STATE OF MICHIGAN
IN THE SUPREME COURT

WILLIAM HENDERSON, ET AL,

Plaintiffs-Appellants,

v

MICHIGAN CIVIL SERVICE COMMISSION and MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendants-Appellees.
_____/

Supreme Court No. 156270

Court of Appeals No. 332314

Ingham Circuit Court
No. 15-645-AA

MICHIGAN CIVIL SERVICE COMMISSION'S BRIEF IN OPPOSITION TO WILLIAM HENDERSON'S APPLICATION FOR LEAVE TO APPEAL

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

Laura Moody (P51994)
Chief Legal Counsel

Christopher W. Braverman (P70025)
Assistant Attorney General
Attorneys for Civil Service Commission and Department of Corrections
Defendants–Appellees
Labor Division
P.O. Box 30217
Lansing, MI 48909
(517) 373-2560

Dated: September 7, 2017

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Rules

Regulations

Constitutional Provisions

COUNTER-STATEMENT OF JURISDICTION

Appellant Henderson, under MCR 7.305(B), seeks leave to appeal the Michigan Court of Appeals' decision issued in this case on June 29, 2017.[1] In that decision, the Court of Appeals determined that when a final Michigan Civil Service Commission decision is reviewed by a court, and no hearing was required for the Commission to reach its decision, the appropriate standard of review is the "authorized by law" standard set forth in article 6, § 28 of the Michigan Constitution. In doing so, the Court of Appeals reversed the circuit court's decision to apply the "substantial evidence" standard and reinstated the Commission's final decision regarding the proper classification of the affected Department of Corrections employees.[2] Henderson now seeks reversal of the Court of Appeals' decision.

[1] The Court of Appeals, on August 15, 2017, approved the decision for publication.

[2] This Brief in Opposition to the application for leave to appeal is filed on behalf of both the Civil Service Commission and the Department of Corrections, which were named as parties in the original circuit court appeal. However, only the Commission's final decision is involved in this appeal.

COUNTER-STATEMENT OF QUESTION PRESENTED

1. The Civil Service Commission's final decisions are subject to judicial review under article 6, § 28 of the Michigan Constitution. Where no hearing is required, the Constitution provides that the proper standard of review is whether the Commission's decision is "authorized by law." Did the Court of Appeals correctly determine that this substantive constitutional standard was not displaced by the procedural Michigan Court Rules, MCR 7.117 and 7.119, with respect to the review of final Commission decisions?

Henderson's answer:	No.
Civil Service Commission's answer:	Yes.
Department of Corrections' answer:	Yes.
Trial court's answer:	No.
Court of Appeals' answer:	Yes.

CONSTITUTIONAL PROVISIONS INVOLVED

Article 6, § 28 of Michigan 1963 Constitution

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law.

INTRODUCTION

In seeking leave to appeal, Henderson urges this Court to set aside decades of settled jurisprudence and rewrite administrative law practice in Michigan. Specifically, Henderson suggests that when this Court amended the Michigan Court Rules in 2012, it intended to graft the substantive standard of review from the Administrative Procedures Act onto virtually every administrative appeal to circuit court, regardless of whether the APA applied to that agency's decision. The Court of Appeals correctly rejected this unsupported proposition, and found instead that the Court Rules merely set forth the *procedural mechanics* for appealing an agency's decision, not the standard of review itself.

The Court of Appeals further determined – correctly – that when the Civil Service Commission issues a final decision that does not require a hearing to be conducted, the applicable standard of review is the "authorized by law" standard set forth in the Constitution. As a result, the Court of Appeals expressly reversed the circuit court's erroneous application of the "substantial evidence" standard. Moreover, the Court of Appeals expressly found that the circuit court improperly reviewed the evidence in the record, reweighed that evidence, and substituted its judgment for the Commission's.

