STATE OF MICHIGAN
IN THE SUPREME COURT

WILLIAM R. HENDERSON, and All Others Similarly Situated,

Plaintiffs-Appellants,

v

MICHIGAN CIVIL SERVICE COMMISSION and MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendants-Appellees.

SC: 156270
COA: 332314
Ingham CC: 15-000645-AA

SACHS WALDMAN, P.C.
Mary Ellen Gurewitz (P25724)
Marshall Widick (P53942)
Attorneys for Plaintiffs-Appellants
2211 E. Jefferson, Ste. 200
Detroit, MI 48207
Tel: (313) 496-9441
Fax: (313) 965-4602

Christopher W. Braverman (P70025)
Michigan Dept. of Attorney General
Labor Division
P. O. Box 30217
Lansing, MI 48909
(517) 373-2560

PLAINTIFFS-APPELLANTS' SUPPLEMENTAL BRIEF

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

STATEMENT OF QUESTIONS PRESENTED

Consistent with this Court's Order of April 6, 2018 in this case, the following three questions are presented and addressed in this supplemental brief:

I. Whether the "authorized by law" scope of review under Const 1963, art 6, § 28 applied to the appellants' judicial review of the Civil Service Commission's final decision made without a hearing.

The Circuit Court answered yes – as the minimum review standard.

The Court of Appeals answered yes.

The Plaintiffs-Appellants answer yes – as the minimum review standard.

The Defendants-Appellees answer yes.

II. Whether the Court of Appeals gave proper meaning to the "authorized by law" constitutional standard.

The Plaintiffs-Appellants answer no.

The Defendants-Appellees answer yes.

III. Whether the Court of Appeals correctly applied that scope of review to the appellants' challenge.

The Plaintiffs-Appellants answer no.

The Defendants-Appellees answer yes.

STATEMENT OF THE BASIS OF JURISDICTION

This Court has jurisdiction over this appeal from a decision of the Michigan Civil Service Commission pursuant to Const 1963, art 6, § 28, Michigan Court Rule 7.117, and Michigan Compiled Laws §§ 24.301-24.306.

INTRODUCTION

This case presents an appeal from the Michigan Court of Appeals, reversing a decision of the Ingham Circuit Court, which had reversed a decision of the Michigan Civil Service Commission. The Civil Service decision concerned the appropriate classification of 2,472 employees of the Department of Corrections who, in the guise of position "abolishment," had been effectively demoted from their positions. On April 1, 2012, 2,415 Resident Unit Officers (RUOs) and 57 Corrections Medical Unit Officers (CMUOs) were notified that their positions were "abolished." They were simultaneously "reassigned" to 2,415 newly created Corrections Officer (CO) positions and 57 newly created Corrections Medical Officer (CMO) positions. One simple fact is undisputed. On April 2, 2012, and afterwards, they continued to do exactly what they had been doing on April 1, 2012, and before. They continued to perform the most dangerous jobs in the Department of Corrections, working in the housing units in the prisons, in constant face-to-face contact with the prisoners, monitoring their conduct, evaluating them, counseling and disciplining them. The only change they experienced was less pay – for the same work.

No classification study or any other review preceded this decision to "abolish" the positions, which had existed for decades. Rather, the previous Civil Service and Corrections Department reviews had supported and approved these classifications. Although a classification study ostensibly supported the abolishment decision *fourteen months later*, this study was proven not just flawed but misleading, in key factual respects. During the Civil Service appellate process, the Plaintiffs-Appellants presented substantial evidence demonstrating that the positions had been correctly classified. The Department of Corrections presented no evidence to the contrary. A review officer who considered the evidence reached conclusions which were demonstrated and even acknowledged to be false. Notwithstanding the evidence that the jobs were unchanged, the Civil Service Commission placed its imprimatur on the Corrections

Department's effective demotion of these employees. The Circuit Court correctly concluded that this decision was not just unsupported by the record but contrary to it. The Civil Service Commission had adopted a rule which precluded any hearing, and then contended in court that because the decision was made without a hearing its findings and final decision could only be challenged under the authorized by law standard of review. The Court of Appeals agreed and further concluded that in applying the authorized by law standard it was precluded from examining the evidentiary record, a conclusion which flies in the face of the basic principles of administrative law. The Court of Appeals effectively made appellate review meaningless.

