STATE OF MICHIGAN

IN THE SUPREME COURT

WILLIAM R. HENDERSON and
MICHIGAN CORRECTIONS ORGANIZATION,

Plaintiffs-Appellants,

S. Ct. Docket No. 156270
COA No. 332314
Lower Case No. 15-645-AA

MICHIGAN CIVIL SERVICE COMMISSION and
MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendants-Appellees.
_____/

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**PLAINTIFFS WILLIAM R. HENDERSON'S AND MICHIGAN CORRECTIONS ORGANIZATION'S REPLY TO DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR LEAVE TO APPEAL**

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## ARGUMENT

There is no dispute that this case involves a matter of public interest. Specifically, it involves the classification of thousands of Michigan public employees, and the resolution of a currently unclear principle of major legal significance: the appropriate standard of review under the Michigan Constitution. Review of this case is therefore warranted under MCR 7.305(B)(2) and MCR 7.305(B)(3), respectively.

The Commission opposes review primarily on the assertion that the Court of Appeals' decision was correct. Respectfully, this is erroneous. The Commission incorrectly alleges that MCR 7.119(H) does not set forth a standard of review, but instead the "procedural mechanics" for applying standards of review established outside MCR 7.119(H). This Court should reject this allegation as contrary to the plain language of MCR 7.119(H). Likewise, this Court should reject the Commission's other allegation that Const 1963, art 6, § 28 forbids this Court from promulgating rules requiring courts to apply substantial evidence where no hearing is required. This allegation is also erroneous. Indeed, Const 1963, art 6, § 5 authorizes such promulgation.

For these reasons, more fully explained below, leave to appeal should be granted.

### I. The Commission Concedes That This Case Involves A Significant Public Interest, Making Review By This Court Appropriate.

As noted by the Commission, "there is indeed a public interest component in this case." Def's Br at 11. However, the Commission minimizes the significance of this interest by stating that "approximately 5% of the State's workforce" is "affected" by the Court of Appeals' decision. While it is true that 5% of the workforce-- those employees who were functionally reclassified-- are *immediately* affected by the decision, the decision *in actuality* affects each and every employee in the classified civil service, approximately 47,000 individuals, because it drastically limits the ability to challenge classification decisions and expands the ability of state

departments to alter classifications at will. Moreover, the decision has become more significant since the Michigan Corrections Organization filed its petition on August 10, 2017, because on August 15, 2017 the decision changed from unpublished status to published status, making it binding and precedential.

Accordingly, in light of the especially significant public interest involved, review by this Court is warranted. *See* MCR 7.305(B)(2); *Gulf Underwriters Ins Co v McClain Indus*, 483 Mich 1010; 765 NW2d 16 (2009)(Young, J., concurrence)(concurring in Court's denial of application for leave to appeal because there was a failure to allege that the case involved a significant public interest).

Further, this Court should reject the notion proffered by the Commission that review is inappropriate because the asserted "correctness" of the Court of Appeal's decision "outweighs" the significant public interest involved in this case. There is no such test. Nowhere does MCR 7.305(B)(2) state that review of cases involving a significant public interest becomes inappropriate where the Court of Appeals' decision under challenge is "correct." The Commission has neither advanced an interpretation nor identified decisional law supporting the grafting of such a limitation on the plain meaning of the rule.

Decisions involving a significant public interest should be reviewed by the Court because the consequences to the public of an incorrect result are dire.

## II. The Commission Effectively Concedes That The Law Regarding The Application Of The Authorized By Law Standard Is Unclear, Also Making Review By This Court Appropriate.

Review by this Court is also appropriate so that the Court can clarify a legal principle of major constitutional significance: the application of the authorized by law standard. The Commission admits that, "[t]he precise boundaries of what sort of review is allowable under that

standard have not been established... (giving asserted examples of impermissible review).” Def’s Br at 21.

It is the absence of these boundaries which makes this Court’s review appropriate. Further, the decision cited as identifying “examples of impermissible review,” *Wescott v Civil Service Comm*, 298 Mich App 158, 164; 825 NW2d 674 (2012), featured highly unusual circumstances. The Court in *Wescott* stated that the Circuit Court misapplied the standard when it overturned a Commission denial of long term disability benefits because of the Commission’s failure to take into account other agencies’, including the SSA’s, finding of disability. *See Whaley v Civil Serv Comm*, unpublished opinion of the Court of Appeals, issued May 30, 2013 (Docket No 306353) (“*Wescott* establishes and we agree that the [Commission] is not required to consider or give weight to the disability determinations of other governmental agencies.”) This example of impermissible review does not give guidance on what review is appropriate or permissible.