Far from being "clearly erroneous," the Court of Appeals correctly applied the constitutional standard of review to the Commission's decision and correctly reversed the circuit court. Any public interest involved in this case should therefore be outweighed by the correct and legally sound analysis in the Court of Appeals' decision, and this Court should deny the application for leave to appeal.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

A. Applicable civil service law, rules, and regulations.

The Constitution creates the Commission and grants it "plenary power" within its sphere, including the authority and mandate to "classify all positions in the classified service according to their respective duties and responsibilities," and to regulate all conditions of employment in the State classified service. Const 1963, art 11, § 5, ¶ 4; *Viculin v Dep't of Civil Serv*, 386 Mich 375, 393 (1971). The Constitution also grants appointing authorities, like the Department of Corrections (Department), certain powers in the classified system. Specifically, appointing authorities can create and abolish positions for reasons of administrative efficiency without the Commission's approval. Const 1963, art 11, § 5, ¶ 8. Once created, though, the Commission must ensure all positions are classified according to the position's duties and responsibilities. *Id.*, ¶ 4.

The Commission's rules also give the Department, as an appointing authority, certain rights for managing its operations and personnel. The Department has the power to determine its mission, and the methods, means, and personnel by which its operations are carried out. Civ Serv R 6-4.1(b), (d). The Department can abolish positions based on a "lack of adequate funding" or "reorganization of the work force." Civ Serv R 6-4.1(i).

Every position in the classified service is subject to periodic and ongoing review by the Commission's staff, including on-site position reviews. Civ Serv R 4-2 & Civ Serv Reg 4.03(3)(H). After reviewing the necessary information and

documentation, the Commission's staff will issue a technical classification decision with respect to any position(s) in question. Civ Serv Reg 4.03(3)(G), (4).

An employee or appointing authority aggrieved by a technical classification decision can file what is known as a "technical classification complaint," which will be reviewed by a technical review officer. Civ Serv R 8-3.1(a) & 8-3.3(a); Civ Serv Reg 8.02(4)(A). Technical review officers are expressly not permitted to conduct hearings and their decisions must be based on their technical expertise, the Commission's rules and regulations, the appointing authority's records, and the parties' submissions. Civ Serv R 8-3.3(b)(1), (3) & Civ Serv Reg 8.02(4)(C).

B. Nature of the proceedings.

1. The Department abolishes the positions.

On April 1, 2012, the Department abolished more than 2,400 Resident Unit Officer (RUO) and Corrections Medical Unit Officer (CMUO) positions while creating roughly the same amount of Corrections Officer (CO) and Corrections Medical Officer (CMO) positions. (Certified Civil Service Record (CCSR), Vol 4, Tab 39, Bates #001185.)[3] Employees in the abolished positions were then able to "bump" into the newly created positions. (CCSR, Vol 2, Tab 21, Bates #000170.)

[3] CCSR citations refer to the five-volume Certified Record of Administrative Proceedings, filed with the Ingham County Circuit Court on August 24, 2015.

2. The Commission's Classification Office undertakes an extensive audit to ensure the affected employees are properly classified.

The Commission's Office of Classifications, Selections and Compensation (Classification Office) "determined that a classification study was necessary to ensure that the newly created positions were appropriately classified" (CCSR, Vol 4, Tab 39) — in other words, to ensure that the CO and CMO classifications were appropriate for the affected employees, as opposed to the previous RUO and CMUO classifications. The classification study stretched over several months in 2012 and 2013, and broadly consisted of the following:

- The Classification Office conducted on-site position reviews, known as "desk audits," at each major Department facility.
- The Classification Office used eight classification experts to perform desk audits of approximately 120 positions.
- The Department and the Michigan Corrections Organization, which is the exclusive representative of the bargaining units for the affected positions, were allowed to "identify one position for review at each facility to help obtain a representative sample."
- The Classification Office "randomly identified additional positions to further compliment the sample" of positions for review. [*Id.*, Bates #001185-86.]

The desk audits included discussions with employees in the disputed positions, their supervisors, and the Department. (*Id.*, Bates #001186.) Each employee and supervisor was asked a standard list of questions. (*Id.*, Bates #001191.) The Department also provided responses. (*Id.*)

In a nutshell, the classification study's goal was to determine which classifications were the best fit for the affected employees, based on the "actual duties" of each position. (*Id.*, Bates #001187.) As explained in its 17-page report,

the classification team concluded that the duties performed by the employees in question "best fit the concepts established in the CO and CMO classifications," and thus the newly assigned classifications were appropriate. (*Id*., Bates #001201.)

