



FROM GARAN LUCOW MILLER'S MUNICIPAL LAW DEPARTMENT

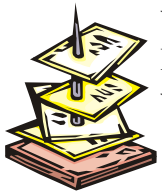
# GOV LAW

*Monthly Publication for Michigan Cities, Townships, Villages and Schools*

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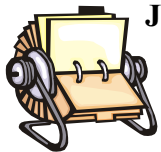
## From the Editor by John J. Gillooly

### We asked GLM's Municipal Experts: **If You Could Give Your Municipal Clients One Piece of Advice, What Would it Be?**



**WILLIAM BRICKLEY**, GLM Grand Blanc: Don't confuse your personal views with your professional responsibilities to the government agency and make sure the facts support the decisions you make. Most

public officials understand these distinctions very well. They are able to make sometimes difficult and unpopular decisions because they understand their role in the government. A few officials feel obligated to say what is on their mind and, unfortunately, that just fuels some of the lawsuits that we end up defending. I am not saying that a government official should be quiet or should be afraid to dissent but be careful when throwing out theories or explanations without a solid basis in fact. **Contact William Brickley at 810.695.3700.**



**JOHN HEIKKILA**, GLM Marquette: Local municipal officials are now called upon more frequently to make decisions regarding complex matters. If you are dealing with a subject with which you are

unfamiliar, make sure you have reviewed all available information before you make a decision. Consult your accountant, insurance representative, attorney, or local groups such as the Michigan Township Association or

Michigan Municipal League to review all necessary background information. Do not permit yourself to be rushed into a decision until you are comfortable that you understand the implications of your actions. **Contact John Heikkila at 906.226.2524.**



**JAMI LEACH**, GLM Detroit: I can't emphasize enough the importance of documenting everything, either in writing, by video, audio, or photograph. For example:

- ✓ Injuries caused by defective conditions on sidewalks or on buildings – photograph the alleged defects up close, show measurements and the surrounding area.
- ✓ In police situations, if restraint is required in jail, document the exact reason and exact times and video tape the entire restraint if possible.
- ✓ If someone complains of a need for medical attention while in police custody, inform a supervisor and document it. Better to err on the side of caution and get some medical attention than to end up with a lawsuit later for failing to do anything.
- ✓ In most cases, statutes of limitation expire in 3 years, so if there is any chance of a lawsuit, save photos, tapes, and documentation at least that long. **Contact Jami Leach at 313.446.5538.**

**Other Contributors Featured in this Issue:**  
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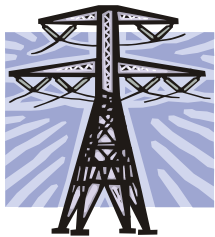
## Multi-Million Dollar Victory

by Steven A. Matta



GLM attorneys Steven Matta and John Whitman teamed with Salem Township attorney, Doug Winters, to fight corporate giants attempting to take advantage of the Township. Salem Township hosts the Arbor Hills Landfill, and contracted with Browning Ferris Industries of Southeastern Michigan, Inc. to operate the landfill, pay rent to the Township based on gate receipts, and pay royalties to the Township based on income received from the sale of landfill gas (LFG).

When the parties contracted in 1991, they did not know what use would be made of the LFG, only that it had energy-producing potential. Ultimately, BFI built a \$35 Million gas-to-energy facility, and the LFG was used to generate electricity which was sold to DTE by BFI-related entities. From 1995 to 1997, BFI paid the Township 50% of the gross LFG sales. In 1997, the price of gas increased and the Township relinquished ownership of the gas collection system to allow BFI to obtain valuable tax credits. BFI continued to pay the Township 50% of the gross LFG sales, amounting to more than \$400,000 annually to the Township.



In 1999, BFI sold its assets to Allied Waste which, in turn, sold the on-site gas-to-energy facility to Gas Recovery Systems, Inc. GRS continued to pay the Twp. 50% of the gross LFG sales until March 2002, when it sent the Township a check for \$250, having unilaterally decided to begin deducting costs of extraction, processing, and depreciation. GRS claimed the original Host Community Agreement provided for these deductions, and claimed to be owed almost \$1 Million in overpayments.

GLM filed suit on behalf of the Township for breach of contract, seeking damages for past due payments and specific performance and, in a counterclaim, the defendants sought reimbursement for the \$1 million in alleged mistaken payments. GLM attorneys worked closely with the Township attorney and the Board of Trustees to develop and implement a

successful case strategy. A committee of three trustees was formed to discuss issues quickly, to maintain confidentiality, and assist in both public and closed door meetings held throughout the litigation.