As a result, this case carries ramifications beyond the immediate litigants before the Court. It affects all persons, corporations, and others who seek to challenge agency or commission findings in a court of law. It specifically concerns the standard of review under Const 1963, art 6, § 28 which mandates "direct review" by the courts of final agency "findings" and "rulings." We urge the Court to grant this application for leave to appeal, and reverse the Court of Appeals' decision, in order to ensure that the standard of review under Const 1963, art 6, § 28 does not grant such an extreme level of deference effectively shielding a governmental body's actions from judicial review.

CHRONOLOGY

April 1, 2012 - The Department of Corrections "abolishes" 2,472 positions, creates 2,472 new positions and simultaneously assigns the employees holding "abolished" positions to the newly created, lower classified, lower paid positions. The employees' job responsibilities are unchanged.

April, 2012 - In response to a grievance filed by the Michigan Corrections Organization (MCO) on behalf of the demoted employees, it is agreed to hold the grievance in abeyance while the Civil Service Office of Classifications, Selection and Compensation (OCSC) undertakes a classification

study, ostensibly to determine whether the 2,472 newly created positions are correctly classified, that is, were the persons in those positions doing the work of RUOs and CMUOs, as claimed by the employees and their union, or were they doing the work of COs and CMOs.

May 22, 2013 - The Department of Corrections provides a brief statement to OCSC regarding the abolishment of the positions. (1a - 3a) MCO is not permitted to participate in the Classification Study.

June 14, 2013 - The Civil Service OCSC issues its CO and CMO Classification Study concluding that the demoted employees are performing the work of COs and CMOs and not that of RUOs and CMUOs. (6a - 22a)

October 4, 2013 - Plaintiff William Henderson, on behalf of similarly situated employees, and represented by MCO, files a Technical Classification Complaint, providing detailed evidence in support of the argument that the conclusions of the Classification Study are erroneous, that the work of these 2,472 officers has not changed and that they are performing the work described in the job descriptions of RUOs and CMUOs. (23a - 600a)

January 31, 2014 - The Department of Corrections files a short position statement in response to the Technical Classification Complaint, but provides no evidence. (601a - 606a)

July 25, 2014 - A Technical Review Officer issues a Technical Review Decision, concluding that the demoted employees are properly classified and dismissing the Technical Classification Complaint. (607a - 665a)

December 1, 2014 - Henderson files an Application for Leave to Appeal to the Employment Relations Board along with a Motion to Accept New Evidence Regarding Corrections Mental Health Care. (666a - 700a, 701a - 753a)

February 23, 2015 - The Technical Review Officer files a brief in response to the Application for Leave to Appeal. (754a - 772a)

March 23, 2015 - The Department of Corrections files a response to the Application for Leave to Appeal. (773a - 779a)

May 20, 2015 - The Employment Relations Board issues a brief decision recommending that the Civil Service Commission deny the Application for Leave to Appeal. (780a - 782a)

June 12, 2015 - The Civil Service Commission issues a Final Decision, approving the recommendation of the Employment Relations Board and adopting its decision as its own. (783a - 786a)

August 7, 2015 - Henderson files a Claim of Appeal to the Ingham Circuit court, pursuant to Art. 6, Section 28 of the Michigan Constitution of 1963, MCR 7.117 and MCL 24.301, *et seq*. (787a - 794a)

March 14, 2016 - The Ingham Circuit Court reverses the Civil Service Commission decision, finding that it was not supported by competent, material and substantial evidence on the record, and, in the alternative, that the decision was not authorized by law, because it was arbitrary and capricious. (897a - 905a)

April 4, 2016 - The Civil Service Commission and the Department of Corrections file an Application for Leave to the Michigan Court of Appeals. (906a - 961a)

August 19, 2016 - The Court of Appeals grants leave to appeal. (991a)

June 29, 2017 - The Court of Appeals reverses the decision of the Ingham Circuit Court and reinstates the decision of the Civil Service Commission, finding that, because the Commission had decided the case without a hearing the substantial evidence test was inapplicable, and finding that

under the applicable authorized by law standard the reviewing court was not permitted to examine the evidentiary record in support of the decision. (1083a - 1094a)

August 10, 2017 - Henderson files an Application for Leave to Appeal the Decision of the Court of Appeals. (1098a - 1119a)