3. Affected employees file technical classification complaints.

After the Classification Office concluded the positions were properly classified as COs and CMOs, several employees filed technical classification complaints. They asked the Commission to rescind the abolishment of the RUO and CMUO positions, reinstate those classes, and return the affected employees to positions in those classes. (See CCSR Vol 4, Tabs 32, 34, 37, 38; and Vol 3, Tabs 26 and 29.) The technical complaints, along with the Department's position statement, were consolidated and presented to a technical review officer.

C. Civil Service administrative decisions.

The Commission reviewed the technical classification complaint through several levels, which culminated in the final decision that is the subject of appeal in this case.

First, the technical review officer concluded that the Department's assignment of duties to the affected employees were "most consistent with the CO and CMO classifications," and therefore the positions were properly classified. (CCSR, Vol 2, Tab 21, Bates #000226.) Second, the Employment Relations Board (ERB) reviewed Henderson's application for leave to appeal the technical review decision. (CCSR, Vol 1, Tab 2.) The ERB agreed with the conclusions of the

Classification Office and the technical review officer that the duties of the new positions were most consistent with the CO and CMO classes. (*Id.*, Bates #000003.) The ERB recommended that the Commission deny leave to appeal. (*Id.*) Finally, on June 12, 2015, the Commission issued its final decision adopting the ERB's recommendation, which affirmed the technical review officer's decision that the affected employees were properly classified as COs and CMOs. (CCSR, Vol 1, Tab 1, Bates #000001.)

D. The circuit court reverses the Commission's decision.

Henderson timely appealed the Commission's decision to the Ingham County Circuit Court. The circuit court, after receiving briefs and hearing oral argument, reversed the Commission's decision, reversed the underlying technical review decision, and affirmatively ruled that all affected employees "are properly classified" under their previous positions. (Circuit Court March 14, 2016 Opinion and Order.)

The court disagreed with the Commission's position that because a hearing was not required, the applicable standard of review "is limited to a determination of whether the Commission's decision was authorized by law." (*Id.*, p 3.) The court ruled instead that, under the Constitution, "the standard of review requires this Court to ascertain whether the Commission's final decision was authorized by law, whether it was arbitrary and capricious, *and whether it was supported by competent, material, and substantial evidence on the whole record*." (*Id.* (emphasis added).)

The court then ruled that the technical review officer's conclusion, which found that "the former RUOs were appropriately classified as COs," was "arbitrary and capricious as well as unsupported by any competent, material, and substantial evidence." (Circuit Court Opinion and Order, p 6.) The court based this decision on what it deemed to be "flawed" questions posed by the classification study with respect to whether the former RUOs participated on a "treatment team," which was the first example of work in the RUO job specification. (*Id.*, pp 5-6.) The court acknowledged that employees themselves, along with the Department, had provided statements that the former RUOs did *not* participate on treatment teams. (*Id.*) But the court deemed that the "treatment team" question was confusing to the affected employees, and even though the Department's own statements "could and should have been taken into account," the "confusing results of the classification study . . . cannot be held to provide competent, supported, or material evidence on the whole record." (*Id.*, p 6.) The court went further, finding that the technical review officer's reliance on the Department's statements, as opposed to contradicting reports from some former RUOs, was "simply an exercise of will in an attempt to support the [Department's] effective reclassification of the RUO positions . . . ." (*Id.*)

The court then held that the technical review officer's conclusion that "the former CMUOs were performing only the work of the CMO" was "arbitrary and capricious and was not supported by competent, material, and substantial evidence on the record." (Circuit Court Opinion and Order, p 7.) Thus, the court stated "there is no evidence to support a conclusion that the former CMUOs were not

participating in the work required of the CMUO position." (Circuit Court Opinion and Order, p 7.)

E. The Court of Appeals reverses the circuit court and rules that the constitutional "authorized by law" standard applies.

The Court of Appeals, in a published opinion, engaged in a detailed analysis "regarding the limits of the [circuit] court's scope of review." *Henderson v Civil Serv Comm*, __ Mich App __ (2017) (Docket No. 332314); slip op at 6. The Court adopted the findings of "[n]umerous binding authorities," which have interpreted article 6, § 28 of the Michigan Constitution and "establish that when a hearing is not required, courts review an agency decision only under the 'authorized by law' standard, and not also the substantial evidence test." *Id.*, slip op at 8. The Court rejected the argument that this Court's decision in *Viculin v Department of Civil Service*, 386 Mich 375 (1971), required the application of the "substantial evidence" test: "the reliance of plaintiffs and the circuit court on *Viculin* for the proposition that both the authorized by law and substantial evidence standards applied to cases where no hearing was required was misplaced." *Id.*

