

Michigan

MUNICIPAL REVIEW

September/October 2007



The Michigan Municipal League

This association of cities and villages was organized in 1899 for improvement of municipal government by cooperative action. Member benefits and fee-based services include: education, publications, information, research, lobbying, human resource and municipal management services, risk management and insurance and a legal defense fund.

Headquarters

1675 Green Rd., P.O. Box 1487
Ann Arbor, MI 48106-1487
(734) 662-3246 or 800-653-2483
FAX: (734) 662-8083
Email: info@mml.org
Website: www.mml.org

Lansing Office

320 N. Washington Square, Suite 110
Lansing, MI 48933-1288
(517) 485-1314 or 800-995-2674
FAX: (517) 372-7476
Email: advocate@mml.org

Northern Field Office

200 Minneapolis Avenue
Gladstone, MI 49837-1931
(906) 428-0100
Fax: (906) 428-0101
Email: ckennedy@mml.org

Executive Director: Daniel P. Gilmartin

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The official magazine of the Michigan Municipal League

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Volume 80, Number 5

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EXECUTIVE DIRECTOR'S MESSAGE

Daniel P. Gilmartin

Better Communities. Better Michigan

Do you value your resources. . .
your human resources?

Recently I had the privilege of hosting state league directors from around the country for our annual workshop on Mackinac Island. There were over 90 attendees, speakers and guests, many of whom were visiting our state for the very first time. I was struck by how many of them went out of their way to tell me that the state that I call home is among the most beautiful and vibrant they had seen. Much of the praise came from people who drove up from the airports in Detroit, Grand Rapids and Traverse City, or those from the northeast states who drove through Canada and entered Michigan via Port Huron or Sault Ste. Marie. The talk was of the state's natural beauty and the charming communities that they encountered during their journeys. There was no talk about the state's fledgling economy or the woeful forecasts for the Big Three. It was simply a group of outsiders looking at our state and its communities with an unjaded eye – and liking what they saw.

Hosting that meeting meant I was unfortunately unable to attend the MLGMA summer workshop in Gaylord and hear ICMA Executive Director Bob O'Neill speak about the "Good to Great" concepts and their implications for local governments. At the League we are utilizing "Good to Great" to help steer us through many of the changes that we are making. The book correctly points out that long-term successes for any organization are not about who has the best plan in place, but about who has the best people in place.

Local government, in fact all public service, is a labor intensive business where having the right people in the right place can make all the difference. Despite that, it is easy to view the "Human Resources" function strictly as a mechanism for limiting liability in hiring and employment. This MMR issue provides that type of practical advice, but is intended to go beyond that and challenge everyone to take a fresh look at their "Human Resources" – much like my fresh look at Michigan through the eyes of the Mackinac Island visitors.

Your staff – the human resources of your organization – make it distinct. They are the first line to the public and directly impact the quality of services delivered. Many people have just one or two contacts with their municipality in a year, usually with an employee; will those be positive interactions that give residents confidence in their local government?

Local government, in fact all public service, is a labor intensive business where having the right people in the right place can make all the difference.

These economic times demand the best of all of us. The right staff in the right jobs, with the right attitude and a true spirit of public service can make all the difference. While some might view education, organizational development and human resource functions as easy cuts to make, consider the importance of having the best qualified, most highly skilled staff serving your public. The impact of having staff in place who view challenges as opportunity, who are willing partners in finding creative solutions and are relentlessly focused on your mission can be powerful.

At the League we have been working hard toward that goal. Our staff continues to develop and the quality of our services is the finest that it has ever been. In fact, I got substantial positive feedback from my state league colleagues on our programs and services and it is clear that our organization is emerging as a national leader in tackling challenges faced by 21st century communities. Our proactive public policy agenda and unique partnership building is a model that others are beginning to emulate. Our willingness to embrace new technology in communicating our message is driving all of this to new heights, along with an exciting new "brand" for the League that will be rolled out in September. None of this would be possible without a talented and motivated staff working to make it happen.

Attracting and retaining the right people is central to making the leap from "Good to Great" – ours at the League and yours within your local municipalities. I hope that you enjoy this issue and are inspired to view your human resources through fresh eyes. ♦

Daniel P. Gilmartin is executive director of the Michigan Municipal League. You may contact Dan at 734-669-6302 or 800-653-2483 or dpg@mml.org.

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Magazine Staff

Jeanette Westhead, Graphic Designer
Susan Vasher, Address Changes
Kim Cekola, Editorial Content

To Submit Articles

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Address Changes

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On the Cover

The McKinley Towne Centre in downtown Ann Arbor is the new home for Google's AdWords division. Google is expected to remain in its Ann Arbor location for five years, ultimately employing about 1,000 workers. Meeting rooms at Google are named after selected Michigan communities, and are filled with mementos and memorabilia from each. For instance the company's largest room, the Battle Creek Café, is adorned with vintage cereal boxes. Google has also designated a Traverse City room, fittingly decorated with cherry festival items. (Photograph by Jeanette Westhead)

Public management: hiring, firing and in-between

Susan A. Finnegan

Often, public officials find themselves as managers of employees with limited experience with the legal requirements placed on employers. Following are a few highlights of the issues public employers should consider.

Background checks

Employers must be aware of limits on the use of background investigations. Under the Fair Credit Reporting Act a credit report includes any communication of information by a consumer reporting agency about a consumer's credit, character, reputation, personal characteristics, or mode of living, which is used as a factor in establishing the consumer's eligibility for employment. Generally, if an employer wishes to obtain a report on a prospective employee the employer must provide conspicuous written notice and receive advance written consent. There are additional requirements depending on the type of information sought and whether the employer makes an adverse decision based on information contained in a consumer report.

Anti-discrimination laws

Federal and state anti-discrimination laws include: Title VII of the Civil Rights Act; the Immigration Reform and Control Act; the Age Discrimination in Employment Act; the Americans with Disabilities Act; the Rehabilitation Act; Michigan's Elliott-Larsen Civil Rights Act; and Michigan's Persons with Disabilities Civil Rights Act. Employers may not discriminate based on a person's race, ethnicity, color, gender, religion, age, origin, citizenship, height, weight, marital status, or disability. Michigan's Department of Civil Rights offers a helpful Pre-Employment Inquiry Guide with permissible and impermissible

interview questions. The guide is available at www.michigan.gov/mdcr. On the left tool bar, click on "Publications," then go to "Pamphlets & Brochures," then select "Pre-Employment Inquiry Guide."

Due process for terminations

The Supreme Court has ruled that public employees in some situations may have a constitutionally protected property or liberty interest in continued employment. See, *Cleveland Board of Ed. v. Loudermill*, 470 U.S. 532 (1985). These employees have a right to due process when terminated. The *Loudermill* Court found that a pre-termination opportunity to respond to charges, coupled with a post-termination review procedure, provided sufficient due process. A public employer must therefore know what circumstances give rise to *Loudermill* protections and ensure that they are provided.

Personnel files

Several statutes govern personnel files and other employment documentation. The Bullard-Plawecki Employee Right to Know Act outlines what a personnel file may and may not include. The Act also addresses the right to review personnel files, retention of disciplinary records, and disclosure of personnel files.

Other statutes also require employers to retain employment documents. The Family and Medical Leave Act; the Michigan Wage and Fringe Benefits Act; the Americans with Disabilities Act; OSHA; MI-OSHA; Title VII of the Civil Rights Act; the Fair Labor Standards Act; and the Age Discrimination in Employment Act include record-keeping requirements.

Social security privacy

Michigan's Social Security Privacy Act prohibits using or displaying



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more than 4 sequential digits of social security numbers except in limited circumstances. Furthermore, any municipality that obtains one or more social security numbers in the ordinary course of business must have a social security number privacy policy that:

1. ensures confidentiality;
2. prohibits unlawful disclosure;
3. limits access;
4. describes how to dispose of documents; and
5. sets penalties for violations. (See www.mml.org/members/pdf/opp/social_security.pdf for a sample policy.)

The Fair Labor Standards Act

Under the Fair Labor Standards Act employers must pay non-exempt employees one and a half times their hourly rate for hours over 40 worked each week. However, the Act allows most political subdivisions of the state to provide time-off in lieu of overtime compensation (comp time) subject to certain limits. Such substitution must be pursuant to an agreement between employer and employees.

Numerous issues can arise under the Fair Labor Standards Act including determining which employees are non-exempt, fluctuating workweeks, multiple part-time positions by one employee, and volunteerism. (See article pg 18.)

The Open Meetings Act

Finally, when employing or appointing someone to public office, interviews must be conducted in an open meeting under the Open Meetings Act. The public is entitled to be present and must have the opportunity to address the public body. The body may, however, consider discipline, suspensions, complaints and evaluations in a closed hearing, if requested by the employee. ♦

Susan A. Finnegan is an attorney with Plunkett & Cooney in Kalamazoo, Michigan. You may contact Susan at 269-226-8861, or by email at sfinnegan@plunkettcooney.com.

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“The MML has traditionally brought in some of the nation’s top experts in municipal government to speak at the Convention. At past conventions, I have obtained the latest information on global information systems, e-government, and manager evaluations. This knowledge helped me better serve the citizens in my community as an elected official.”

Bill Munsell, Mayor Pro Tem,
Sault Sainte Marie

General Sessions

Keynote Speakers

The 109th MML Annual Convention is shaping up to be a great event for Michigan local government officials. Our three keynote speakers will set the tone for a dynamic, must attend Convention.



Building Innovative, Creative and Sustainable Cities

Wednesday, 9:15-10:15 am

Carol Coletta, president and CEO of CEOs for Cities and host and producer of the nationally syndicated public radio show “Smart City,” will focus her talk on innovation as the new imperative for urban leaders in the knowledge economy, and the strategies leaders can use to build successful, next-generation cities. At CEOs for Cities, Carol has pioneered research on attracting and retaining talent, identifying and leveraging distinctiveness for economic gain and applying innovative tools to city making, among other issues important to the success of cities today. CEOs for Cities’ work takes a look at the national and global trends affecting how we live and identifies how urban leaders can capitalize on the opportunities inherent to cities in the face of rapid change. Carol will speak to these trends and explore the effects on cities and what urban leaders can do to respond.



Council-Manager Relations ~ Michigan Local Government Management Association Colloquium Presentation

Wednesday, 12:15-1:45 pm

Robert J. O’Neill, Jr., is executive director of the International City/County Management Association (ICMA).

O’Neill’s “reinvention” of the government of Hampton, Virginia as city manager (1984-1997) was widely recognized by organizations such as the National League of Cities and Public Technology, Inc. and by David Osborne and Ted Gaebler, authors of *Reinventing Government*.



The New Urban Narrative

Thursday, 9:00-10:15 am

Brian Boyle, a founding partner in The Issue Media Group is an expert in leveraging new media to help cities advance. Traditional media continues to portray Michigan’s urban centers in negative terms. Rust Belt. Disinvestment. Crime. Poverty. Loss of Manufacturing Jobs. Schools.

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visit www.mml.org for details and registration materials

The Bullard-Plawecki Employee Right-to-Know Checklist

A personnel record may include

- Applications, résumés or other information regarding employee's qualifications
- Information regarding employee's compensation
- Information regarding disciplinary action subject to applicable collective bargaining agreement
- Information about employee's transfers, job assignments, promotions
- Typed and handwritten notes taken during employment interviews
- Oral employee references transcribed into written notes by an interviewer IF identity of the person making the reference is not disclosed
- Written employee references IF identity of author is not disclosed
- Employee's written statement (no more than 5 pages long) in response to a document in the personnel file with which he/she disagrees
- Records of employee's association, political activities, publications or communications IF submitted or authorized by employee to employer in writing or when such activities occur on the employer's premises or during employee's work hours that interfere with the performance of that employee's duties or duties of other employees
- Records kept solely by an executive, administrative or professional employee IF entered into the file within 6 months after the date of the occurrence or the date the fact became known
- Other information which complies with the definition of Record and is not specifically excluded under the Act

A personnel record shall not include

- Employee references if identity of the author is disclosed
- Staff planning information involving more than one employee, i.e. on promotions, job assignments, compensation
- Medical Records/Reports if available to the employee from the medical facility
- Grievance information
- Information of a personal nature involving a person other than the employee
- Information relating to a criminal investigation
- Records kept solely by an executive, administrative or professional employee and not shared with others
- Records of an educational institution directly related to a student
- Records of an employee's associations, political activities, publications or communications without employee's written authorization or submission

This checklist is an interpretation of the Bullard-Plawecki Employee Right-to-Know Act (ERKA) which should serve as a guide to the more important sections of the Act. It is not a complete restatement of the Act. Please see MCL 423.501 et seq. for the full text of ERKA.