April 6, 2018 - This Court orders oral argument on whether to grant leave to appeal or other relief, and orders the filing of supplemental briefs. (1161a)

STATEMENT OF FACTS

I. THE OPERATION OF PRISONS IN MICHIGAN

The issues presented in this case – dealing with the appropriate classification of nearly 2,500 positions in the Department of Corrections -- cannot be understood without a basic understanding of how the prisons are operated.[1]

There are approximately thirty prisons in Michigan. (The number has changed over the course of this litigation with consolidations and closings.) Each prison is headed by a warden. One, Huron Valley, is a women's prison and the others are for male prisoners. The prisons have different security levels or classifications, ranging from level I, the minimum, to level V, the maximum, with segregation and detention units for dealing with the more difficult offenders. Most prisons house different security levels, although the differing levels occupy separate areas and do not ordinarily mix. The structure and organization of the prisons and the housing units within them vary, depending on when they were built and the security level of the prisoners they house.

All of the prisoners live in housing units, which are in separate areas within each prison. In some of the facilities there is group housing, as in a dormitory or army barracks. In others there

[1] This information is from the Department of Corrections website. Michigan.gov/corrections, from the answers to the classification study desk audits (424a - 461a; 513a - 520a); and from the affidavits and brief in support of the Technical Classification Complaint (23a - 77a) and has not been disputed.

are rooms or cells. There are bathroom and laundry facilities, and a recreational area or day room. Some housing units may have TV rooms and quiet rooms. There are a number of housing units in a prison. For example, Baraga Correctional Facility has eight housing units, seven of them level V and one level I. The Central Michigan Correctional Facility has sixteen housing units, all of them level I. At the present time there are approximately 250 housing units, housing more than 40,000 prisoners. Generally, there are separate buildings for food service, health care, and prisoner services. The latter would contain facilities for academic and vocational education, a library, a law library, a barber shop, and a commissary. Social and recreational activity occurs in the yard. The yard is a term which is broadly used to define the recreational area. It may include a gymnasium, a track, a weight pit, a room with pool tables and card tables. There might be a hobby and craft room. There is generally a separate building for administration and visitors.

During the day the prisoners from each housing unit would go together to the food service building at scheduled times for meals, although those with dietary restrictions would go first. Prisoners in Level V housing units or in segregation or detention would be subject to more stringent restrictions, and some might receive food in the cells to which they are confined. Apart from meal (chow) time, each prisoner has an individual schedule or detail to follow, sometimes called an itinerary or call out, which could include working in food service, working as a porter in building and grounds, cleaning and maintenance, taking academic or vocational classes, participating in such behavior modification classes as “cage the rage” or “thinking for change,” or going for health care or counseling appointments. A prisoner must report to his designated locations, and is required at all times to be where his itinerary provides. Prisoners are counted several times a day, sometimes in housing units and sometimes in other parts of the facilities. At

all of the facilities, regardless of the security level, the prisoners are "locked down" during the night.

II. EMPLOYEES IN THE HOUSING UNITS

As noted, each prison is headed by a warden. There may be one or more deputy wardens, depending on the size of the facility. The staff in the housing units has historically included the Resident Unit Manager (RUM), who has responsibility for a number of housing units, the Assistant Resident Unit Supervisor (ARUS), and the Resident Unit Officers (RUOs). Since 2011 the DOC has begun to reduce the number of RUMs and ARUS's and to replace some of the ARUS positions with the Prison Counselor (PC) position. Exhibit 2 to the Technical Classification Complaint (99a - 102a) shows the number and assignments of RUMs, ARUS's, and Prison Counselors in each of the facilities on January 1 of 2011, 2012, and 2013. The total numbers and change in each of these was:

Date	RUM	ARUS	Prison Counselor	Total
1/1/11	93	326	1	420
1/1/12	87	307	0	394
1/1/13	62	258	51	371
Change	-31	-68	+50	-49

The Prison Counselors have many of the same responsibilities as the ARUS, although they have no supervisory responsibilities, have a lower classification, and are paid less. The pay scale for the ARUS position was $20.75 to $29.43. The pay scale for the Prison Counselor position was $18.78 to $25.89.[2]

Prior to April 1, 2012, there were two basic corrections officer positions in the prisons, the distinction being whether they were assigned to work inside or outside of the housing units.