Further, the Court rejected the argument that the Court Rules, specifically MCR 7.117 and 7.119, impose the APA's "competent, material, and substantial evidence standard" on the Commission's final decision. *Henderson*, slip op at 8-9. The Court affirmed that there is a "distinction between the *procedure* for review and the *scope* of review," and MCR 7.119(H) "merely instructs the [circuit] court to identify its reason" for reversing a Commission decision, regardless of which

standard it applies. *Henderson*, slip op at 9 (emphasis added). To further underscore this point, the Court noted that it "has continued to expect circuit courts to review [Commission] decisions in accordance with the standards of review *set forth in the constitutional provision* after adoption of MCR 7.117 and 7.119, indicating that the court rules at issue *did not adopt the APA's standard of review*." *Id*. at 9, n 6 (emphasis added).

In determining that the constitutional "authorized by law" standard is "the proper scope of review for agency cases where no hearing is required," the Court described this conclusion as "firmly established by the constitutional provision and caselaw interpreting it." *Henderson*, slip op at 10. Accordingly, "the circuit court erred by reviewing the [Commission's] decision to determine whether competent, material, and substantial evidence supported it." *Id*.

The Court of Appeals further agreed with the Commission that, even under the authorized-by-law standard, the circuit court "exceeded its scope of review . . . by reweighing the evidence, making credibility decisions, and substituting its judgment for the [Commission's]." *Henderson*, slip op at 10. The Court found that "[t]he law is clear that, in a case where a hearing was not required, it simply is not 'proper for the circuit court or this Court to review the evidentiary support" for the agency's decision. *Id*. at 11. The Court identified three specific examples of the circuit court's improper review of the evidentiary record: (1) it "reweighed the evidence, essentially giving less weight to the results of the classification study and the statements by the DOC and more weight to the affidavits of employees"; (2) it

questioned the credibility of the study by suggesting that the highly relevant issue of whether employees participated on a treatment team was 'intentionally clouded'"; and (3) it "impermissibly dictated what evidence the [technical review officer] should have entertained in making its ruling." *Henderson*, slip op at 11-12. "None of this is permissible in an authorized-by-law scope of review." *Id*. at 12. Finally, the Court expressly found that the Commission's classification decision was in fact authorized by law:

> The [Commission] exercised its constitutional authority to classify the newly created positions, Const 1963, art 11, § 5, and nothing indicates that the [Commission's] decision violated a statute or resulted from procedures that were unlawful. Regarding whether the decision was arbitrary and capricious, the [Commission] predicated its decision on an extensive and detailed classification study, the determining principle of which was to identify the extent to which employees in the newly created positions participated in the treatment-related activities envisioned for the RUO and CMUO positions. The conclusions of the [Classification Office] were subject to multiple layers of review that included an opportunity for plaintiffs to submit additional documentation and express their critique of the study and resulting classification. The [Commission's] decision came at the end of this process. In light of the foregoing and of our limited scope of review, we cannot say that this decision "lacks an adequate determining principle" or that it "reflects an absence of consideration or adjustment with reference to principles, circumstances, or significance," or that it is "freakish or whimsical." [*Henderson*, slip op at 12.]

As a result, the Court reversed the circuit court's decision and reinstated the Commission's final classification decision.

STANDARD OF REVIEW

Appellate courts reviewing a lower court's review of an agency decision must "determine whether the lower court applied correct legal principles and whether it misapplied the substantial evidence test to the agency's factual findings." *Boyd v*

Civil Serv Comm, 220 Mich App 226, 234 (1996). The determination of whether the lower court misapplied the substantial-evidence test is nearly the same as a determination under the clearly erroneous standard. *Id.* at 234-235. A finding is clearly erroneous "[if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Dep't of Human Servs v Mason*, 486 Mich 142, 152 (2010) (citation omitted).

ARGUMENT

I. The public interest that may exist for this case is outweighed by the correctness of the Court of Appeals' decision.

Henderson first argues that this Court should grant its application for leave under MCR 7.305(B)(2) because the Court of Appeals' decision "implicates the public interest." (App for Leave, p 4.) Henderson points to the number of classified employees affected by the decision (approximately 5% of the State's workforce) and the financial impact of the classification (potential savings of approximately $8 million per year) as factors invoking the public interest. (*Id.*, pp 4-5.)