Checklist provided by the law firm of Plunkett & Cooney

Personnel records: access and disclosure

Susan A. Finnegan

Once an employer ensures that the correct documents are included in employee personnel files, the question arises, “who may have access?” The answer is, “it depends.”

Employee access to their own personnel files

Under Michigan’s Bullard-Plawecki Employee Right to Know Act (ERKA) employees have the right to review their personnel file upon written request. ERKA requires employers to allow review at reasonable intervals, generally not more than twice a calendar year. It must be at a place reasonably near to the employee’s normal place of work and during office hours, unless office hours would require the employee to take time off from that employer – in that case, another reasonable time. If an employee demonstrates an inability to review the file at the employer’s site, the employer must mail a copy of the records upon written request. Finally, employees have the right to a copy of their file. Employers may charge the actual incremental cost of duplication.

Disciplinary documents under ERKA

ERKA prohibits an employer from divulging disciplinary information “to a third party, to a party who is not a part of the employer’s organization, or to a party who is not a part of a labor organization representing the employee,” without providing the employee with written notice specified under the statute. Note, ERKA does not prohibit disclosures of disciplinary information; it simply requires the employer to provide notice to the employee. Thus, employers may define who has access to disciplinary documents by following the notice requirements under ERKA.

However, members of “the employer’s organization” are permitted under ERKA to view disciplinary records without notice. Unfortunately, there is little guidance on who this includes. The statute does not define the phrase and only one case addresses the issue. In *Loftis v. G.T. Products*, the court of appeals found that an employee committee set up by the employer was part of “the employer’s organization,” and the employer was not required to provide written notice prior to sharing disciplinary records with the committee. The employer provided the committee with evidence of plaintiff’s absences and write-ups for the committee’s recommendation concerning termination.

The court noted the absence of case law to guide it in defining “employer’s organization.” Nevertheless, it determined that the committee – established in the employee handbook and used as part of the company’s disciplinary procedures established in the handbook – was part of the organization. Thus, *Loftis* suggests that if individuals are identified in an employee handbook and incorporated into established disciplinary procedures (which are followed), they may be part of the “employer’s organization” under ERKA.

Finally, employers must comply with ERKA’s requirement that employers review personnel records and delete disciplinary records more than four years old – unless ordered in a legal action or arbitration.

Application of Michigan’s Freedom of Information Act

ERKA explicitly states that it shall not be construed to diminish a right of access to records as provided under Michigan’s Freedom of Information Act (FOIA). Of course,

providing an employee with ERKA notice does not conflict with FOIA.

FOIA includes an exemption for personnel records of law enforcement agencies. However, FOIA does not exempt personnel records of non-law enforcement employees. To the contrary, courts have ordered their release. Disclosure must instead be examined under FOIA’s other exemptions on a case by case basis.

Social security numbers

FOIA does exclude records disclosing social security numbers. Likewise, Michigan’s Social Security Privacy Act requires employers to protect the confidentiality of social security numbers. Employers must limit access to social security numbers and have policies to provide confidentiality. Except in specific cases, employers should always redact social security numbers when disclosing documents.

Additional considerations

Although personnel files do not generally include medical information, employers must also comply with the Health Insurance Portability and Accountability Act (HIPAA) and agreements with HIPAA covered entities. A collective bargaining agreement may also impact access to personnel records. Simply put, numerous factors govern the disclosure of personnel records. This article merely touches on a few. ♦

Susan A. Finnegan is an attorney with Plunkett & Cooney in Kalamazoo, Michigan. You may contact Susan at 269-226-8861, or by email at sfinnegan@plunkettcooney.com.



MUNICIPAL LEGISLATIVE POLICY UPDATE

Andy Schor

Legislative scorecard: first 9 months . . .

Michigan has come to a crossroad. Our economy is still in flux, even though the rest of the country is rebounding. Legislative leaders are split on what needs to happen to move us forward. The Michigan Municipal League has been front and center in many of the important decisions that will determine Michigan's direction in the 21st century economy. To really understand what is happening in Lansing, you need a scorecard.

In one corner, you have Governor Jennifer Granholm. In her State of the State Address, she called for an investment in Michigan, for city revitalization – in conjunction with what the MML has been pushing. MML members know that quality of life locally is important to retain and attract citizens and businesses to Michigan. Granholm said that we can cut Michigan to oblivion and chase everyone out of the state (last one out, please turn off the lights) . . . or we can invest in ourselves and our communities and bring people back to this great state.

Granholm called for a revenue-neutral business tax replacement. The MML joined her in pushing revenue neutrality, as any cuts could translate to revenue sharing cuts.



2 points for Governor Granholm for recognizing a problem and pushing for a solution.

In the next corner, we have the Michigan House of Representatives which is controlled by the Democrats (58-52). The House Democrats created the Michigan Business Tax, and it was a home run for locals. The MML worked with Reps. Bieda and Condino to protect local services by ensuring the House plan was revenue neutral, and did not touch local personal property taxes. It did give relief from school personal property taxes (repaid to the school fund from the MBT), so it will help businesses in our communities without hurting local services. Some tweaks of the law are expected for tax increment financing this fall.

House Democrats also have focused on investments in Michigan through revenue enhancements. They were able to fix an \$800 million deficit in the 2006-7 budget without voting to cut revenue sharing! The 2007-8 budget is \$1.8 billion in deficit, and House Democrats have discussed an income tax



increase combined with a tax on luxury services. They don't want to cut local services . . . they want to ensure our viability and vitality and quality of life.



2 points for the House Democrats for protecting local revenues, and for their willingness to put out proposals to effectively move Michigan forward.

Finally, you have the Senate which is controlled by the Republicans (21-17). The Senate Republicans are calling for taxpayer savings at the state and local level before allowing

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votes on tax increases. What does that mean for locals? It means that for the first time in 35 years, real reform is on the table for PA 312 (mandatory binding arbitration for public safety). MML has pushed for changes in 312 to ensure local taxpayer savings by addressing a community's ability to pay in PA 312 decisions; ensuring that internal comparables of other bargaining units be given priority; and that external comparables be appropriate. Communities must have effective police and fire services, but the final decisions for these costs are out of our control under PA 312. Senate Republicans understand this and are pushing for change.

Reforms also mean removing barriers to local service sharing. Under current law, employees cannot be "harmed" in a consolidation. Most local governments have good relationships with their unions, and respect that employees don't want

to make differing benefits for equal work. So, the practical reality of this language is that communities will not save money in consolidations because employees don't want differential benefits for equal work, and locals can't save money if they equalize all contracts at the highest level (because no employee can be harmed). Senate Republicans recognize this problem as well, and are pushing to remove these barriers to local consolidations and savings as part of their reforms to allow for taxpayer savings through consolidations.

 **2 points for the Senate Republicans for pushing real local government savings through personnel and consolidation reform.**

So, with 9 months gone in the first year of the 2007-2008 session, what appears to be a legislative tie (2-2-2) is actually a victory for the Michigan Municipal League and our members! And, not mentioned are several other issues on the table to make Michigan communities even better (revenue sharing formula, Brownfield reauthorization, tipping fee formula, local roads dollars, etc). But the bottom line is that the Governor, House Democrats, and Senate Republicans all buy into the MML message of ensuring local services and local quality of life to move Michigan forward.

Stay tuned . . . ♦

Andy Schor is a legislative associate for the Michigan Municipal League. You may contact Andy at 517-908-0300, or by email at aschor@mml.org.



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Sen. VanWoerkom



The current revenue sharing formula, which addresses the needs of urban developed communities, is set to expire. Will you support continuation of this formula and statutory revenue sharing to these communities, or do you expect changes in the formula?

The revenue sharing formula does expire this year, and I expect that the Legislature will debate about a new formula

and settle for an extension of the existing formula. The dark cloud of the 2008 budget hangs over everything that we do. Any new formula that increases the amount of revenue sharing to local government will certainly be doomed as we try to contain the budget. I fully expect that there will be a tax increase but the increase will be limited to covering existing programs. I do not believe that existing programs will see increases in funding unless it is a program that is caseload driven. That being said, I would be open to tinkering with the formula for the future. I believe that the formula should fairly address the needs, not the wants of cities, villages and townships. But it must also reflect the fact that cities play a leadership role in our economy. Dynamic cities play an important role in generating prosperity in the state.

What measures will you support to assist Michigan cities and villages with economic development and job retention/attraction?

I plan to support reauthorization of the Brownfield Redevelopment Act. Redeveloping blighted buildings in more Michigan communities will greatly help our state. The legislation currently being considered in the Senate will add more flexibility to the Brownfield program and make it easier to use. By recycling land within cities, communities can reduce pressures on suburban and rural land areas, thereby decreasing urban sprawl. Redevelopment projects make sense both economically and environmentally. A recent study conducted by the Consumers Renaissance Development Corporation ranked Michigan's Brownfield program first in the nation for liability protection, cleanup standards, financial incentives and government support from both the state and local levels. I look forward to floor action on this important package. I am also looking forward to discussion on a package of bills focused on invigorating Michigan downtowns that will be introduced by the Senate Commerce Committee later this year. The Committee held field hearings in several communities across the state to solicit input, and heard great testimony on policy ideas

from business people and economic development officials. I look forward to working with my colleagues on policies to assist downtowns – large and small – across the state.

Do you support investing in public transit? If so, what measures will you pursue?

As a member of the Senate Committee on Transportation and as a co-chair of the Public Transit Caucus, I support continued investment in public transit. I am particularly concerned about disabled residents who need public transit to get around. But there are so many other good reasons to support public transit – from the reduction of fuel consumption to the easing of traffic congestion, to the relief of parking problems and even to the increase in social interaction. I enjoy using public transit in many of the cities I visit. Again, because of budget constraints, the possibility of extra funding for public transit will be bleak in the '08 budget. But I am hopeful that the study of a Detroit connector can proceed. I voted for Senate Bill 59 which would create a task force to examine long-term solutions to financing Michigan's transportation needs. I also would like to find a way to increase rural bus transit operating capital.

Over time, legislative actions have eroded the ability of local residents and their elected officials to govern themselves without state or federal interference. What are your thoughts on returning home rule to Michigan's communities?

I have wrestled with this issue often in my 8 ½ years in the Legislature. I believe that local officials reflect their communities and can best make decisions for their constituents. However, I have at times voted for issues that take away home rule. I have done that because I believed that whatever it is should be standard throughout the state rather than a patchwork. One issue that I struggle with right now is the windmill issue. I believe that the locals know best what their community wants on windmills, but yet, if they go up, there should be laws throughout the state that are uniform. Once an issue is taken from home rule, it rarely goes back to the locals.

What is the biggest issue facing your hometown that you plan to address in the Legislature?

Last year I campaigned on the jobs issue because my hometown, as well as everyone else's hometown, is concerned about the prosperity of its residents. I am focused especially on the alternate energy sector, hoping that we can attract new ventures in West Michigan and that existing plants and projects can expand. Right now there are a couple of projects in the planning stages and I am working with them to see that they become operational. ♦

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Key issues and tools to help you protect against FMLA related employment claims

Carolyn Jereck

The Family Medical Leave Act (FMLA) applies to all public agencies (state and local governments) as well as local education agencies (public or private schools). FMLA health-related absences frequently challenge a municipality's ability to balance compliance under the act with an employee's guaranteed rights. The purpose of this article is to help you identify key issues and provide tools designed to protect against future FMLA related employment claims.

Key issues

The following provisions pose frequent problems for municipal employers under the FMLA:

1. Intermittent leave

Under certain circumstances, covered employees may utilize FMLA leave time intermittently and/or in blocks of time. They may also do so by reducing hours worked during their "normal" day or week. This entitlement is not, however, absolute. Use of intermittent leave is subject to the *employer's approval* if the leave is associated with the birth of the employee's child and/or placement of a child with the employee for foster care and/or adoption. The employer's policy must be clear, concise and consistently applied in order to avoid legal challenge on this basis.

2. Substitution of paid for unpaid leave

Under certain circumstances, a covered employee or employer may choose to use accrued paid leave (i.e., sick and/or vacation days) to cover some or all of the FMLA leave. An employer's ability to require the substitution of accrued paid leave for unpaid FMLA leave must be clearly defined within the employer's FMLA policy in order to avoid a later challenge that the employee's FMLA rights were violated by improperly charging accrued paid leave against unpaid leave.

