

STATE OF MICHIGAN
COURT OF APPEALS

RETIRED DETROIT POLICE AND FIRE
FIGHTERS ASSOCIATION INC,

UNPUBLISHED
December 16, 2010

Plaintiff-Appellant,

v

No. 293998
Wayne Circuit Court
LC No. 08-116128-CL

DETROIT POLICE OFFICERS ASSOCIATION,
DETROIT POLICE LIEUTENANTS AND
SERGEANTS ASSOCIATION, DETROIT
POLICE COMMAND OFFICERS
ASSOCIATION, DETROIT FIRE FIGHTERS
ASSOCIATION, THE CITY OF DETROIT, and
CITY OF DETROIT POLICE AND FIRE
RETIREMENT SYSTEM,

Defendant-Appellees.

Before: WHITECK, P.J., and ZAHRA and FORT HOOD, JJ.

PER CURIAM.

Plaintiff, Retired Detroit Police and Fire Fighters Association Inc, appeals as of right an order dismissing its claims of breach of fiduciary duty, breach of contract, and conspiracy to cause breach of fiduciary duty, for lack of standing. We affirm.

I. BASIC FACTS AND PROCEEDINGS

Plaintiff is an association representing the interests of approximately 6,500 retired police officers and fire fighters. Defendants, Police Officers Association (DPOA), Detroit Police Lieutenants And Sergeants Association (DPLSA), Detroit Police Command Officers Association (DPCOA) Association, Detroit Fire Fighters Association (DFFA) are labor unions (collectively, “the Unions”) representing, respectively, Detroit police officers with a rank of “Police Officer,” Detroit police officers with a rank of “Lieutenant, Sergeant or Investigator,” Detroit police officers with a rank of “Inspector or Commander,” and all Detroit fire fighters. Defendant city of Detroit Police and Fire Retirement System (Retirement System) provides retirement benefits for retired and deceased police officers and fire fighters and their beneficiaries. The Retirement System has a board of directors (Board) that is responsible for its operation, management and administration.

As stated in *Policemen and Firemen Retirement System v City of Detroit*, 270 Mich App 74, 75, 714 NW2d 658 Mich App (2006), the Board,

is responsible for the general administration, management, and operation of the Policemen and Firemen Retirement System, which provides retirement and death benefits to active and retired uniformed city employees, their families, and beneficiaries.

* * *

Several Detroit officials and employees sit on the Board, including the mayor or his representative, a city council member, the city treasurer, the police chief, the fire commissioner, three firefighters, and three police officers.

* * *

Part of the Board's responsibilities is to ensure that the retirement system is properly funded. Accordingly, the Board, after consultation with an actuary, determines the amount of Detroit's annual pension contribution. The plan actuary calculates plan assets and liabilities to determine whether the plan is overfunded or underfunded. The annual contribution Detroit must make to the plan includes present service cost, plus a credit or additional payment depending on whether the plan is overfunded or underfunded.

On June 26, 2008, plaintiff filed a complaint against the DPOA, the DPLSA, the DPCO, the DFFA and defendant city of Detroit seeking superintending control of the Retirement System¹ to reverse a resolution allowing the city of Detroit a \$25 million annual credit toward its obligation to fund the Retirement System over the following three years, should the Retirement System remain overfunded. Plaintiff alleged that the Board was overfunded in fiscal year ending June 30, 2006 by over \$100 million because of an unexpected return on investments. Plaintiff alleged that the Unions and the Retirement System breached their fiduciary duties to plaintiff when various members of the Unions seated on the Board approved the resolution in exchange for the city of Detroit amending the collective bargaining agreement to provide that active employees would be reimbursed for 100 percent of their accumulated sick leave upon their retirement instead of only 70 percent. On appeal, DPCOA and DFFA freely admit that "[i]n 2008, the city again sought an offset to its contribution and offered benefit enhancements in order to encourage the allowance of these offsets." Joint Brief on Appeal, 8. DPCOA and DFFA maintain that the Unions had every reason to accept the city of Detroit's offer and no reason to reject it. Further, that the increase in final average compensation benefited the active union members and was in no way detrimental to the retired union members or the Retirement System. If the Retirement System became underfunded, the city of Detroit would have to

¹ Plaintiff did not name the Retirement System in the complaint, but the Retirement System later intervened.

increase its contribution to return it to fully funded status. The city of Detroit, on the other hand, simply maintains that defendants do not owe a fiduciary duty to plaintiff retirees in regard to negotiating collective bargaining agreements for active employees.