The Commission acknowledges that there is indeed a public interest component in this case. But the Commission contends that any public interest that may exist has been sufficiently addressed by the Court of Appeals, based on the thoroughness of its analysis and the legal correctness of its conclusions. The soundness of that decision should therefore outweigh the potential public interest in continuing to litigate those issues before this Court.

II. The Court of Appeals correctly decided the legal issues in this case, based on the plain language of the Constitution and decades of caselaw interpreting it.

When the Commission appealed the circuit court's decision, the Court of Appeals was faced with deciding essentially two issues: (1) what is the proper standard of review for a final Commission decision where no hearing was conducted; and (2) whether the circuit court properly applied that standard of review. On the first question, the Court of Appeals concluded that the proper standard is the "authorized by law" standard set forth in Article 6, § 28 of the Michigan Constitution. On the second question, the Court concluded that the circuit court erred in its application of the standard because it reweighed evidence, made credibility determinations, and substituted its judgment for the Commission's. The Court reached the correct conclusion on both issues. Thus, this Court should deny Henderson's application for leave to appeal those conclusions.

A. The Court of Appeals correctly concluded that the constitutional "authorized by law" standard applies to Commission decisions where no hearing was conducted.

The Court of Appeals began its analysis by determining whether the circuit court should have applied only the "authorized by law" standard, or whether it should *also* have applied the "substantial evidence" standard. *Henderson*, slip op at 6-10. The Court correctly determined that the circuit court should only have applied the "authorized by law" standard. *Id*. at 10.

1. The applicable standard depends on whether a hearing was required.

For at least the last four decades, it has been settled law that final Commission decisions are reviewed by Michigan courts under the constitutional standard of review. *Viculin v Dep't of Civil Serv*, 386 Mich 375, 392 (1971) ("Art. 6, § 28, applies to final decisions of the Civil Service Commission"); *Parnis v Dep't of Civil Serv*, 79 Mich App 625, 628 (1977) ("The minimum scope of judicial review . . . is prescribed in Const. 1963, art. 6, § 28"); *Wescott v Civil Service Comm*, 298 Mich App 158, 162 (2012) ("the scope of judicial review applicable to a circuit court's review of a decision by the [Commission] is governed by Const. 1963, art. 6, § 28").

The parties did not dispute this point, as noted by the Court of Appeals: "[t]he parties correctly agree that Const 1963, art 6, § 28 provides the scope of the circuit court's review of the [Commission's] decision." *Henderson*, slip op at 6. Rather, the dispute regarding the proper standard related to *which* of the constitutional standards set forth in article 6, § 28 applied.

After establishing the general right to appeal final agency decisions that meet certain characteristics, the Constitution creates two standards that, as a default, govern a circuit court's review:

> This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. [Const 1963, art 6, § 28.]

Under the plain language, the minimum standard of review for any final agency decision is whether that decision was "authorized by law." *Id.* But "in cases

in which a hearing is required," the agency's decision must also be "supported by competent, material and substantial evidence on the whole record." *Id.* As noted above, *Viculin*, *Parnis*, and *Wescott*, among other cases, have determined that these are the standards applicable to the Commission's decisions.

The dispute regarding the proper standard originated from the circuit court's decision, which found that all final Commission decisions are reviewed under *both* standards (the "authorized by law" and "substantial evidence" standards), regardless of whether a hearing was held. The circuit court reached that conclusion based on its reading of this Court's *Viculin* decision:

> [*Viculin*] examined the issue of the standard of review and found that the competent, material, and substantial standard of review was to be applied to final decisions of the Commission, *without differentiating on the issue of whether a hearing was being held.* [Circuit Court Opinion and Order, p 3 (emphasis added).]