Most challenges on this basis arise where the employee was not properly notified of the employer's policy before a request for leave is made. Note as well that an employer's policy may not contradict key provisions afforded union employees pursuant to a Collective Bargaining Agreement.

3. Serious health condition

Exactly what constitutes a *serious health condition* is subject to varying definitions under the Act. Most broadly defined, it means a physical or mental illness, injury, impairment and/or condition.

If there is any doubt as to whether an employee's condition satisfies the definition of serious health con-

dition, an employer may require medical certification verifying the need for leave to be issued by a health care provider. However, an employee must be allowed at least 15 days to obtain the medical certification required.

4. Managing the *serious health condition* throughout the leave

An employer may request periodic updates throughout the leave period regarding the employee's status, intent to return to work and medical certification authorizing return to work following the leave.

The FMLA permits an employer to challenge the validity of a medical certification supporting that a serious health condition exists by seeking a second or third medical opinion. However, in order to avoid any dispute in this regard, an employer should notify employees that such a policy exists and that the employer will invoke its right to pursue alternate opinions if questions arise concerning the validity of the certification throughout the FMLA leave.

An employer may also implement a policy prohibiting an employee from working while on FMLA leave.

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An employer may also implement a policy prohibiting the employee's participation in activities inconsistent with the underlying basis for and/or medical certification justifying the leave. These types of policies assist an employer's ability to defend against employee challenges to discipline and/or discharge proceedings where an employee fraudulently obtained FMLA leave.

Although an employer may request clarification from an employee's health care provider, its ability to do so is limited. Specifically, the Act requires that an employee must give permission before an employer may contact an employee's healthcare provider to obtain clarification regarding the medical certification and/or return to work authorization. In order to avoid any challenge in this regard, an employer's interests are best served by obtaining permission from the employee to pursue clarification, if appropriate, **before** the FMLA leave begins.

5. Job restoration

Generally speaking, the Act provides that an employee who returns from FMLA leave must be restored to the same or an equivalent position. However, an employee is only guaranteed to be treated the same way as he/she would have been treated had he/she not been on FMLA leave.

For example, if an employee's position is eliminated (due to downsizing and/or reorganization) while on FMLA leave, the fact that the employee cannot be returned to the same position does not constitute an FMLA violation. It is also possible to discipline an employee while on leave if he/she would have been subject to discipline before the leave began. However, be sure to consult with your employment lawyer before taking such measures as they are frequently met with claims that any adverse employment action taken was, in fact, a pretext to an underlying discriminatory intent.

Continued strategies

Routine consideration of the following factors will assist you and your municipality in avoiding the most common employee challenges arising under the act:

1. Regular review of policies, handbooks and forms

In order to avoid direct challenges, employers should routinely review and update handbooks and other written policies addressing FMLA guidelines and policies. This is particularly true with regard to key notice provisions specifically identified in the Act.

2. Training

An employer should make certain that employees designated to enforce and oversee FMLA policies are knowledgeable and/or otherwise properly trained to do so. Stated more succinctly, the in-house FMLA expert must know the Act inside and out in order to minimize the risks and related costs associated with legal challenges for perceived violations.

3. Consistent enforcement

Ensure that your municipality's "track record" with regard to application, approval and/or general handling of FMLA situations is consistently enforced. If possible, delegate primary responsibility for overseeing the application approval, review and verification process to one person. This should assist in minimizing challenges related to inconsistent enforcement and/or interpretation of existing FMLA related policies and/or procedures.

4. Updated job descriptions

Assuming they do not already exist, it is important to develop and maintain detailed and accurate job descriptions. These will assist an employer with FMLA compliance issues in several ways. They can be provided to physicians to assist in formulating opinions relating to an employee's ability to return to work following FMLA leave.

More specifically, they can be used to evaluate an employee's ability to return to his/her previous position and/or the need for an alternate position tailored to accommodate ongoing limitations. They are also useful in conducting reviews of the standard job functions on an annual basis.

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5. Notify and document

In order to protect against FMLA challenges, it is imperative that discussions, decisions and agreements reached with any employee requesting FMLA leave be properly documented and preserved for future reference and/or clarification. Moreover, the Act specifically imposes various record keeping requirements necessary to ensure compliance.

In order to streamline the process and minimize inconsistent consideration of information contained in employee requests and employer responses, employers may, for example, wish to consider using the forms approved by the Department of Labor – Wage and Hour Division.

When in doubt consult your employment attorney

Notwithstanding the fact that the FMLA has been around since 1993, it remains a complicated statute and employer issues associated with interpretation and enforcement continue.

Your municipality's employment lawyer is best positioned to assist your municipality with training, interpretation and/or enforcement of statutory provisions and/or responding to questions relating to potential employee challenge.

Conclusion

The primary purpose of the FMLA is to provide covered employees with a tool to balance family and work responsibilities by accommodating requests for unpaid leave under certain circumstances. Employer consideration, processing and accommodation of FMLA requests can be complicated and may prove problematic if mandatory terms and conditions are not properly instituted and followed. Properly interpreted and applied, the Act also provides employers with the means to balance productivity with employee care concerns while at the same time ensuring compliance and reducing the risk and cost associated with subsequent legal challenge. ♦

Carolyn Jereck is a litigation department leader with the law firm of Plunkett & Cooney, and concentrates in the areas of municipal law, loss prevention, construction law, employment law, and general negligence litigation. You may reach Carolyn at 248-594-9393 or cjereck@plunkettcooney.com.

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Overtime considerations – exempt and non-exempt employees

Melvin J. Muskovitz

Both the federal Fair Labor Standards Act (FLSA) and a similar Michigan statute require that overtime be paid at 1.5 times a non-exempt employee's regular rate of pay for each hour over 40 worked in a workweek. The FLSA does *not* require that an employee be paid overtime for hours worked in excess of eight per day, or for work on weekends or holidays, so long as the employee does not work more than 40 hours in a week.

The FLSA does not consider paid holidays, sick time and vacation leave as hours worked. An employee's meal period can also be excluded from compensable working time if it is at least 30 minutes long and the employee is completely relieved of all duties and free to leave the workstation. Rest periods or coffee breaks 20 minutes or shorter must be counted as hours worked. Whether rest periods longer than 20 minutes count as hours worked depends upon an employee's freedom during the breaks.

Compensatory time or overtime?

The FLSA authorizes a public agency to provide compensatory time (comp time) off in lieu of overtime compensation, at a rate of not less than 1.5 hours for each hour of overtime worked. In order for the use of comp time to be allowed, there must be an agreement or understanding between the employer and employee.

Public employees may generally accrue up to 240 hours of FLSA comp time (160 hours of actual overtime work). However, employees who work in a public safety (policy and fire), emergency response or seasonal activity may accumulate up to 480 hours of FLSA comp time (320 hours of actual overtime work). An employee

who has accrued comp time and wishes to use the time, must be permitted to do so within a "reasonable period" after making the request if it does not "unduly disrupt" the operations of the agency. Undue disruption must be more than mere inconvenience to the employer. It is the position of the U.S. Department of Labor that the fact that an employer will have to pay overtime to a substitute is not a legitimate reason for denying leave.

Upon termination of employment, an employee must be paid for all unused comp time figured at: (a) the average regular rate received by the employee during the last three years of employment, or (b) the final regular rate received by the employee, whichever is higher.

Who is entitled to overtime pay?

There are a number of positions that are exempt from the overtime requirements of the FLSA. The three most common exemptions relate to executive, administrative and professional employees, commonly referred to as the "white-collar" exemptions. To qualify for such an exemption, the employee must be paid on a salary basis (at least \$455 per week) and perform certain duties.

Executives are those employees who manage an enterprise or department, or subdivision thereof, customarily and regularly direct two or more full-time employees or their equivalent, and have the authority to hire or fire employees (or have their recommendations be given particular weight). **Administrative employees** are individuals who perform office or nonmanual work directly related to management policies or general business operations of the employer, and

whose work requires the exercise of discretion and independent judgment with respect to matters of significance. **Professional employees** are those individuals who perform work requiring advanced training acquired by a prolonged course of specialized intellectual instruction, as distinguished from general academic education, apprenticeships or routine training and involving the exercise of discretion and judgment, or who perform original or creative work depending primarily on invention, imagination or talent in the recognized field of artistic endeavor.

Depending on duties and compensation, certain employees performing computer related functions (e.g., computer systems analysts, computer programmers, software engineers) may also be exempt.

The FLSA also provides that certain employees are not covered by the Act. These include elected officials, certain personal staff members selected by an elected official and certain individuals appointed by an elected official to a policy making position.

Salary basis test and allowable deductions

In order to meet the salary basis test, an employee must regularly receive each pay period the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Thus, if an exempt employee is ready, willing and able to work, deductions may not be made for time when work is not available as long as the employee performed some work during that week. Under new regulations that went into effect in 2004, the deductions an employer can make from an employee's pay without violating the salary basis requirement

have been expanded. For example, an employer can now suspend an exempt employee without pay for one or more full days for violating written work rules that apply to all employees. Unpaid full-day absences for personal reasons, and in some cases for illness, will also not affect an employee's exempt status.

The new regulations contain a "safe harbor" provision for employers who make improper deductions. Impermissible deductions will not result in the loss of an employee's exempt status if the employer (1) has a clearly communicated policy prohibiting improper deductions, including a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good faith commitment to comply in the future. This safe harbor provision does not apply, and the employer will lose the exemption, if the employer willfully continues

to make improper deductions after receiving employee complaints.

Overtime rules for police & fire

In addition to the difference in maximum comp time accrual caps, the FLSA provides another very significant difference for public employees engaged in law enforcement and fire protection activities. As a general rule, employees must be paid overtime at one and one-half (1½) times their regular rate of pay for all hours worked in excess of 40 hours per week. Under Section 207(k) of the act, however, employees involved in fire protection or law enforcement activities, who have an established and regularly recurring work period that is not less than seven consecutive days nor more than 28 consecutive days, are only entitled by the statute to receive overtime pay if they work more than the maximum number of hours established by law for their

work period. For employees having a 28-day work period, overtime must be paid for hours worked in excess of 171 (law enforcement) or 212 (fire protection). These figures are prorated for employees whose work periods are less than 28 days. An employer can agree by union contract, or otherwise, to pay overtime for fewer hours worked.

This article highlights some of the more pertinent issues regarding exempt and non-exempt employees. Because every set of facts and circumstances may raise different legal issues, this article is not intended to be a legal opinion with respect to a specific situation. ♦

Melvin J. Muskovitz works in the Ann Arbor office of Dykema Gossett PLLC. Mel can be reached at 734-214-7633 or mmuskovitz@dykema.com.



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Performance evaluation: the quality of the process will determine the quality of the results

Heather Van Poucker

Each time I work with a client community to develop a highly customized performance evaluation system, it proves that HOW you go about something is every bit as important as the finished product. Especially with something as sensitive as performance evaluation, the process used is paramount to success.

First, assess your readiness

Organizations considering performance evaluation should carefully assess their “organizational readiness” prior to its undertaking. A poor performance evaluation system, or one developed without organizational readiness to fully implement and embrace the system, can do more harm than good to an organization. In assessing organizational readiness, consider the following:

1. Is performance evaluation a valued priority of policy makers?
2. Does the current political climate and state of organizational/employee morale support the development of such a tool?
3. Is there a clear purpose for why evaluations are sought, and how the results will be used?
4. Is there “buy-in” among department heads/managers and staff to the concept of evaluation as a constructive management tool?
5. What is the skill level among supervisors who will be conduct-

ing evaluations . . . are they prepared for this responsibility?

6. Do employees trust their employer? Will they see this as an opportunity to add value to the organization, or as a negative?

Second, define the “why”

There must be clarity in your purpose. There can be more than one good reason your organization is interested in evaluating performance, but all goals should be clearly defined before beginning to develop a measurement tool. For example:

- Is pay to be tied to performance?
- Is performance evaluation to be used to promote proactive performance management among managers?
- Is there hope that performance evaluation will yield better morale, better customer service, better something else?
- Does the organization wish to hold employees more accountable for results?

When examining the big question of why to do performance evaluation, the organization has a rare opportunity to tie everyday performance to the overarching organizational mission.

Third, assemble a strong team

With a clear purpose in mind, identify a representative group to help guide the process. It is useful to draw from all levels of the organization and across all departments so the fullest perspective is provided. This group will not only lend their perspectives, but will serve as a liaison to all other employees. To promote buy-in and confidence in a

final product, all employees should be aware of the development process and have an opportunity for input through these committee representatives.

