com/register/310882632

- Anne Seurynck presented "Open Meetings Act: What Every Municipality Should Know." To view a recording of the webinar, visit: www1.gotomeeting.com/register/556820696

By popular demand, Foster Swift's free webinar series continues in 2012. Scheduled topics for the April and June free webinars are below. Look for more dates and topics for other webinars in future newsletters. Also, if you have a topic you would like to see as a subject of an upcoming webinar, please email Ron Richards at rrichards@fosterswift.com.

UPCOMING WEBINARS

"Millages: What you need to know about drafting proposals and placing them on the ballot"

April 19, 2012 - 11am - 12pm
Presented by Anne Seurynck

Look for more details in the coming months.

"An Update on the 2011 Labor Law Changes and the Impact on Michigan Municipalities"

June 6, 2012 - 12 - 1pm
Presented by Michael Blum

Look for more details in the coming months.

SAMPLING OF COURT SUCCESSES

Court Upholds Township's Agricultural Zoning Against Developer's Challenge

The Court of Appeals upheld the dismissal of a developer's suit against a township. *DF Land Development, LLC v Charter Twp of Ann Arbor*, unpublished per curiam opinion of the Court of Appeals (Docket No. 298858, dec'd 11/17/11). The developer argued that the property's existing zoning, agricultural or residential on ten-acre lots, was illegal by depriving it of a more economically viable use of the land. The Court rejected the claim. The Court upheld the zoning as reasonable – the zoning preserved the rural character, natural features, and availability of open areas by limiting residential development on the property through density restrictions.

The developer also argued that the zoning ordinance was exclusionary since the zoning ordinance created a particular zoning classification (R-7, multi-family units at a higher density) but the township had no properties designated as that on the township's map. The Court rejected that argument too. It explained that about 1/3 of the residential units in the township were multi-family housing. Therefore, there was no exclusion. Foster Swift's Tom Meagher successfully represented the Township.

Court Holds State Aid Rules for Libraries Are Unlawful

In a published opinion issued on August 16, 2011, the Michigan Court of Appeals held that the Michigan Department of Education lacks authority to promulgate the State Aid Rules, which tried to impose new conditions on public libraries' eligibility to receive critical state funding. The Court also concluded that the State Aid Rules' requirement that libraries provide identical services to contract service areas is contrary to the Michigan Constitution. *Herrick v Dep't of Educ*, ___ Mich App ___ (Docket No. 300393, dec'd 8-16-11).

Herrick District Library ("Herrick") sued the Michigan Department of Education ("MDE")

and the Library of Michigan in 2009, seeking a declaration that MDE's now-defunct predecessor, the Department of History, Arts and Letters ("HAL") lacked authority to adopt the State Aid Rules and that the State Aid Rules are contrary to Michigan law. The Ottawa County trial court agreed with Herrick.

The Court of Appeals affirmed the trial court's decision. The Court first held that agencies like HAL and MDE only have rulemaking authority that is implied by an enabling law – but here, no law gave HAL or MDE any express or implied rulemaking authority. Consequently, MDE does not have the authority to adopt rules to govern distribution of state aid to public libraries. The Court then held that the State Aid Rules conflict with the Michigan Constitution, which was intended to promote local control of libraries.

As a result of this decision, the State Aid Rules remain invalid and unenforceable. It is unknown whether MDE will attempt to enforce its "minimum standards" for state aid, which are substantively identical to the constitutionally deficient State Aid Rules.

Herrick was represented in both the trial court and the Court of Appeals by Foster Swift's own Anne Seurynck, Mike Homier, and Laura Garlinghouse.

FOSTER SWIFT SPEAKING EVENTS

In 2011, Foster Swift attorneys gave many presentations on a variety of municipal matters. They included the following:

- Mike Homier spoke to the Berrien County Assessor's Association in St. Joseph, Michigan, regarding preparing for Michigan Tax Tribunal cases in April.
- Mike Homier spoke for the Michigan Townships Association on "urban chickens," zoning and land use, medical marihuana/wind regulations, and ordinances in Frankenmuth, Gaylord and Lansing in June.
- Anne Seurynck hosted a series of free webinars for library trustees this past summer. View recordings of the webinars by visiting: www.fosterswift.com/services-Library-Law.html (look under the "Events" heading)
- Anne Seurynck and John Kamins spoke on different topics at the 13th Annual Public Corporation Law Section's Summer Educational Conference. Anne was a panelist on an Open Meetings Act topic, and John was a panelist on "Computer Networks, Social Media and Cloud Computing."
- John Kamins talked on "Significant Developments in Municipal Finance" at the 33rd Annual Michigan Municipal Treasures Association's (MMTA) Fall Conference in October.
- Anne Seurynck and Michael Homier presented on "Top 10 Open Meetings Act Mistakes & How to Avoid Them" at the Michigan Municipal League's Annual Convention in October.

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