The Commission argued, and the Court of Appeals agreed, that this was a misreading of *Viculin*, which applied the "substantial evidence" standard *in that case*, but did not hold that it would apply to the review of *every* Commission decision. The Court's analysis on this issue was thorough and accurate:

> Plaintiffs argue that *Viculin* supports the court's application of both the authorized by law and the competent, material, and substantial evidence standards to its review of the CSC's decision, but their argument is unpersuasive. The *Viculin* Court held that Const 1963, art 6, § 28 did not guarantee or permit review de novo of a final decision by the CSC affirming an employee's "dismissal from state service" after a "full hearing." *Viculin*, 386 Mich at 381-384. In so holding, the Court stated, "[t]he scope of review is that stated by the Constitution, 'whether the same are supported by competent, material and substantial evidence on the whole record.'" *Id.* at 392. Plaintiffs contend that, because "the Supreme Court did not rely on the sentence in the constitutional article requiring a substantial evidence test for cases where a hearing was held," a circuit court's application of the

> competent, material, and substantial evidence standard does not rest on "the presence or absence of a hearing." However, the issue in *Viculin* was the method of review, not the scope of review. *Viculin*, 386 Mich at 392. The *Viculin* Court *made no determinations about the scope of review where a hearing was not required, which is the issue in the case at bar*. As the Supreme Court recently explained, to derive a rule of law from the facts of a case "when the question was not raised and no legal ruling on it was rendered, is to build a syllogism upon a conjecture." *People v Seewald*, 499 Mich 111, 121 n 26; 879 NW2d 237 (2016). Thus, the reliance of plaintiffs and the circuit court on *Viculin* for the proposition that both the authorized by law and substantial evidence standards applied to cases where no hearing was required was misplaced. [*Henderson*, slip op at 8 (emphasis added).]

The Court's analysis on the *Viculin* issue is correct because that case only involved a final decision where the Commission held a hearing. *Viculin*, 386 Mich at 381-383. This Court did not hold in *Viculin* that the "substantial evidence" standard applied to every final Commission decision. To the extent any question remained after *Viculin* as to which standard would apply where no hearing was required, numerous cases definitively answered that question, and the Court of Appeals properly cited and relied on those cases:

> Numerous binding authorities establish that when a hearing is not required, courts review an agency decision only under the "authorized by law" standard, and not also the substantial evidence test. See, e.g., *Ross v Blue Care Network of Mich*, 480 Mich 153, 164; 747 NW2d 828 (2008) ("Decisions of an administrative agency or officer, in cases in which no hearing is required, are reviewed to determine whether the decisions are authorized by law."); *Brandon Sch Dist v Mich Educ Special Servs Ass'n*, 191 Mich App 257, 263; 477 NW2d 138 (1991) ("Where no hearing is required, *it is not proper* for the circuit court or this Court to review the evidentiary support of an administrative agency's determination. Judicial review . . . is *limited* in scope to a determination whether the action of the agency was authorized by law." (Emphasis added)); *Wescott v Civil Serv Comm*, 298 Mich App 158, 161; 825 NW2d 674 (2012) (adopting the assertions in *Ross* and *Brandon*). [*Henderson*, slip op at 7-8.]

Other binding, published cases have consistently concluded that when the constitutional standard of review applies, the applicable standard depends on whether the agency is required to hold a hearing. See, e.g., *Northwestern Nat'l Cas Co v Ins Comm'r*, 231 Mich App 483, 490 (1998) (ruling that "because no contested hearing was required or held, the proper standard of review was that set out in Const 1963, art 6, § 28 and . . . not the substantial evidence test or the substantial and material error of law test."); *McBride v Pontiac Sch Dist*, 218 Mich App 113, 122 (1996) (ruling that because no hearing was required, "judicial review is limited to a determination whether the decision is authorized by law"); *Whispering Pines AFC, Home, Inc v Dep't of Treasury*, 212 Mich App 545, 552 (1995) (ruling that because no hearing was required, "the Michigan Constitution requires nothing more than a determination by the court that the final decision by the [agency] was authorized by law"); and *J&P Market, Inc v Liquor Control Comm*, 199 Mich App 646, 650 (1993) ("Because a hearing is not required, a decision by the [Liquor Control Commission] to deny a license transfer is reviewed only under the minimum standard.").

The Court of Appeals, in this case, merely reaffirmed a settled point of law in Michigan: when the Constitution governs the review of an agency's decision, the applicable standard turns on whether a hearing was required. As noted above, the Constitution governs review of the Commission's final decisions. And there is no question that a hearing was not required in this case. Therefore, the appropriate standard was whether the Commission's decision was "authorized by law." The

Court of Appeals reached the correct conclusion when it found that "the circuit court adopted incorrect legal principles when it reviewed the [Commission's] decision for evidentiary support that was competent, material, and substantial." *Henderson*, slip op at 8.