Fourth, identify the best fit for the organization

With your purpose defined and your team assembled, the next task is to outline what type of performance system would work best for the organization. Consider the organization’s purpose, mission and goals. Would it be best to use a traditional evaluation plan that looks back over the year’s performance, or would a more proactive, goal-based system be more useful? Would some combination serve the organization well?

Next decide who will be evaluating whom, and when. Again, your purpose will guide these answers. If improved customer service is a primary goal, a performance evaluation system that uses multiple raters from varying levels within the organization may be a good fit. In other cases, a more traditional top down system may work best.

Fifth, create a consistent behavior-based evaluation tool

Determine what will be evaluated, or the performance factors or goals that will be used. In all cases these must be job related, so an up to date and accurate job description will be your best resource. Typically, certain performance factors apply to all positions, such as quality of work. Others, like management and supervision may only be applicable to supervisors.

Next, you’ll select a rating scale. Some systems use very simple agree/disagree statements. Others get as detailed as a 10 point scale. The important thing is to establish a scale that is meaningful to the user and clearly defines what each rating intends to capture. For

Heather Van Poucker is manager of Consulting Services for the Michigan Municipal League. You may contact Heather at 734-669-6326 or by email at hvanpoucker@mml.org

example, on a 10 point scale, what is the difference between a 6 and a 7? If you can't articulate it, you've got a poor scale. Usually a 3 or 4 point scale works well.

Be careful of how connotations can impact rating scales. For example, a 5 point scale with "satisfactory" used for level 3 will often yield many ratings of 4. Users commonly see "satisfactory" as negative and artificially inflate to the next level.

One way to prevent rating error and promote consistency in how a performance evaluation system is applied is to use behavioral examples to describe each rating level. For example, when rating a performance factor for attendance, the following behavioral examples may be helpful:

Unacceptable: Frequently tardy, uses sick time inappropriately.

Acceptable: Usually on time, uses sick time appropriately.

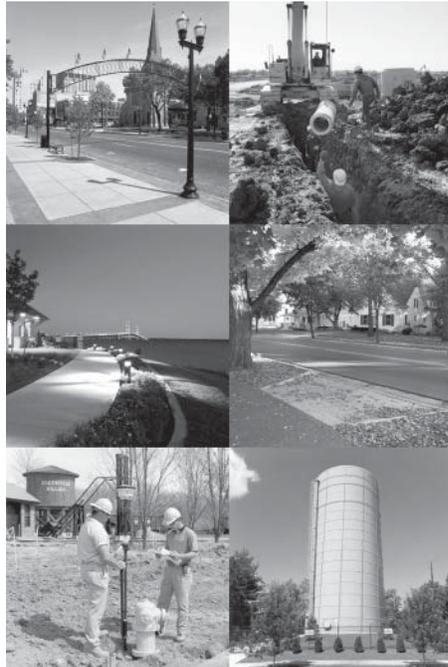
Exceptional: Never late, rarely uses sick time.

By providing examples for each rating level, evaluators have a common definition to apply; what is "acceptable" to one person will be "acceptable" to another.

Last, communicate and educate

Finally, it is critical to communicate with those who will be evaluated: why is performance evaluation important, how will it be used and what are the intended outcomes?

You increase the odds that performance evaluation will be a constructive process by promoting it to staff. And you will increase the reliability and accuracy of the tool by training those who will be evaluating others. They need to be aware of how to use the system and of the myriad challenges inherent in evaluating performance. Otherwise, supervisors will be left thinking they have one more unpleasant form to fill out, instead of recognizing performance evaluation as an effective management tool. ♦



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Legal issues involved with discipline and discharge decisions

Charles T. Oxender

The (written) foundation for discipline and discharge

Avoiding or reducing liability for your municipality's employment decisions regarding discipline and discharge begins long before any such employment decisions are actually made. Whether you can justify and/or defend employment decisions typically depends on what is set forth in the written "foundational" materials regarding employment with your municipality.

Documents such as employment applications, employee handbooks, individual employee contracts, a listing of workplace conduct rules, and written employment evaluations will often be key evidence in any legal challenge to discipline or discharge decisions.

Employee evaluations

While employee handbooks, employment contracts or workplace conduct rules help to establish the foundation of the employment environment, a written performance evaluation will often be at the heart of your company's employment decision making. When created, administered and relied upon properly, this document will often be the best evidence that your municipality has acted appropriately, reasonably, and without discrimination. Done tactfully, it can also be a motivational and instructional tool for employees.

On the other hand, when a municipality fails to properly and accurately record its assessment of an employee's performance, whether due to an evaluator's queasiness about criticizing a subordinate in writing or the municipality's failure to train supervisors how to evaluate their subordinates properly, it leaves itself without any objective evidence to back up its

claim of poor performance, for example, when it finally gets fed up with an employee and wants to discharge him or her.

Imposing discipline properly

If you want to maintain the "at will" employment status for your employees, but also want to follow a progressive discipline system, you should describe and preface that system in your municipality's employee handbook, workplace conduct rules, or written policy with a disclaimer that expressly states that the system is discretionary guidelines and that it does not alter the "at will" status of employment.

You should also be generally aware of a union employee's right, under state and/or federal labor laws, to have a representative present during a disciplinary interview if the employee reasonably believes that the interview may lead to discipline. Under a United States Supreme Court decision known as the *Weingarten* case, and under a similar provision in Michigan's Public Employment Labor Relations Law (known as "PELRA"), represented employees have the right to refuse to submit to an interview that they reasonably fear may result in discipline unless they are accompanied by a representative of their choice. If you were to continue a disciplinary interview after denying an employee's request for representation, or if you were to discipline an employee for refusing to participate in the interview without representative, your company would be committing an unfair labor practice.

Making defensible discharge decisions

There is no magic to deciding on and carrying out an employee's

discharge that will prevent an employee from challenging the discharge in court, before an arbitrator, or with an administrative body. Nevertheless, if you consider the following points prior to making the decision and carrying out the discharge, you can very likely reduce the risk of financial liability for the decision.

Often, wrongful discharge cases are not decided on a legal basis – that is, whether an "at will" employment relationship existed from a legal standpoint, or whether there was "just cause" for discharge. Rather, as noted above, the outcome of these cases generally depends on whether the decision maker felt that the discharge was fair, reasonable and consistent. To maximize the chances of such an outcome consider the following guidelines, which all relate to the framework and practices that should be in place outside of the actual discharge decision.

- Adopt and abide by a written employee evaluation system that is honest, realistic and accurate. Be rigorous in your administration of the evaluation system by ensuring that the employee's performance problems, as well as warnings to the employee about them, are documented and acknowledged by the employee.
- Personally meet with the employee to discuss problems when they occur. Document these meetings and make sure the employee receives an acknowledged copy that is also included in the employee's personnel records.
- Adopt a formal progressive discipline system. Employees should be given, where appropriate, advance warnings of their

deficiencies and opportunities to improve prior to being discharged.

- Consider putting the employee on a written performance improvement plan. Clearly state the objective goals and areas of improvement you desire and provide a reasonable period of time (e.g. 30 or 60 days) for the employee to demonstrate improvement.

- Give a “last chance” warning, particularly with long-term employees. The warning should clearly specify that the employee will be discharged if the actions are repeated – and then you must be prepared to actually make and carry out the discharge if the employee unjustifiably repeats the behavior or action at issue. Ideally, obtain the employee’s signature to acknowledge his or her receipt and understanding of the last warning.

Sometimes, even if you have carefully and consistently followed the above framework, an employee’s discharge will be necessary or inevitable. Following the steps below before and when you actually carry out the discharge will help to reduce any legal risk or exposure from the discharge.

Before an employee is discharged, have the factual basis for the discharge reviewed by someone else in the company *other than* the person recommending the discharge (or by legal counsel). Several questions should be answered before a final decision is made to discharge the employee:

- What is the reason(s) for discharge that will be given by the company if a dispute arises?
- How does the reason given for the discharge square with company handbooks, policies and procedures, and/or representations concerning reasons, causes,

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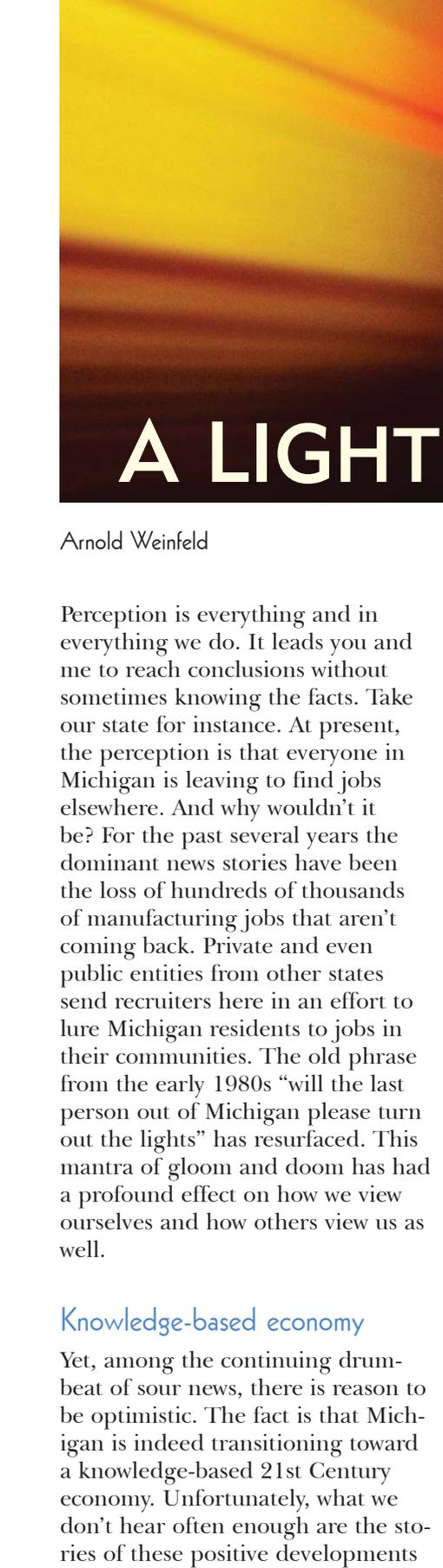
standards, and procedures for termination?

- How strong and objective is the evidence of the event that is the basis for the discharge?
- If you follow a progressive discipline system, is evidence of progressive or prior discipline documented? Were any steps in the system missed (or not documented)? If so, why? Was the employee warned with the most recent prior discipline that discharge was the next step?
- What do the employee’s evaluations say? Do they support or lend credence to the reason for the discharge? Do they contradict it (example: glowing written evaluations leading up to a performance-based discharge are suspect)?
- Has the decision maker looked at the employee’s entire personnel record? If not, has a human resources representative conducted such a review?
- How have similar situations been handled in the past? Is there any evidence of a pattern of discharging employees in any certain protected classification (i.e., gender, race, ethnicity, etc.) more frequently than employees outside that classification for the same conduct?

- Has the employee been given an opportunity to explain his or her actions prior to making the discharge decision?
- Are there compelling explanations or sympathies in favor of the employee? On the other hand, are there aggravating circumstances that warrant discharge even for a relatively minor infraction?
- Should there be a “last chance” warning (keeping in mind that this must be considered for consistency as well, with the company prepared to explain why a Caucasian employee, for example, was given a “last chance” warning when an African-American employee was not)?
- Would a transfer to a different job or shift (or, perhaps, a leave of absence) solve the employee’s problem, such that an otherwise productive and/or positive employee can be rehabilitated and maintained?

Following these tips will help put the employer in a better position to defend its discipline and discharge decisions. ♦

Charles T. Oxender is an associate with the law firm of Miller, Canfield, Paddock and Stone, PLC. Charles may be reached at 313-496-6420 or oxender@millercanfield.com.



A LIGHT AT THE END OF THE TUNNEL

Arnold Weinfeld

Perception is everything and in everything we do. It leads you and me to reach conclusions without sometimes knowing the facts. Take our state for instance. At present, the perception is that everyone in Michigan is leaving to find jobs elsewhere. And why wouldn't it be? For the past several years the dominant news stories have been the loss of hundreds of thousands of manufacturing jobs that aren't coming back. Private and even public entities from other states send recruiters here in an effort to lure Michigan residents to jobs in their communities. The old phrase from the early 1980s "will the last person out of Michigan please turn out the lights" has resurfaced. This mantra of gloom and doom has had a profound effect on how we view ourselves and how others view us as well.