[2] https://web1mdcs.state.mi.us/MCSCJobSpecifications/JobSpecMain.aspx

Resident Unit Officers were assigned to work in the housing units on the day and afternoon shifts, which are generally referred to as the active shifts. The pay range for the position was $17.22 to $26.01. Corrections Officers were assigned to the jobs outside of the housing units, including food service, yard, gym, wall posts, gates, perimeter security vehicles, and reception. Corrections Officers were also assigned to the housing units on the night shift when the employees were locked down. The pay range for this position was $16.00 to $24.51. Since the abolishment of the RUO classification, all of the officers assigned to the housing units are now classified as Corrections Officers and paid accordingly.

In addition, two facilities, the Charles Egeler Reception & Guidance Center (aka Duane Waters) and the Woodland Center Correctional Facility, had employees in two additional classifications, Corrections Medical Unit Officer (CMUO), with the same pay range as the Resident Unit Officer, and Corrections Medical Officer (CMO), with the same pay range as the Corrections officer. Woodland Center houses prisoners who suffer from such serious mental illness that they cannot be housed with the general prison population. All but a few of the CMUO positions, those at the Duane Waters Health Center, were abolished at the same time as the RUO positions. All of the former CMUOs at Woodland are now classified as CMOs.

A 1983 job description for the RUO position described the first duty as follows:

> Participates as a member of a treatment team of housing unit mangers, assistant housing unit managers, other resident unit aides and corrections officers in determining the classification, reclassification, parole eligibility, counseling needed by clients, minor disciplinary procedures and treatment programs for each resident in the housing unit. (117a)

The most recent iteration of this job duty, from 2006, stated as follow:

> Participates as a member of the treatment team in determining the classification, reclassification parole eligibility, counseling needed, minor disciplinary procedures and treatment programs for each prisoner in the housing unit. (160a)

The treatment team was, thus, defined from the outset as the employees who worked in the housing unit. Subsequent job descriptions have not included the titles of these treatment team members but the composition of the treatment team has not changed in any material respect[3] and the team functions have remained the same.

The DOC also has treatment teams in the Mental Health Services division of the Bureau of Health Care Services. The Qualified Mental Health Professionals (QMHPs) do not work in the housing units and do not participate in the housing unit treatment teams. (521a - 543a)

III. RESPONSIBILITIES OF HOUSING UNIT OFFICERS[4]

It is essential to understand what the (former) Resident Unit Officers and (former) Corrections Medical Unit Officers actually do in their day to day work. The record contains affidavits submitted by Plaintiffs from employees actually performing the work,[5] with the most detailed, from Officer Karen Kowalski, also attaching reports that a housing unit officer is responsible for preparing. (205a - 284a) We summarize here the affidavit testimony of Officer Kowalski provided in support of the Technical Classification Complaint.

The work of the Housing Officer is challenging and demanding. To the security responsibilities of a Custody Officer, the job adds the tasks and responsibilities of a supervisor, an army sergeant, and a parent. (203a) First, as is obvious, the Housing Officer works in a housing unit in constant face-to-face contact with prisoners, a fact which is emphasized in the job

[3] As noted above, the DOC has been reducing the number of Resident Unit Managers and Assistant Residence Unit Managers and replacing the latter with Prison Counselors. (763a)

[4] Since April 1, 2012, all of the Resident Unit Officers have been called Corrections Officers. Since all officers are now classified as Corrections Officers for purposes of discussion we have distinguished between the two groups by calling them Housing Officers and Custody Officers. This terminology, distinguishing between housing and custody, has long been in use in the Department of Corrections.

[5] Kowalski affidavit (194a - 204a); Bungart affidavit (285a - 290a); Guerin affidavit (291a - 296a); Doades affidavit (601a - 606a).

specification and the description of working conditions. This means that the job is both more stressful and more dangerous than the custody jobs where the contact and interaction with prisoners is less. (203a)