Because plaintiff had requested superintending control, the case was assigned to the chief judge of the circuit court. The chief judge, in a letter to the parties' attorneys, questioned whether the instant case was properly an action for superintending control. The parties submitted briefs on the issue and the chief judge determined that the instant case was not a case for superintending control and transferred it to another judge (hereafter the trial court). There was no appeal of that decision.

After the case had been transferred, the trial court granted plaintiff's motion to amend the complaint to include claims for breach of contract and conspiracy to interfere with a contract. The trial court dismissed count 1 of plaintiff's amended complaint seeking superintending control, and no appeal of that decision was taken. The contract claim was based on an October 2004 "memorandum of understanding" signed by representatives of plaintiff, the Unions and the city of Detroit, that reflected the parties' agreement that the Board should distribute Retirement System overfunding to plaintiff's members and the Unions' members. The Retirement System was not a member to this memorandum of understanding. Plaintiff alleged that defendants breached this memorandum of understanding because in fiscal year ending June 30, 2006 the Retirement System was overfunded by over \$100 million, and the Unions and city of Detroit did not seek to distribute the overfunding to the active and retired members of the Unions. Rather, plaintiff claims that the Unions influenced its members seated on the Board to allow the city of Detroit an offset over the next three years (unless the Retirement System should become underfunded) in exchange for an increase in the Unions' active members' benefits. Plaintiff also alleges this arrangement constituted a conspiracy to breach the memorandum of understanding and a conspiracy to breach the Board's fiduciary duty to all its beneficiaries.

DPOA and the city of Detroit filed motions for summary disposition to address plaintiff's additional claims. They argued that the memorandum of understanding had been superseded by an April 2001 "release and settlement agreement to distribute certain retirement systems assets" entered into by the parties. In response, plaintiff claimed that the release did not apply to the fiscal year in question. DPOA and the city of Detroit also argued that plaintiff lacked standing because plaintiff's members (1) had not suffered a concrete injury in fact and that plaintiff's claims were based on speculation because plaintiff's members have not been denied any benefit from the Retirement System; (2) the city of Detroit and the Unions were required to negotiate active members' benefits as a "a mandatory subject of bargaining;" (3) the Unions and the city owed no legal duty to plaintiff; and (4) plaintiff's members were not entitled to an increased benefit merely because active Union members received a benefit. The remaining defendants subsequently filed motions for summary disposition essentially raising the same arguments. After a hearing, the trial court dismissed plaintiff's remaining claims because plaintiff failed to show that its members had been harmed because they had not been denied any benefit from the Retirement System, and therefore lacked standing.

II. STANDING

A. STANDARD OF REVIEW

Whether a party has standing is a question of law, which this Court reviews de novo. *Michigan Citizens for Water Conservation v Nestle Waters North America, Inc*, 479 Mich 280, 291; 737 NW2d 447 (2007).

B. ANALYSIS

Plaintiff argues that the trial court erred in determining that plaintiff lacked standing. Because plaintiff has no substantial legal interest in the overfunding of the Retirement System, we conclude that plaintiff lacked standing to bring the instant claims.

In *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, ___ Mich ___; ___ NW2d ___ (Docket No. 138401, decided July 31, 2010), the Michigan Supreme Court recently overruled *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001), under which, the “irreducible constitutional minimum” of standing contained three elements. Those elements were: (1) an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical, (2) a causal connection between the injury and the conduct complained of such that the injury is fairly traceable to the conduct, and (3) likelihood and not merely speculation that the injury will be redressed by a favorable decision.