Knowledge-based economy

Yet, among the continuing drumbeat of sour news, there is reason to be optimistic. The fact is that Michigan is indeed transitioning toward a knowledge-based 21st Century economy. Unfortunately, what we don't hear often enough are the stories of these positive developments

occurring within our state. It is time for all of us to take a deep breath and begin to understand where the opportunities are occurring and where they will be in the future. A recent report from the University of Michigan's Center for Local, State and Urban Policy entitled "Michigan's Economic Transition: Toward a Knowledge Economy," points to the evidence necessary for us to change the current perception and feel better about ourselves and our future.

Using Bureau of Labor Statistics, the report provides the facts to show long-term positive job growth in many areas of the "new economy." This includes employment growth of 5.9% over the last ten years in financial services, 7% in professional and business services and 20% in educational and health services over the same time period. While there is no denying that job growth in these areas for our state lags behind the rest of the country, the fact remains that it *is* growing and shows capacity for greater growth.

Growth of small businesses

Along with information regarding job growth by sector, the report also

covers another area of importance – the change taking place among actual businesses. Again, using information from the Bureau of Labor Statistics, the report notes growth in the number of Financial Service firms of 9.58%, 5.28% in Professional, Scientific and Technical Services firms and 6.48% in Educational Service companies. But perhaps most significantly, the greatest amount of growth is occurring in smaller firms.

The numbers would indicate that many of Michigan's older and larger firms are being pushed out of the way by smaller, more innovative ones. More evidence comes from a recent Milken Institute report which found that over the last decade those firms with fewer than 500 employees provided 60 to 80 percent of net new jobs in the economy. The Corporation for Enterprise Development ranks Michigan first out of the 50 states in job creation by startup businesses for the period 2002-2003. The report also ranks Michigan 13th in the number of new companies created per 100 workers over the period 2000-2005.

This indicates a re-birth of entrepreneurs, a good sign for our state since entrepreneurs bring ideas and energy. Entrepreneurs were a

staple of Michigan's economy 100 years ago during the birth of our manufacturing industry. Over time, as Michigan's car companies became the Big Three, and as people sought and became accustomed to lifetime employment, the entrepreneurial culture that sparked our economic engine waned. Now, as we make the transition to a new economy, entrepreneurs are again playing an important role, a role which brings opportunities for communities.

Human capital

Of course attracting and creating businesses of the 21st century means having the people, the "human capital" to fill those jobs created by these companies. And while recent news stories that 2/3 of new graduates from the state's three major research institutions – UM, MSU and Wayne State – plan to leave upon graduation, other numbers paint a brighter picture. For instance, the National Science Foundation ranked us 13th in 2003 in the number of individuals in science. And in 2006, the NSF ranked us 10th in the nation in the number of engineers and 2nd in terms of employment in high-tech establishments. On the college graduate level we rank 8th in the number of advanced science and engineering degrees and 16th in number of science and engineering graduate students per 1,000 25-34 year olds. Even our primary students compare better to the nation as a whole on math and science proficiency exams. While we don't lead the rankings in any of these categories, the data shows the capacity is there for "new economy" employers to build their base here in Michigan.

Building communities

Yes, our state remains in transition and will for some time, but let there be no doubt that we are headed in the right direction. Communities have a role to play in creating places that will attract and retain the companies of the future and those who will work for them. As your



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statewide association, the League is ready to move into the future with your help in creating those places. We believe it is time to work together – municipal officials, local citizens, community developers, state officials and all those who understand our communities hold the key to long-term economic growth. We need to create a new perception that Michigan is rounding the bend and that the light at the end of the tunnel is of better

days for our residents, our communities, and our state. ♦

Arnold Weinfeld is director of public policy and federal affairs for the Michigan Municipal League. You may contact Arnold at 517-908-0304 or aweinfeld@mml.org.

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Rep. Clemente



The current revenue sharing formula, which addresses the needs of urban developed communities, is set to expire. Will you support continuation of this formula and statutory revenue sharing to these communities or do you expect changes in the formula?

I'm not certain what the future of the current revenue sharing formula will be, but I know

that Michigan communities are at a crossroads. In the past, revenue sharing gave locals sufficient resources to offer the services that their residents needed. Yet, as the state's overall economy changes, the lack of reliable tax revenue that our manufacturing industries used to provide results in a decline in revenue for all levels of government. This means that governments must be more innovative and flexible as we shift into a new economy. Meaningful solutions to the current revenue shortfalls at the local level will only come from creative collaboration between state and local officials.

What measures will you support to assist Michigan cities and villages with economic development and job retention/attraction?

I am always trying to find a way to create more access for locals to economic development tools, and to make sure that this includes the following steps: analysis, process, and implementation. Taking any of these three elements without the other would be incomplete. I am interested in the discussion of creating regional economic development zones to assist in these steps, as well as to help coordinate the state government's efforts to help locals with economic development.

Do you support investing in public transit? If so, what measures will you pursue?

I support public transit. With four CORE communities in my district, I believe that investment should be targeted first toward those corridors where existing resources and infrastructure are already in place.

Over time, legislative actions have eroded the ability of local residents and their elected officials to govern themselves without state or federal interference. What are your thoughts on returning home rule to Michigan's communities?

With the current economic realities facing our state, I believe that all levels of government will benefit from increased cooperation and collaboration. It will require new thinking to get by with diminishing resources.

What is the biggest issue facing your hometown that you plan to address in the Legislature?

By far, the biggest challenge is attempting to find the balance between providing the services residents expect and managing with fewer resources. ♦



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Preserving the historic Standish train depot

Curtis Hillman

The Standish train depot is a picturesque, one-story fieldstone structure of Richardsonian Romanesque inspiration. It has a high roof that terminates in a gable at one end and a hip at the other. The depot contains three rooms, a spacious waiting room and smaller ticket office and freight room spaces.

This magnificent structure nearly met its demise seven years ago when a developer was looking at the property to build a shopping center. Retention of the depot was questionable. The developer also contemplated moving the depot to another location along the tracks where all its historical significance might have been lost, leaving nothing more than a pile of rocks.

The Standish depot was the product of the construction of a railroad line between West Bay City and Mackinaw City. In "The Story of Standish and Its People, 1876-1976," J.L. Judd urged the railroad to build an "outstanding" depot in the village. The local farmers were asked to "bring their larger field stones that could be used in the building." This may explain how a city as small as Standish obtained a depot structure so much more substantial than was typical.

The *Bay City Times* followed the progress of construction. On June 19, 1889 it expressed that the station "when finished, will be the finest depot on the line between Bay City and Mackinaw," and reported on October 13, 1889 that "The Standish Depot is completed and in all probability will be opened this week. It is a little daisy."

In 2000, a small group of people joined to save the depot. After the purchase agreement with the developer fell through, the small group, which had become a sub-committee of the Arenac County Historical Society, decided to make an offer to the owner. A purchase agreement was signed, literally without any money, with the understanding that the depot committee would have two years to raise the necessary monies.

Fundraising

Various fundraising ideas were undertaken (i.e. raffles, auctions and just plain asking for money), but progress was slow and more money was needed to honor the purchase agreement. Without the knowledge of the committee, one member submitted a letter to the Herbert H. Dow Foundation relay-

ing the story but not asking for anything. The Foundation replied in total support of saving and restoring the Standish depot, and would contribute all of the money needed for the purchase. The project was "full steam ahead."

The money raised prior to the Foundation grant was quickly moved into the restoration phase fund. The depot purchase only acquired half of the property wanted. The other half included a once flourishing gas station, convenience and sporting goods store, which was closed and in a state of disrepair. The property was going up for tax sale when the Depot Committee decided to intervene. Over one hundred thousand dollars was owed in back taxes. Most developers found it very difficult, if not impossible to pay this bill and develop the property. The Arenac County Board of Commissioners was approached to see if the Depot Committee could acquire the former gas station property through the tax reversion process. The Board of Commissioners had already paid the various units from their tax revolving fund. The Board agreed that if the property did not cost them any more money, they would give the property to the Depot Committee, which they did.

Formalizing the Committee

The Committee discovered a program funded through MDOT that required a "formal" existence to apply. The group could form an inter-local government authority under the Urban Cooperation Act of 1967, Act 7 of Public Acts of Michigan of 1967. The Act authorizes inter-local agreements between any power, privilege or authority, which the agencies share in common and which each might exercise separately. An authority agreement was formulated and at present,



seven townships, three cities, one village and the County of Arenac have joined to form the Arenac Heritage Route Authority. This agreement allows the various governmental units to work together as a whole, with one voice.

The Authority was then able to apply for the MDOT grant which involved submitting a business plan showing how it would maintain and operate the tourist information center going forward. The Authority agreement provides for a \$.50 per capita assessment to those units of government part of the Authority. The match to the grant included the ownership of the property and paying for the architectural designs for the property.

Initially the Authority thought that the restoration of the depot would take two, three, or four phases. But when MDOT announced the Authority would receive a grant for \$756,000, the project quickly became a one-phase restoration. This made the project one of the first, if not *the* first, in the state of Michigan to receive funding for a project not owned by the state. MDOT maintains all the funds and pays the bills when the respective contractors have satisfactorily completed their work.

As the project continues to develop, the community support continues to grow. Money is not only coming from Authority members, but from service organizations, individuals, businesses and school children. The latest contribution was from a penny drive held by a 3rd grade class to buy a commemorative brick to be placed in the walkway to the future band stand. The 3rd graders actually raised enough money to buy two bricks at \$100 each. The money raised by the sale of engraved bricks and other fundraisers will allow the Authority to construct a band stand/gazebo reminiscent of days gone by. The financial support from the community now stands at over \$525,000.



Photo courtesy of Arenac Heritage Route Authority

Donations

The Committee has received significant donations. One came from a Disabled American Veterans (DAV) Post in Standish. The Post could no longer stay open due to lack of members and money. The DAV sold their property and donated \$50,000 of the sale proceeds to the Depot Project. The donation allowed the Authority to do the necessary environmental studies and to tear down the old gas station on the front of the property. All that the veterans have asked in return is to have a plaque placed near the flagpole commemorating the veterans who had passed through the depot on their way to war.

Another big donation was antique rail cars. Lake State Railway donated three cars that are on permanent display for all to see and enjoy. A 1929 D & M Caboose was donated about four years ago and two 1954 English cars were donated in the fall of 2006. The caboose arrived to its resting place via railway from Bay City. The English coach cars came from the former roundhouse in Tawas where they had been stored for more than 20 years. The English Cars, by welding on wheels, were turned into 5th wheel trailers and driven straight down US-23 from Tawas to Standish this past January. A 50-ton crane lifted the cars to their final location. An elevated handicap accessible walkway has also been constructed to allow everyone to view the three historic railroad cars.

Conclusion

Working with the twelve governmental units has been interesting. Each unit has appointed three people to the Authority board with staggering terms of appointment; one 1 year, one 2 year and one 3 year. All subsequent appointments will be for 3 years. An executive board of directors has been elected to run the Authority, conduct the monthly meetings and to collect all funds either by donation or through assessment.

The Grand Opening and Dedication Ceremonies of the newly restored facility are scheduled for Saturday, October 6, 2007. Numerous dignitaries are scheduled to speak at this momentous occasion.

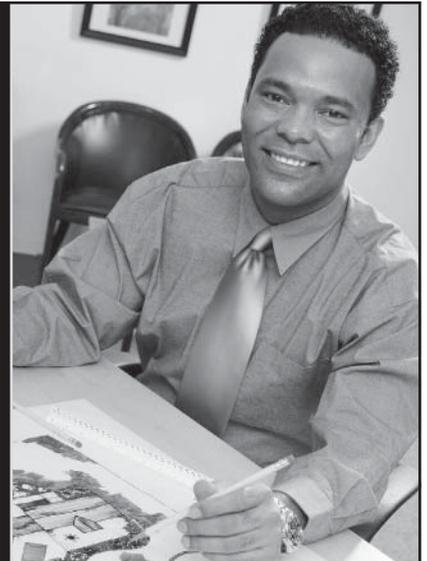
The small group of people that formed seven years ago to save the depot is still working today to see this project to completion. The forming of the Arenac Heritage Route Authority was the vehicle for the Arenac County community to work together to accomplish this and further historical restorations. Once the depot is completed in the fall of 2007, the Authority will be looking for other worthwhile community projects. ♦

Curtis Hillman is the chair of the Arenac Heritage Route Authority. He was also one of the founding members of the Standish Depot Preservation Committee. Curt can be contacted at 989-846-6560 or curtaat@charterinternet.com.