The case required exhaustive and complex discovery, including production, analysis and cataloging of thousands of pages of documents concerning an intricate web of corporate relationships among the numerous defendants, their internal contractual arrangements, as well as the system of LFG collection and energy production itself, and documenting and reviewing 6 years course of performance, tracking down the parties' original representatives, and deposing numerous witnesses in 5 states. GLM was able to accomplish the vast discovery necessary and safeguard the Township's confidentiality while regularly addressing the concerned public's need for information about the case.



The Township ultimately prevailed without a trial. Judge Melinda Morris of the Washtenaw Circuit Court, in three separate opinions and orders totaling almost one hundred pages in length, found that even though the contractual language was unambiguous, the evidence left no genuine issue of fact that the knowledge, representations and intentions of the contracting parties was reflected in their course of performance, including that the LFG sales price had been adjusted to reflect costs already, notwithstanding contractual language to the contrary.

Judge Morris dismissed the counterclaim, granted summary disposition in favor of the Township on the breach of contract claim, and ordered specific performance of the LFG payments based on past performance. The Township, which does not impose a tax on its citizens and funds its budget largely on the income from the landfill, will continue to receive 50% of the gross LFG sales without deduction for costs of any kind. An existing Gas Sales Agreement among the defendants runs through 2030, with increasing prices each year, which could bring over \$50 Million to the Township depending on production. The Court also found in favor of the Township on its claim for indemnity under a guaranty. The Court entered judgment for the Township in the amount of \$2,101,835.14 which included past due payments, interest and over \$414,000 in attorneys fees and costs to date. No appeal was taken, and the Township has already been paid the principal amount of the judgment.

## Pay Attention to Your Employees' Military Status

by Thomas R. Paxton



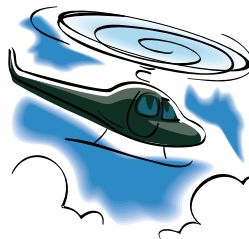
There are currently 1.35 million volunteers nationwide serving in the National Guard and Reserves. Thirty Thousand are classified as "IRR" – Individual Ready Reserve (recently discharged service men and women who are susceptible to recall for several months after they are otherwise formally discharged from their service). In their civilian lives, a large percentage of these reservists and guards are local and state employees. As they plan for and react to deployments, there are several statutes of which employers of military reserves and guards must be aware.

The **Uniformed Services Employment and Reemployment Rights Act** ("USERRA") 38 USC § 4301 covers all civilian employers, whether public or private and regardless of size. USERRA requires the employer to provide military leaves of absence to employees who are called to military service and requires the employer to rehire them when they return. USERRA supersedes any state law, contract, agreement, policy, plan, practice, unless the law is more beneficial to the service person ( Michigan law does provide some similar protections – see MCL 32.273). While on USERRA leave, the employer must offer the opportunity to purchase health care insurance similar to that required by COBRA. However, there can be no waiting period or exclusion of coverage for preexisting condition due to military absence.



**USERRA** prohibits retaliatory adverse employment actions against a member of a uniformed service, including employees who have applied to be a service member, or someone who has an obligation to perform service in a uniformed service. The act further requires an employer to provide the service member reemployment rights and benefits

when the employee returns from his military obligation. The employee must give notice of service requirement unless "military necessity" prevents him from doing so. (However, the military's determination of "necessity" is generally not subject to review.)



There are some protections for employers from what may seem to be burdensome measures. An employer is not required to reemploy a person if the employer's circumstances have so changed as to make such reemployment impossible or unreasonable or that such employment would impose an undue hardship on the employer. The employer has the burden of proving the impossibility or undue hardship. Reemployment is not also required when the cumulative length of the absence exceeds five years.

A Michigan statute that municipal employers often overlook when hiring is the **Veterans Preference Act** ("VPA") MCLA 35.402. As the name suggests, the act provides for preferred hiring of veterans but, more importantly, for HR administrators and managers, it limits the reasons the veteran can be terminated or disciplined. The VPA provides that an honorably discharged veteran cannot be terminated or disciplined without first being afforded a hearing to determine if there is "cause" for the action. This hearing requirement has caused the Michigan Court of Appeals to rule that the act converts any veteran who is hired as an at will employee automatically to a "just cause" employee. *Jackson v. Detroit Police Chief*, 201 Mich App 173, 176; 506 NW2d 251 (1993). The hearing must be held before the decision to discipline or termination is made.



Because an employee may be entitled to rights that supercede any offer letter or employee handbook, employers must be careful to understand who may be a veteran and, thus, subject to the VPA, before they hire.

Municipal and governmental human resource managers should be careful to know the military status of their employees so they do not inadvertently deny servicemen and women their rights after serving our country.