The Court of Appeals’ recent decision in *Kelly v Parole Board*, unpublished decision of Court of Appeals, issued August 3, 2017 (Docket No 334960) offers a contrary view. The Court stated that the Circuit Court properly applied the authorized by law standard articulated in *Wescott* when overturning the parole board’s decision because the parole board failed to take into account mitigating circumstances, which included, *inter alia*, the parolee’s amnesia and efforts to comply with parole conditions. This is directly at odds with the Commission’s assertion that “a circuit court applying the authorized by law review could not ... dictate what evidence the Commission must entertain in making its ruling.” Def’s Br at 21-22.

This lack of clarity regarding the application of the authorized by law standard provides an additional reason for granting the application, since doing so will allow this Court to clarify a legal principle of major significance to the state's jurisprudence. MCR 7.305(B)(3).

## III. The Plain Language Of MCR 7.119(H) Does Not Support The Commission's Incorrect Allegation That MCR 7.119(H) Sets Forth Only The "Procedural Mechanics" That Apply During Appeals.

This Court should also reject the assertion that "the Court Rules merely set forth the procedural mechanics for appealing an agency's decision, not the standard of review itself." Def's Br at 1. This interpretation ignores the consistency with which the rules were fashioned to set forth and effectuate the appropriate standard of review.

The rule states: "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." As with statutes, courts interpret court rules according to their plain meaning. *See In re Chrzanowski*, 465 Mich 468, 482; 636 NW2d 758 (2001)("Court rules, like statutes, are to be interpreted in accordance with their plain meaning."); *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009); *Attorney General v Michigan PSC*, 392 Mich 660, 667; 221 NW2d 299 (1974). The plain meaning of the rule is that it sets forth the standard of review that must be met in all cases.

If this meaning were not intended, the rule would have been drafted differently. The rule could have stated: "where a rule or statute requires that a decision be supported by competent, material, and substantial evidence on the whole record, the court shall specifically identify the finding or findings that lack support." Alternatively, it could have stated: "If the agency's decision or order is not supported by competent, material, and substantial evidence on the whole record, and such support is required, the court shall specifically identify the finding or findings

that lack support." Alternative drafts of the rule supporting the alternative meaning urged by the Commission are virtually limitless. The Rule was not so drafted.

In short, the Rule sets both the procedural mechanics of review and the standard of review itself-- there is no dichotomy.

## IV. The Commission Mischaracterizes The Plaintiffs' Position As Requiring MCR 7.119 To "Displace" The Constitution.

It is simply wrong for the Commission to suggest that, "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." Def's Br at 18-19. By so stating, it is the Commission and not Plaintiffs that urges a view on this Court that "displaces" the Constitution.

To the contrary, as the Court of Appeals correctly noted: "[t]his Court has stated that Const 1963, art 6, § 28 establishes a minimum standard of review without forbidding more stringent review.[] Plaintiffs argue along the same lines." *Henderson v Civil Service Comm*, __ Mich App __ , slip op at 8 n 5 (2017) (Docket No 332314).

Article 6 § 28, states: "[a]ll final decisions, findings, rulings, and orders of any administrative officer or agency... which are judicial or quasi-judicial... 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." Article 6, § 5 authorizes this Court to provide for a higher standard of review.[1] This Court acted on that authority by its passage of MCR 7.119(H), which, as described *supra*, provides for substantial evidence review.

[1] Const 1963, art 6, § 5 states: "[t]he supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." This provision exists in perfect harmony with Const 1963, art 6, § 28.

MCR 7.119(H), as actually advanced by Plaintiffs, does not therefore "displace" the Constitution, but instead effectuates Article 6, § 5's authorization to this Court to establish the rules by which courts operate, including providing for review more stringent than the authorized by law standard set forth "as a minimum" in the Constitution.

**RELIEF SOUGHT**

Plaintiffs request that leave for appeal be granted, and that a ruling that the Circuit Court was correct to adopt, and correctly applied, the substantial evidence standard in its review, and that the Circuit Court correctly applied the authorized by law standard. The Plaintiffs further seek all other relief that this Court deems appropriate.

Respectfully submitted,

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