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Creative financing for municipal transit systems

David A. Domzal

Remember the good old days when gasoline was \$2.00 per gallon, and a carbon footprint was something that dinosaurs left behind? We seem to be rapidly entering the area of the unknown, and, in the words of Dorothy, “Toto, I’ve a feeling we’re not in Kansas anymore.” One thing does appear clear is that public transportation will be very much in the forefront of the discourse in the years to come. For example, public transportation can play a vital role in creating a healthier state, as buses produce about half as much carbon dioxide and nitrogen oxide emissions, per passenger mile, as do private automobiles. “Want to help the environment? Ride public transportation!” was the message of the American Public Transportation Association for Earth Day of April 22, 2007.

Public transportation in Michigan

While Michigan has never been fertile territory for public transportation, steps are being taken to develop and improve a number of transit systems throughout the state. One little known fact is that Michigan has nine large transit agencies (defined as having more than 2 million boardings per year), and approximately 100 other transit agencies and authorities. Two exceptional examples of transit systems planning for the future are under active consideration. In Grand Rapids, approval was recently granted to accelerate the study of a streetcar system similar to the one in use in Portland, Oregon, and in Southeast Michigan. Discussions continue with various levels of government to expand an Ann Arbor-Downtown Detroit rail link.

Financing public transportation

While all of this talk of a greener Michigan is heady stuff, the practical issue of how to finance advanced transit systems has proven challenging. Traditionally, transit equipment (buses and rail cars) have been funded in one of two ways – paying cash or issuing bonds. Problems often arise in the “pay as you go” cash approach, as it may not always be possible to match the expenditures to the funds received, particularly if, for example, the transit agency desires to replace its entire bus fleet at one time. Similarly, while there are a number of bonding options available to municipal transit agencies, such as through the Michigan Municipal Bond Authority or the issuance of Transit Grant Anticipation Notes (GANs), bond financing has often not proven to be a cost-effective approach.

The principal source of funding for mass transit in the U.S. comes from federal grants, specifically Section 5307 and 5309 Grants, which are administered by the Federal Transit Administration. Section 5307 funds primarily come from general federal revenues and federal trust funds. The Section 5307 grant program makes available funding for capital up to 80% of costs and 50% of operating expenses for the transit system, with the balance to be made up by state or local matching funds. Grant funds are apportioned to urban areas using a formula based upon population, population density and a number of other factors. Section 5309 grants (funding for Section 5309 is generated from the federal motor fuels tax) are discretionary, and urbanized areas with populations greater than 50,000 are eligible to submit applications for Section 5309 funds to the FTA. As in the case of Section 5307 grants,

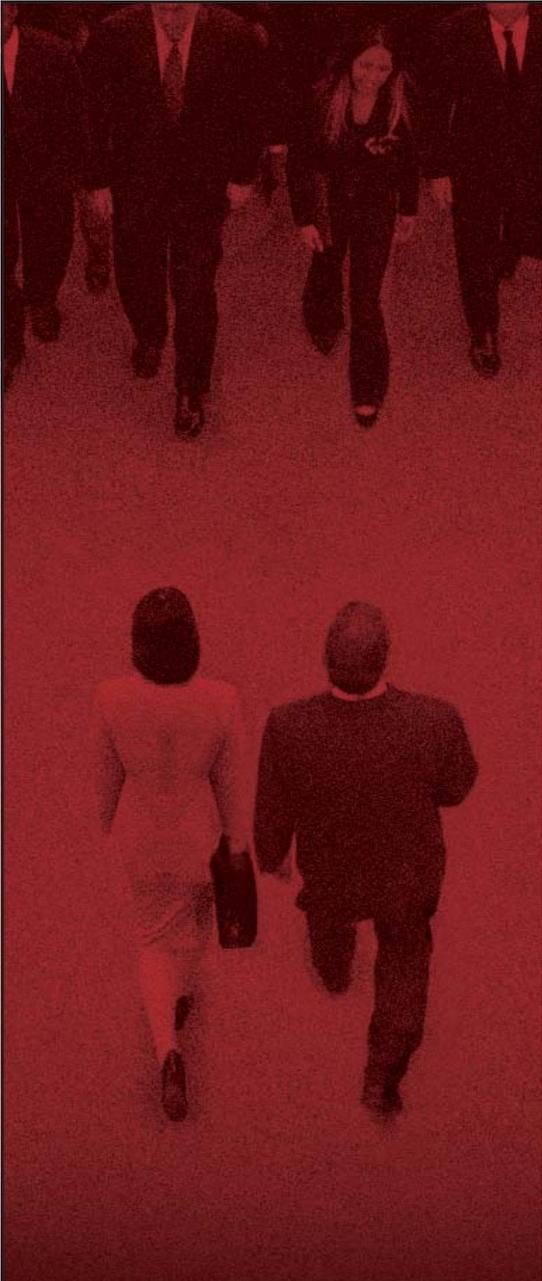
state or local matching funds are required.

Alternative financing: certificate of participation

There is a third financing alternative that should be considered: Municipal Installment Purchase Agreements, also referred to Certificate of Participation (COP) financing. COPs can provide a highly effective mechanism for matching grant fund revenues to capital outlays. For example, if a transit agency needs to replace 20 buses in its fleet, but only has adequate revenues to acquire 5 vehicles, issuing COPs that are backed by the future flow of Section 5307 and 5309 grant funds, as well as fare box revenues, may well permit the full fleet replacement to be completed at one time. There are several benefits to completing the project in an expedited manner, such as the following:

- Potential reduction of purchase price per unit, by ordering more units;
- Reducing risk of higher unit pricing due to increases in raw material pricing or environmental factors;
- Lowering operating costs from accelerated retirement of older vehicles and maintaining a standardized fleet;
- Higher quality of service to the public and increased patronage; and
- Net cost saving from interest earned on cash balances.

How does COP financing work? Very simply, it is a form of the traditional conditional sale or lease/purchase agreement, whereby the



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transit agency makes a commitment to make periodic payments (typically semi-annual, corresponding to its receipt of federal grant funds) over the life of the equipment being purchased (typically 10-12 years). Payments are broken into interest and principal, and there is no balloon or fair market value payment required to be paid at the end of the term of the agreement. Title to the purchased equipment generally resides with the transit agency, subject to the COP holder retaining a security interest in the purchased equipment until the final payment is made. The obligation of the transit agency to provide payment is then marketed to investors, and the interest component of the payment received by the investor (the investor receives an actual Certificate of participation) is exempt from federal income taxes, thus providing the transit agency attractive financing rates. The FTA, to further facilitate this type of financing, explicitly allows transit

agencies to pledge future federal funds as security for the financings. Further, Congress, in enacting the TEA-21 legislation in 1998, provided a "firewall" for transportation grants, insulating them from future negative congressional action, thus assuring the financial community that pledged grant funds will be available. The combination of these factors has resulted in low interest rates being available to financing agencies.

There is one additional benefit to COP financing. It is available to finance refurbishing costs, such as chassis rebuilding, engine/drive train replacement and interior/exterior restoration. Also, a number of transit agencies, such as Cincinnati, Toledo and State College, Pennsylvania, to name a few, are actively involved in converting at least a portion of their fleets to accept fuels such as bio-diesel and compressed natural gas.

The skeptic might well ask if there are transit agencies in Michi-

gan that have benefited from such creative financing, and the answer is an unqualified "yes." In 2000, the Suburban Mobility Authority for Regional Transportation (SMART) found itself in need of replacing its entire fleet of approximately 300 vehicles. In voting to approve the purchase, the SMART Board of Directors approved the use of COP financing. SMART serves portions of Wayne and Oakland County, and all of Macomb County. (For a listing of the serviced communities, please visit SMARTBUS.ORG Under Ride SMART, Services by Community.) In conjunction with Municipal Services Group, Inc. of Littleton, Colorado, SMART secured financing for 292 Gillig buses, over the period of 2001-2003. Each of the individual financings was virtually identical, and interest rates on the three financings range from 4.4% to 5.23%. The hoped-for benefits of reducing maintenance costs

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and fuel costs, improving driver morale and increasing the comfort and convenience for passengers (the author is a rider on the bus system) have been achieved. "We are delighted with the financing program," stated Karen Jensen, SMART's Finance Director. "By upgrading our entire fleet at one time, we've reduced our operational expenses by about \$3.00 per mile, and the savings from the COP financing has resulted in SMART realizing savings of approximately \$7 million, mainly from being able to better use our cash reserves," said Ms. Jensen.

Conclusion

As fuel costs continue to rise, demand for public transportation will increase, and ridership on existing transit lines will increase. It can be anticipated that there will be increased demands on municipal transit agencies to expand and upgrade their systems, while at the same time achieving operational efficiencies. While COP financing does not generate new revenue for the transit agency, it does allow the close matching of federal grant funds to expenses, and can help the agency implement its long-term capital program. While we may not know exactly where mass transit in Michigan is headed, it is nevertheless nice to know that creative financing can get us where we need to go. ♦

David Domzal, Esq. is a founding partner at Williams Acosta, PLLC, a Detroit law firm, and practices in the area of municipal, real estate, energy and finance law. You may contact David at ddomzal@williamsacosta.com or 535 Griswold, Ste 1000, Detroit, MI, 48226.

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Congratulations to our members!

Michigan Mayor honored for promoting regionalism at annual MSU Citizen Planner Academy

Jim Rynberg, Mayor of Fremont, received the Distinguished Citizen Planner Award from Michigan State University's (MSU) Citizen Planner program. Rynberg was chosen as the award recipient for being the driving force behind the creation of a Joint Planning Commission with full planning authority for Fremont and two of its surrounding townships, Dayton Township and Sheridan Charter Township. Rynberg is also helping his community adopt Form-Based Zoning, an innovative zoning code that regulates the function of land use and allows diverse architectural development that can serve multiple and changing functions.

Ann Arbor named 2007 Solar America City

The U.S. Department of Energy Office of Public Affairs will make available nearly \$2.5 million to thirteen cities to increase the use of solar power across the country, building on the president's commitment to further the development of clean, renewable energy technologies. Cities were selected based on their plan and commitment to a comprehensive, citywide approach to the deployment of solar technologies.

The DOE will provide hands-on assistance from technical and policy experts to help cities integrate solar technologies into city energy planning, zoning and facilities; to streamline city-level regulations and practices that

affect solar adoption by residents and local businesses; and promote solar technology through outreach, curriculum development, and incentive programs.

Additional cities selected to receive a Solar America City award include: Austin, TX; Berkeley, CA; Boston, MA; Madison, WI; New Orleans, LA; New York City, NY; Pittsburgh, PA; Portland, OR; Salt Lake City, UT; San Diego, CA; San Francisco, CA; Tucson, AZ.

Clerk of the Year Award

The Michigan Association of Municipal Clerks (MAMC) awarded its distinguished annual clerk of the year, as voted by its membership. Congratulations to:

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SEMCOG Regional Ambassador

Southeast Michigan Council of Governments (SEMCOG) has awarded its highest honor, the Regional Ambassador award, to Mt. Clemens city commissioner David Harrington, and Wayne city councilwoman Susan Rowe. SEMCOG is a regional planning partnership of governmental units serving 4.9 million people in the seven-county region of Southeast Michigan striving to enhance the region's quality of life. ♦



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Local governmental units come together to promote Your Michigan campaign

The Michigan Council of Local Governments (MCOLG) comprised of the Michigan Association of Counties, Michigan Association of Regions (represented by SEMCOG), Michigan Association of School Boards, Michigan Municipal League, and the Michigan Townships Association launch the *Your Michigan – Live, Learn, Work, Play* – campaign.

Your Michigan focuses on the services – from roads and recreational programs to education and public safety – local government units provide to families across the state. Examples of these services include:

- *Your* community operates recreational programs and facilities for you and your families.
- *Your* public schools prepare students for a global economy and attract families, business and commerce.
- *Your* 115,000 miles of roads are paved and maintained for safe commutes to work and schools, to visit relatives or to go on vacation.

- *Your* local police and fire departments make neighborhoods a safe place to live.

Look for multiple materials distributed by the members of MCOLG that highlight the various services you receive in return for your tax dollars. These services are the foundation that collectively supports your ability to live, learn, work and play in the Michigan community you call home.

The purpose of this campaign is to emphasize return on the dollar for taxpayers. The Michigan associations representing local-level governmental units established MCOLG to identify opportunities for collaboration and to leverage the strength of each organization's advocacy efforts. Furthermore, MCOLG educates the public and policy makers on the importance of local public services and quality of life. ♦

Andrea L. Messinger is the legislative and communications coordinator for the Michigan Municipal League. You may contact Andrea at 517-908-0302 or amessinger@mml.org.