The *Lansing Sch Ed Ass'n* Court stated that, “Michigan standing jurisprudence should be restored to a limited, prudential approach that is consistent with Michigan’s long-standing historical approach to standing.” Slip op at 2. The *Lansing Sch Ed Ass'n* Court held that,

a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

Here, we conclude plaintiff did not establish a legal cause of action because plaintiff has no right to receive any overfunding from the Retirement System. MCL 38.1140m expressly provides that, “[i]n a plan year, any current service cost payment *may* be offset by a credit for amortization of accrued assets, if any, in excess of actuarial accrued liability.” The word “may” designates discretion. *American Federation of State, County and Mun. Employees, AFL-CIO Michigan Council 25*, 214 Mich App 182, 542 NW2d 333 (1995). Thus, the decision to grant an offset to the employer if there is overfunding rests with the Board. Plaintiff cannot claim a right to the overfunding. Rather, plaintiff only has a right to receive the benefits due to its members. Plaintiff also maintains that the memorandum of understanding “was a binding contract between [p]laintiff, the Unions and the City [of Detroit].” However, the memorandum of understanding

plainly states that “the parties believe that the Policemen and Firemen Retirement System is required to abide by the terms of the [m]emorandum of [u]nderstanding pursuant to applicable law *however the parties recognize the independence of the trust fund/Retirement System as a separate entity with fiduciary obligations.*” (Emphasis Added). The memorandum of understanding merely states the parties’ aspirations in regard to whether the Board will distribute overfunding, if any, to all members of the Unions. Accordingly, plaintiff cannot establish a breach of contract on the basis of the memorandum of understanding.

Further, we cannot conclude that plaintiff “has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.” *Lansing Sch Ed Ass’n*, at slip op 22. There is no dispute that the statutory scheme does not provide plaintiff the right to challenge a decision in regard to the distribution of overfunding in the Retirement System. In this respect, the circumstances are akin to *Policemen and Firemen Retirement System*, 270 Mich App 74. In that case, the Retirement System was underfunded and the city of Detroit attempted to enforce a city ordinance to extend the amortization period to 20 years, contrary to the Board’s decision to adopt a 14-year amortization period. This Court held that the “the statutory language is unequivocal that the Board determines the amount the employer (Detroit) contributes annually to the retirement system and that the employer, in turn, is “required” to make the contribution.” *Id.*, at 80-81. Further, that “[t]he Board’s determination also necessarily includes the amount of time in which Detroit must pay the unfunded accrued pension liabilities because the period directly affects the amount Detroit must contribute to the plan each year.” *Id.*, at 81. Similarly, here, the Board determines the amount that the city of Detroit contributes (and conversely does not contribute) annually to the Retirement System. Given that the city of Detroit cannot challenge the Board’s determination in regard to the amortization period during a period of underfunding, it follows that plaintiff has no legal basis to challenge an offset granted during a period of overfunding.

Further, plaintiff fails to establish that its members have a special injury or right, or substantial interest that will be detrimentally affected by the Board’s decision to grant the city of Detroit an offset because the Retirement System was overfunded. Plaintiff alleges that “[p]laintiff’s members suffered an injury in fact because the Defendants’ actions reduced the security of the plan without providing a compensating benefit for the reduced security,” Plaintiff’s concerns are misplaced, however, given that “Const 1963, art 9, § 24 provides that “[t]he accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.” Stated differently, plaintiff’s action to recover any benefits owed lies in a contract against the city of Detroit. Plaintiff simply does not have an action against defendants.

Moreover, should any reduction of any benefit be realized, plaintiff has an action against the city of Detroit to recover any loss of benefit. Thus, although plaintiff may have standing to adjudicate an eventual claim in the event that its members are denied benefits, plaintiff’s claim here is simply not ripe for adjudication. The requirement of ripeness precludes the adjudication of hypothetical or contingent claims. An action is not ripe if it rests on contingent future events. See *Hendee Putnam Tp*, 486 Mich 556, 786 NW2d 521 (2010). Because plaintiff lacks standing

to assert a cognizable legal claim, and otherwise has not stated a justiciable claim, we affirm the trial court's decision dismissing plaintiff's action.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Karen M. Fort Hood