2. The Court Rules do not impose a substantive standard of review for final Commission decisions.

In reaching its conclusion on which standard of review applied in this case, the Court of Appeals relied on the plain constitutional language regarding the different levels of review, and decades of consistent caselaw interpreting that language. Henderson argued – and continues to argue – that the true source of the standard of review for final Commission decisions is *not* found in the Constitution, but instead in the Court Rules. (App for Leave, pp 6-8.) This argument is unsupported by the language of the Court Rules themselves, is contrary to the constitutional language governing judicial review, and would undo the decades of settled law cited above. The Court of Appeals correctly rejected this argument. This Court should not disturb that holding.

Henderson points to the fact that this Court amended the Court Rules in 2012 with respect to the procedures for appealing an agency decision to circuit court. (App for Leave, p 6.) Specifically, Henderson asserts that the Court Rules were "substantially changed to now *provide for substantial evidence review in accordance with the Administrative Procedures Act*." (*Id.* (emphasis added).) The only support Henderson points to for this contention – which would drastically

rewrite administrative law practice in Michigan – is MCR 7.119(H). This provision applies to the review of final Commission decisions to the extent that MCR 7.117 states that "[a]n appeal from a decision of the [Commission] must comply with MCR 7.119." MCR 7.117(B).

As a general matter, MCR 7.119 governs appeals from agency decisions where the APA applies. MCR 7.119(A). It sets out the mechanics of how a party appeals such a decision to circuit court, including the time requirements, filing requirements, and other procedural elements. MCR 7.119(H) generally states that a circuit court has the power to "affirm, reverse, remand, or modify the decision of the agency and may grant further relief as appropriate based on the record, findings, and conclusions." It then sets forth the following two provisions regarding specific findings the circuit court must include in its decision:

> (1) If the agency's decision or order is not supported by competent, material, and substantial evidence on the whole record, *the court shall specifically identify the finding or findings that lack support.*
> (2) If the agency's decision or order violates the Constitution or a statute, is affected by a material error of law, or is affected by an unlawful procedure resulting in material prejudice to a party, *the court shall specifically identify the agency's conclusions of law that are being reversed*. [MCR 7.119(H)(1) & (2) (emphasis added).]

Henderson reads those provisions as affirmatively establishing and "set[ting] forth two standards of review *that both must be met* when affirming a [Commission] ruling." (App for Leave, p 7 (emphasis added).) In other words, Henderson contends that the Court Rules, and not the Constitution, supply the substantive standard of review when a Commission decision is appealed to circuit court. This necessarily means that in Henderson's view, the Court Rules have displaced the

differing levels of review established by the Constitution, which are based on whether a hearing is required.

The Court of Appeals rightly rejected this proposed rewriting of the administrative law landscape in Michigan. The Court began by noting that the pre-2012 Court Rules, like the current version of MCR 7.117, also "provided that appeals from the [Commission] were governed by the provisions for appeals from administrative agencies in the APA." *Henderson*, slip op at 9. But the Court noted that provision in the Court Rules had been interpreted to reference "the appellate *process*," and did not supply the substantive standard of review. *Id*., citing *Hanlon v Civil Serv Comm*, 253 Mich App 710, 725 n 6 (2002).

The Court went on to state that "[n]othing in the plain language of MCR 7.117 or MCR 7.119 suggests that this distinction between the *procedure for review* and the *scope of review* has been abandoned, and that [the Court Rules] adopted the APA's scope of review." *Henderson*, slip op at 9 (emphasis added). The Court concluded that the proper understanding of MCR 7.119(H) is that it "merely instructs the court to clearly identify its reason for reversal of a [Commission] decision, regardless of whether it employs the competent, material, and substantial evidence scope of review, MCR 7.119(H)(1), or the authorized by law scope of review, MCR 7.119(H)(2)." *Henderson*, slip op at 9. Accordingly, the Court rejected Henderson's interpretation and held that the constitutional "authorized by law" standard applied. *Id*. at 10.