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www.miregions.org



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www.michigantownships.org

League Education Programs October & November

For a registration form please visit www.mml.org.

Risk Management 101

Wednesday, October 10, 2007

Come and learn how Risk Management can save you money. It's within your control! A solid Risk Management plan will enable you to enhance safety, minimize lawsuits, meet regulatory compliance standards, make better business decisions, and enhance asset management.

Attendees will view a PowerPoint presentation, see examples of case studies, participate in debates, as well as answer questions from speakers to recap information covered that day. At the end of this program, participants will be able to:

1. Determine the true cost of accidents.
2. Respond appropriately to sewer backup claims,
3. Explain governmental immunity. (07J-07)

- Check-in 8:30 a.m.; Begin 9:00 a.m.; Lunch; Adjourn 4:00 p.m.
- City Hall, Kingsford 906-774-3526
- Speakers: Judy Thomson-Torosian, Service and Sales Manager, Meadowbrook Insurance Group
Beverly Booker, Loss Control Manager, Meadowbrook Insurance Group
Pam Garrison, Claims Manager, Meadowbrook Insurance Group
- Cost Code A; Special Pricing: \$10 for MML Pool and Fund members
- Credits: CEU .6, EOA 6

2 Dates, 2 Locations!

Understanding FOIA and Making the Proper Responses

Friday Morning, October 12, 2007

Thursday Afternoon, October 18, 2007

Through lecture and a series of examples and discussion, this 3 hour seminar will give local officials an overview of the Freedom of Information Act, outline its basic requirements and review the possible consequences of noncompliance. At the conclusion of the seminar, attendees will be able to describe the basic requirements and purpose of the Act, know the appropriate manner for handling a Freedom of Information Act request, and state the consequences of noncompliance.

- Locations & Times:
October 12 (07J-01)
Check-in 8:30 a.m.; Begin 9:00 a.m.; Adjourn Noon
East Beltline Conference Center, Grand Rapids
616-771-9470
October 18 (07J-03)
Check-in 12:30 p.m.; Begin 1:00 p.m.;
Adjourn 4:00 p.m.
Bavarian Inn Restaurant, Frankenmuth
989-652-9941

- Speaker: John Gillooly, Senior Partner, Garan, Lucow, Miller, P.C.
- Cost Code B
- Credits: CEU .3, EOA 3

2 Dates, 2 Locations!

Open Meetings Act

Friday Afternoon, October 12, 2007

Thursday Evening, October 18, 2007

The Open Meetings Act, passed by the Michigan Legislature in 1976, was enacted to ensure all Michigan citizens have the right to know the functions and happenings of local government. This three hour seminar is designed to provide attendees with the knowledge and tools needed to enable them to conduct their meetings in compliance with the Act. Through a series of visuals and examples, OMA requirements will be reviewed. Ways to enforce the Act will be defined by discussing what happens when government decisions are made in compliance with or in violation of the Act. Individuals attending this session will be able to state the purpose of the Act, identify guidelines of the Act and will know how to conduct a meeting within the legal framework of the Act.

- Locations & Times:
October 12 (07J-02)
Check-in 1:00 p.m.; Begin 1:30 p.m.;
Adjourn 4:30 p.m.
East Beltline Conference Center, Grand Rapids
616-771-9470
October 18 (07J-04)
Check-in 5:30 p.m.; Begin 6:00 p.m.;
Adjourn 9:00 p.m.
Bavarian Inn Restaurant, Frankenmuth 989-652-9941
- Speaker: John Gillooly, Senior Partner, Garan, Lucow, Miller, P.C.
- Cost Code B
- Credits: CEU .3, EOA 3

Elected Officials Academy Core Weekender

Friday & Saturday, October 19-20, 2007

All elected municipal officials must have a basic foundation of knowledge upon which to build their effectiveness as community leaders. This weekend course offers the most critical information in four short courses – Legal Framework, Leadership Roles & Responsibilities, Financial Management and Planning & Zoning – in a compact format that facilitates achievement of Level One of the Michigan Municipal League's Elected Officials Academy. The Elected Officials Academy is a voluntary continuing education program established to encourage and recognize the efforts of local elected

officials to become effective leaders. Learn more about the EOA at www.mml.org. Upon completion of this program attendees will be able to differentiate between the role of the councilmember and the role of the mayor/president, discuss the Uniform Budgeting and Accounting Act, identify where taxes and revenue sharing come from, use zoning checks and balances and make effective zoning decisions. (07J-05)

- **Friday:** Check-in 6:30 p.m.; A light dinner; Begin 7:00 p.m.; Adjourn 9:00 p.m.;
- **Saturday:** Check-in 7:30 a.m.; Begin 8:00 a.m.; Lunch; Adjourn 3:00 p.m.
- Crowne Plaza, Grand Rapids 616-957-1770
- Speaker: A Panel of Experienced Speakers
- Cost Code A
- Credits: CEU .8, EOA 8

Elected Officials Academy Advanced Weekender

Friday & Saturday, October 19-20, 2007

Veteran elected officials who have attended the EOA "Core Weekender" are ready to jump up to the next level of service ability with more in-depth knowledge of municipal issues. Formal presentations about advanced planning and zoning issues, building your municipal finance know-how, and council/manager/staff relations are just one component of this invigorating learning experience. This session offers an excellent opportunity for networking and discussion in a relaxed environment that is often the most effective way for local elected officials to develop and enhance their knowledge and capabilities. Upon completion of this program attendees will be able to identify an expenditure, state what funds are required by law, discuss the rezoning process and contract zoning and define the council/manager relationship. (07J-06)

- **Friday:** Check-in 5:30 p.m.; A light dinner; Begin 6:00 p.m.; Adjourn 9:00 p.m.;
- **Saturday:** Check-in 7:30 a.m.; Begin 8:00 a.m.; Lunch; Adjourn 3:00 p.m.
- Crowne Plaza, Grand Rapids 616-957-1770
- Speaker: A Panel of Experienced Speakers
- Cost Code A
- Credits: CEU .9, EOA 9

3 Dates, 3 Locations!

Risk Management 201 - Root Cause Analysis

Tuesday, November 6, 2007

Wednesday, November 7, 2007

Thursday, November 8, 2007

In RM101 the entire risk management process was overviewed. RM201 will focus on the first two steps of that process: identifying exposures and eliminating exposures. The Root Cause Analysis (RCA) methodology goes beyond troubleshooting and problem solving; it is a tool directed at identifying prevention strategies. The goal is to prevent recurrence of adverse events. Workshops will be conducted on both workers compen-

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sation and property and liability to demonstrate how this methodology can work in your municipality with examples and informative presentations. At the conclusion of this program attendees will be able to identify exposures and develop ways in which to eliminate exposures.

- Check-in 8:30 a.m.; Begin 9:00 a.m.; Adjourn 4:00 p.m.
- Locations & Dates:
November 6 (07K-01)
MML Headquarters, Ann Arbor 734-662-3246
November 7 (07K-02)
Comfort Inn & Suites, Mount Pleasant 989-772-4000
November 8 (07K-03)
Treetops Sylvan Resort, Gaylord 517-732-6711
- Speakers: Beverly Booker, Meadowbrook Insurance Group
Gene King, Meadowbrook Insurance Group
- Cost Code A; Special Pricing: \$10 for MML Pool & Fund members
- Credits: CEU .6, EOA 6 ♦

*Risk Management is Good Management

In continuing with the success of the Risk Management is Good Management program, the Michigan Municipal League Liability and Property Pool and Workers' Compensation Fund have agreed to cover some of the cost for Pool and Fund members to attend many of the liability and workers' comp related training programs offered through the League. For questions about the Risk Management is Good Management program or about MML Pool and Fund membership please contact Jennifer Orr at jorr@mml.org or 800-653-2483.

Cost Code A

When registered one week before the program, Member cities and villages, \$115; Nonmembers \$155. Less than one week before the program add \$35 to the fee.

Cost Code B

When registered one week before the program, Member cities and villages, \$70; Nonmembers \$125. Less than one week before the program add \$35 to the fee.

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MUNICIPAL OPERATIONS

Heather Van Poucker

Personnel manuals: An employer's first line of defense

An up-to-date, comprehensive personnel manual is a foundational piece of any employer's personnel system. It is an opportunity to welcome new employees, communicate your organization's mission and culture, and to provide the employer protection from the myriad liabilities associated with public employment.

A sample list of policy topics that may be included in a personnel manual is provided below. You'll see that it is extensive, and some items are more "dangerous" than others in terms of potential liability. It is best practice to have your attorney review your manual prior to adoption and implementation.

Sample contents

Introduction to The Manual

- Purpose of the Manual
- Application of Policies
- At-Will or Just Cause Employment
- Distribution and Updates of Manual
- Severability

Employee Selection and Related Requirements

- Equal Employment Opportunity
- Accommodation of Disabilities in the Hiring Process
- Employment Postings
- Application Process and Requirements
- Rejection of Applications
- Interviewing and testing Procedures
- Post-offer/Pre-hire Background and Reference Checks
- Post-offer/Pre-hire Physical Examination and Drug Screening
- Nepotism
- Orientation or Probationary Period
- Residency

General Operating Procedures

- Work Day and Work Week, Paychecks
- Attendance
- Breaks
- Work Cancellation
- Personnel Files (Creation, content, access, retention)
- Social Security Number Privacy, Fair Credit Reporting/FACTA
- HIPAA
- Customer Service
- Public Information/FOIA

- Personal Appearance & Hygiene
- Uniforms and Safety Attire
- Drug-Free Workplace
- Use of the City's Resources and Care of Equipment
- Electronic Communications
- Political Activity and General Solicitation
- Harassment & Sexual Harassment
- Workplace Violence
- Concealed Weapons
- Smoking and Other Tobacco Products
- Safety & Right to Know
- Fitness for Duty
- Gifts and Gratuities
- Outside Employment
- Personal Articles in the Workplace/Search Policy
- Key Dispersal

Classification and Compensation

- Compensation Philosophy
- Job Classification/Job Descriptions
- Employment Status (Full-time, part-time, seasonal/temporary)
- Employment Status (Exempt/Non-exempt)
- Pay Adjustments
- Returning Employees and Continuity of Service
- Overtime for Non-Exempt Employees
- Transfers
- Promotions
- Demotions
- Performance Evaluations
- Expense Advances and Reimbursements

Discipline and Termination of Employment

- Rules of Conduct
- Disciplinary Actions
- Complaint or Grievance Procedure
- Voluntary Termination
- Involuntary Termination and Procedural Rights ("Loudermill Hearing")
- Exit Interview
- Return of Property
- Layoff and Recall

Paid and Unpaid Leave Time

- Holidays
- Vacation
- Personal Days
- Sick Leave



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Unemployment Compensation
Social Security
Professional and Trade Associations
Employee Award or Recognition Programs

Regular review and maintenance

Once established, your manual should be reviewed annually to identify:

1. Any changes/additions in laws that need to be reflected in the manual (i.e. Social Security Privacy Act, FLSA changes, etc.)
2. Practical changes in business practices that give rise to new/changed policy (i.e. use of the internet, cell phones, etc.)
3. Changes in employment practices and/or benefits that may be needed to remain a competitive employer in today's workplace (i.e. flexible schedules, health care premium sharing, etc.)
4. Whether the policy is reasonable and still serves its purpose, or whether it can be updated or eliminated altogether
5. Whether established policies follow day-to-day management practices (you must practice what you preach!)
6. Whether established policies are consistently enforced

Training and tracking

Line supervisors should all be carefully trained to promote a shared understanding of personnel policies, and they should be required to utilize uniform practices in their application of policy. They cannot apply some of

Statewide Municipal Pay and Benefits Survey

The Michigan Municipal League's Annual Statewide Municipal Pay and Benefits Survey is currently underway! Most of you received a direct request via email to participate, and all member communities are asked to report their information by **September 1, 2007** through our website, www.mml.org.

Participation in this survey is your chance to secure free access to the most comprehensive, statewide public sector pay and benefits information in Michigan.

Only Communities that Participate in the Survey Will Receive Free Access to the Results, including searchable databases and online libraries.

Questions? Contact Mandy at mreed@mml.org or 734-669-6371.

the policies some of the time, or enforce policies with only some of their staff. This is an employment dispute waiting to happen! As such, some organizations find it useful to track how line supervisors implement policies to ensure consistency.

Lastly, all employees should be trained and refreshed on your personnel policies. Rather than simply obtain a sign-off when a new employee receives the manual, take the time in an orientation session to actually go through your policies, communicate the intent of those policies, articulate how they support the broader mission and enhance the workplace. Then, when there are substantive changes to your manual host a "brown bag lunch and learn" or some other training forum to familiarize staff with the new policies. Remember, obtain new sign-offs from all staff when substantial changes to your manual occur and maintain those within personnel files. ♦

Heather Van Poucker is manager of Consulting Services for the Michigan Municipal League. You may contact Heather at 734-669-6326 or hvanpoucker@mml.org.



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MUNICIPAL FIELD REPORT

Caroline Weber Kennedy

Try it, you'll like it: good ideas from up north

Positive change in business hours

Several months ago, the city of Negaunee, operating for some time with a skeleton staff, changed city hall business hours from 10 a.m. to 4 p.m. Employees work the same daily hours as before (8 a.m. - 4 p.m.), but have two concentrated hours each morning to get projects off the ground or tie up loose ends from the day before. While council anticipated some initial negative feedback from residents, results of the change have been positive. In exchange for the two hours each morning, Negaunee taxpayers receive increased productivity. Operations run more smoothly and the limited staff experiences less stress. The Michigan Municipal League is aware of other communities that have recently instituted a similar change in business hours. If your city considers this option, we recommend that you remind citizens in advance that payments can conveniently be made via the drop box.

Communication key to positive construction image

The city of East Jordan, facing a long-term, inconvenient infrastructure project in the heart of downtown, established "Team E.J." to keep all stakeholders well informed. Team E.J. consisted of the city manager, a representative from the local chamber of commerce, a local reporter and key members of the



East Jordan grant projects and infrastructure improvements beautify historic downtown.

site project. The team met briefly once a week to discuss the project schedule, phases, setbacks, access issues and potential alternatives. The frequent updates and accurate reporting created a more positive relationship between the construction crew and the community. Business owners and residents had an established contact through which to communicate legitimate concerns and offer alternatives,

while the site managers had the opportunity to dialog about stakeholder issues from the perspective of which suggested access improvements might be feasible or not (for safety and other reasons). The city highly recommends this approach for promoting a successful, albeit inconvenient, project. ♦

Caroline Weber Kennedy is manager of field operations for the Michigan Municipal League. You may contact Caroline at 906-428-0100 or ckennedy@mml.org.

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Sue A. Jeffers

When is city-owned property tax exempt?

Facts:

In 1990, the city of Mt. Pleasant purchased and then annexed approximately 320 acres of vacant land adjacent to its boundaries. The city purchased this land for two primary reasons: 1) to extend streets to connect with a proposed ring road system around the community and 2) to have sufficient land for new development to expand its tax base. After it acquired the property and laid out the streets, the city platted, marketed, developed and sold land to various developers, investors, or governmental agencies. By 2002, the city's efforts resulted in five subdivisions: one condominium development, three apartment developments, a soccer field and park, a county emergency center, a state police post, a 138-acre industrial park, an optometrist's office and two commercial uses.

When the city first acquired the property it was listed as tax exempt pursuant to MCL 211.7m. Section 211.7m of the General Property Tax Act provides that "[p]roperty owned . . . by a county, township, city, village, or school district used for public purposes . . . is exempt from taxation under this act." In 1993, after the city had platted two small subdivisions on part of the acquired property, the city assessor (upon advice of the Michigan State Tax Commission) placed the subdivisions on the tax roll. After the assessor's decision was upheld by the board of review, the city appealed the taxable status of the property to the Michigan Tax Tribunal. The State Tax Commission ultimately decided that the remaining parcels acquired by and still owned by the city should be taxable and placed on the tax rolls.

Question:

When a city acquires property and implements a plan to use the property for economic development purposes, is such property exempt from taxation on the basis that is "used for public purposes" pursuant to MCL 211.7m?

Answer according to Michigan Tax Tribunal:

No.

Answer according to the Michigan Court of Appeals:

No. Although the Court of Appeals found that the city's activities constituted a public purpose, it nonetheless found that the property in question was not tax exempt since the "public purpose use is a prospective use rather than a present use"

Answer according to the Michigan Supreme Court:

Yes. The Michigan Supreme Court held that the property was exempt from taxation under MCL 211.7m since Mt. Pleasant used the property for public purposes when it acquired and improved the land for resale for economic development.

The Court, first of all, determined that "economic development constitutes a 'public purpose.'" The Court noted that it had held in *Wayne County v Hathcock* that the activities of Wayne County in acquiring land for a project in an effort to increase its tax base and create jobs was a public purpose and creating jobs was a public purpose.

The Court then considered whether those activities constituted

a "use" of the property. The court distinguished an earlier Supreme Court decision (*Traverse City v Township of East Bay*) which found that land which was not held as part of any plan, was not "used" for public purposes. The Court detailed that Mt. Pleasant had a plan for acquiring the property, annexing it, seeking proposals for its development and then followed its plan and moved toward implementation of that plan. It is important to note that the Supreme Court did not overrule *Traverse City*. As a result, merely owning land without making any use of it will most likely not qualify a municipality for an exemption under MCL 211.7m.

City of Mt. Pleasant v State Tax Commission, No. 129453 (March 28, 2007). The League's Legal Defense Fund participated as an *amicus* party in this case. Richard J. Figura, Simen, Figura & Parker, P.L.C. and Mary Massaron Ross, Plunkett & Cooney appeared on behalf of the city at the Michigan Supreme Court; William J. Danhof, Miller Canfield Paddock and Stone, P.L.L.C. prepared and filed the *amicus* brief on behalf of the League. ♦

This synopsis is based on the article appearing in the April 2007 issue of the *Municipal Legal Briefs* entitled "*City of Mt. Pleasant v State Tax Commission: The final chapter in a tale of two cities*" by Richard J. Figura.

Sue A. Jeffers is associate general counsel for the Michigan Municipal League. You may contact Sue at 734-669-6306, 800-653-2483 or sjeffers@mml.org.

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Zoning Board of Appeals Handbook

by Steve Langworthy, formerly of LSL Planning

Written to help new zoning board of appeals members understand the scope of their role and responsibilities, this handbook will provide a basis of understanding in order to capably perform their duties within the law. Topics covered include: the role of the ZBA as a whole and as individual members; an explanation of the zoning enabling acts; the ZBA's relationship to other municipal bodies and individuals; how to identify and handle conflicts of interest; how to interpret a zoning ordinance; types of variances; preparing for and conducting meetings; and guidelines for making tough decisions.

Planning Commissioners Handbook

by Steve Langworthy, formerly of LSL Planning

This book was written to help new planning commissioners become effective commissioners. The topics covered include tools for planning commissioners, preparing for meetings, meeting the public, how knowledge of the zoning ordinance and applying ordinance standards will help you make decisions that will stick and what the future holds for planning commissioners.

Labor Negotiations Handbook for Municipal Officials

by Joe Fremont, retired Labor Relations Director, Michigan Municipal League.

The *Labor Negotiations Handbook for Municipal Officials* is a comprehensive how-to book for city and village governments. Beginning with the history of unionization, it walks readers through the duty to bargain in good faith, how to select a management team, and how to set pre-bargaining goals and bargaining ground rules. It covers negotiating an agreement, with instructions on proposals, explaining your viewpoint, putting an agreement together, presenting package proposals, and closing the deal. Special bargaining situations, such as first contracts and Act 312 contracts, are also covered. *The Handbook* concludes with dispute resolution procedures.



MUNICIPAL Q&A ... SO GLAD YOU ASKED!

coordinated by Mary Charles

Q. I am looking for current information regarding Americans with Disabilities Act (ADA). Where should I look?

A. The best sources of information on current ADA regulations are the U.S. Department of Justice ADA home page (www.usdoj.gov/crt/ada/adahom1.htm) and the U.S. Department of Labor ADA page (www.dol.gov/odep/pubs/publicat.htm).

Additional resources include the Job Accommodation Network (www.jan.wvu.edu), a free service of the U.S. Department of Labor, and the Great Lakes Disability and Business Technical Assistance Center at 312-413-3636. You might also find their website helpful also: www.adagreatlakes.org/.

Q. We will be conducting interviews shortly for a position in our municipality. I believe you have a One-Pager *Plus* on questions not to ask. If so, please email me this information.

A. We do not have a One-Pager *Plus* on this subject. However, the Michigan Department of Civil Rights has put together an excellent resource on the subject. You can download it from www.michigan.gov/documents/pre-employment_inquiry_guide_13019_7.pdf.

Q. Do we have to conduct interviews in public or can we go into closed session?

A. Section 3 of the Open Meetings Act requires that all action of the public body (i.e. the council) must be taken in public unless they meet the requirements for a closed meeting (Section 7 or Section 8). These exceptions are also outlined in a One-Pager *Plus* on our website. If a position is to be filled by council action, then the interview and the action must take place in an open meeting.

If the position will be filled by a department head (e.g. the police chief is hiring a patrolman), then the department head is generally not considered to be a public body.

This is something you will want to discuss with your municipal attorney.

Q. We have a "non-exempt" employee who has accrued more "comp time" than we realistically will be able to honor as time off. What do we do?

A. As you know, the Fair Labor Standards Act (FLSA) requires that "non-exempt" employees be paid overtime (time and a half) for all hours worked over 40 in a workweek. The FLSA does permit public employers to offer compensatory time off, earned at time and a half, in lieu of immediate cash overtime compensation; the employee must agree to this alternative and there are very specific guidelines related to it.

According to the U.S. Department of Labor, "Overtime compensation . . . may be paid in cash at the employer's option, in lieu of providing compensatory time

off in any workweek or workperiod . . . The FLSA does not prohibit an employer from freely substituting cash, in whole or in part, for compensatory time off; and overtime payment in cash would not affect subsequent granting of compensatory time off in future workweeks or work periods." U.S. Department of Labor, Code of Federal Regulations, 29 CFR 553.26 – Cash overtime payments; http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_553/29CFR553.26.htm

Also remember, non-public safety/emergency response employees may accrue no more than 240 compensatory hours (or 160 actual hours of overtime worked) before overtime payment is required. Public safety/emergency response employees may accrue up to 480 compensatory hours (or 320 actual hours of overtime worked) before overtime payment is required.

Q. We are in the process of writing an ordinance for a village manager. Is it standard procedure to have a village manager reside within the village or is that at the discretion of the council writing the ordinance?

A. PA 212 of 1999 prohibits local units of government from requiring employees to live in the municipality. (See the OPP on The Residency Act on the website (www.mml.org/members/pdf/opp/act.pdf.)

Some municipalities have offered incentives if they do. ♦



City of Coleman

The city of Coleman began as one man's dream. Seymour Coleman surveyed and platted 100 acres of land. The Pere Marquette Railroad Depot was established to serve the lumbering mills in the area. When banks, churches, various businesses and many saloons came to the area, Coleman was born. When the lumber was gone, the city seemed destined to die. But, the railroad built a spur to Mt. Pleasant and new businesses came to Coleman to utilize the railroad.

Although the city has changed through the years, Seymour Coleman's dream is still alive. The railroad tracks are gone now and the railroad has been converted to a walking and bike trail which extends to Midland in the east and into Clare County in the west. A portion of the original Pere Marquette

Railroad Depot has been converted to a restaurant.

Coleman is always looking for ways to improve the lives of its citizens and citizens of the surrounding area. Our city is proud to be the owner of a thirty-unit senior apartment complex, Pere Marquette Senior Estates. Named for the railroad, it sits near the Rails to Trails walking and bike path. Recently, a new Senior Dining and Activity Center was built by the Midland County Council on Aging. A cooperative effort allowed a corridor to be built that connects the Senior Dining and Activity Center to the city's senior apartment complex. Construction of thirty additional units of senior housing is planned to begin in the spring of 2008. This new facility will also be connected to

the Senior Dining and Activity Center. In 2002 the new Coleman Area Library was completed which services the city of Coleman and several of the surrounding townships. The city and surrounding townships also work cooperatively to support a first-rate fire department.

Special activities throughout the year include an illuminated Christmas Parade that we boast was the first of its kind in our area. The streets are filled with all things illuminated with Santa and his reindeer bringing up the rear. June brings the annual classic car show where cars cruise the city concluding with a burnout contest. Judging and awards are also part of this event.

The city of Coleman is often described as a bedroom community, but as you can see, our sleepy little city has much to offer.

Please send address and recipient corrections to Susan Vasher at MML, P.O. Box 1487, Ann Arbor, MI 48106-1487; phone 800-653-2483; fax 734-662-8083; or email svasher@mml.org. Thank you.