Henderson contends that the "plain language" of MCR 7.119 creates two substantive standards of review, which must be applied by the circuit court. (App for Leave, p 7.) This is not so. The provisions of MCR 7.119 are instructions to the circuit court on the type of findings that must be included in its decision, depending on the basis of that decision. They are, in essence, a recognition that different standards could apply to the court's review, and a court should therefore identify the deficiencies in an agency decision accordingly.[4]

This interpretation comports with the language of MCR 7.119 and, more importantly, remains faithful to the different standards of review set forth in the Constitution. Those standards, which depend on whether a hearing is required, have been consistently applied for decades to all manner of state agency decisions, and specifically to final Commission decisions. The Court of Appeals was correct in determining that the Court Rules do not displace the constitutional standards of review. Henderson has failed to demonstrate that this decision was erroneous.

B. The Court of Appeals correctly concluded that the circuit court erred in its application of the standard by reweighing evidence and substituting its judgment for the Commission's.

Once the Court of Appeals answered the first issue – which standard of review applies – it had to determine whether the circuit court properly applied that

[4] Notably, if Henderson's position that MCR 7.119 sets forth the substantive standards of review was accepted, it would have the odd effect of eliminating the "arbitrary and capricious" basis for overturning an agency's decision, because that is not one of the factors identified in MCR 7.119. But that is also the precise basis on which Henderson argues that the Commission's decision in this case should be overturned. (App for Leave, p 10.)

standard. The Court correctly determined that the circuit court exceeded the "authorized by law" standard by reweighing evidence, questioning the credibility of the classification study, and substituting its judgment for the Commission's. *Henderson*, slip op at 11-12.

Henderson asserts that in doing so, the Court of Appeals effectively ruled that "the authorized by law standard does not permit any factual review whatsoever" and must therefore be rejected. (App for Leave, p 10.) But Henderson fails to address the numerous cases expressly holding that circuit courts are prohibited from reviewing the evidentiary record when applying the "authorized by law" standard. "Where no hearing is required, it is not proper for the circuit court or this Court to review the evidentiary support of an administrative agency's determination." *Brandon Sch Dist v Mich Educ Special Servs Ass'n*, 191 Mich App 257, 263 (1991); see also *Natural Resources Defense Council v Dep't of Environmental Quality*, 300 Mich App 79, 87 (2013) ("When the agency's governing statute does not require the agency to conduct a contested case hearing, the circuit court may not review the evidentiary support underlying the agency's determination.").

The precise boundaries of what sort of "review" *is* allowable under that standard have not been established, but examples of impermissible review have been identified. Particularly, the *Wescott* Court noted that a circuit court applying the "authorized by law" review could not "question[] the evidentiary support" or

"dictat[e] what evidence the [Commission] must entertain in making its ruling," either of which would exceed the scope of review. *Wescott*, 298 Mich App at 163 n 4.

In any event, this case does not fall at the boundaries of what might constitute appropriate circuit court review. It involves a circuit court that expressly took the evidentiary record, reweighed substantial portions of the evidence in that record, reached a different conclusion than the agency, and then overruled the agency. Those actions would exceed *any* possible scope of review, let alone the more limited "authorized by law" scope. The Court of Appeals correctly ruled that "the circuit court erred by . . . exceeding the authorized-by-law scope of review by reweighing the evidence, making credibility decisions, and substituting its judgment for that of the [Commission]." *Henderson*, slip op at 12. Henderson has not demonstrated that this conclusion was erroneous. This Court should therefore deny the application.

CONCLUSION AND RELIEF REQUESTED

Henderson has failed to demonstrate, under MCR 7.305(B), sufficient grounds for this Court to grant the application for leave to appeal. While there may be a level of public interest in this case, that interest is outweighed by the thoroughness and legal correctness of the Court of Appeals' decision. The Court of Appeals correctly determined that final Commission decisions where no hearing is required are reviewed under the "authorized by law" standard set forth in the Constitution. And the Court of Appeals correctly determined that the circuit court exceeded that standard when it reweighed the evidence and substituted its judgment for the Commission. Therefore, this Court should deny the application.

Respectfully submitted,

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

Laura Moody (P51994)
Chief Legal Counsel

/s/ Christopher W. Braverman
Christopher W. Braverman (P70025)
Assistant Attorney General
Attorneys for Civil Service Commission and Department of Corrections
Defendants–Appellees
Labor Division
P.O. Box 30217
Lansing, MI 48909
(517) 373-2560

Dated: September 7, 2017