As of 2013 when she described her job in the affidavit, Officer Kowalski had worked as a Resident Unit Officer for about fifteen years, and was working in a Level II unit at Lakeland Correctional Facility in Coldwater. (194a) The unit to which she was then assigned had 42 prisoners although she had also worked in a unit with 83 prisoners. (195a) She described the numerous tasks which must be done by the RUO in the housing unit and the paperwork which accompanies those tasks. Attached to the Kowalski Affidavit are the required forms and reports, which she explained. Officer Kowalski worked the day shift, beginning at 6:00 a.m. Her first task was to make rounds and assure that everyone was there and breathing. (195a) She would wake the prisoners up to get them going on their daily routines. While she did not herself dispense medication, she was responsible for knowing which prisoners must take medication and for insuring that they would go to the health care facility for their medication, generally first thing in the morning. The procedure for leaving the unit for medication is referred to as "medlines." (195a - 196a) Officer Kowalski explained that the Housing Officer must get to know the prisoners, monitor their behavior, watch for signs which could indicate mental health issues and report these issues if they appear serious. It was her job to observe the prisoners for signs of conflict or abuse, prevent conflict if possible, and stop it if it occurs. Through careful observation and intervention she would prevent fights or other critical incidents from happening. (200a) She was responsible for checking the prisoners' rooms, cells or dormitory areas to insure that they were keeping up with the housekeeping requirements and do Room/Cell Check Reports if they failed to do so, which reports can lead to discipline. (196a) She had to insure that the prisoners themselves

maintained good hygiene, and could discipline them if they failed to do so. She had to do packups (going through all of a prisoner's possessions) and shakedowns in search of contraband. (199a) She had to keep track of the prisoners' programs - their work or school assignments - and do reports on them. She was responsible for knowing where all the prisoners in her unit were at all times. (198a) She was in constant communication with the prisoners, counseling them to encourage compliance with the rules and disciplining them if they failed to do so. (200a) She did block reports on prisoner behavior (201a) which are important in the preparation of the Parole Eligibility Reports. She worked with the other Department of Corrections employees assigned to the housing unit, including the Resident Unit Manager (RUM), the Assistant Resident Unit Supervisor (ARUS) and, more recently, with the Prison Counselor (PC), in carrying out the overall work of the housing unit treatment team. (201a - 203a)

The work of a Corrections Medical Unit Officer differed from that of an RUO, as was shown in the affidavit of Officer Roy Doades who was a CMUO at Woodland Center Correction Facility, and continued to perform that, job, although now as a CMO. (596a - 600a) Woodland is a facility for mentally ill prisoners, who, according to the DOC website, "have serious mental illness and cannot function adequately in a general prison population." Officer Doades in his affidavit (596a - 600a) explained that prisoners coming to this facility have the full range of mental illnesses, including schizophrenia, with paranoia and delusions, bipolar disorders, and acute depression. (597a) When they are admitted at Woodland, they are assessed and classified as needing acute care, rehabilitation treatment services, or crisis stabilization services. There are ten housing units at Woodland, one for intake, four for acute care, and five for residential treatment services. (597a) The CMUOs assigned to each unit are members of a mental health treatment team along with the professional mental health staff. (597a) Officer Doades stated that the CMUOs participate in team

meetings with the mental health staff to develop treatment plans, which the CMUOs are then responsible for implementing. (598a) He stated that they carry out all of the job duties described in the CMUO job description, that their jobs are focused on treatment while those of the Corrections Medical Officers (CMOs) are focused on custody, and that the positions of CMUO and CMO are totally distinct, and states further that,

> "The Housing Unit job requires so much more of an officer, both because of our management responsibilities in the unit and our constant contact with prisoners and our participation in the treatment of these difficult, disturbed and needy prisoners." (599a)

IV. THE CIVIL SERVICE PROCEEDINGS

A. The Classification Study

As noted above, the Civil Service Department Office of Classifications, Selections and Compensation (OCSC) undertook its Classification Study to determine if the jobs were properly classified. (6a - 22a) In this study, eight OCSC staff interviewed about 120 employees over the course of many months, asking them about their performance of the duties set forth in their job descriptions. (6a) The first job duty of the RUO is to:

> Participate[s] as a member of a treatment team in determining the classification, reclassification, parole eligibility, counseling needed, minor disciplinary procedures and treatment programs for each prisoner in the housing unit. (160a)

The staff also interviewed 26 supervisors. It appears that questions, seemingly arising from the desk audit responses, were also directed to the Department of Corrections, which responded in a one page position summary in May, 2013, (1a - 3a) and in answers to a few questions. (4a - 5a) MCO was not allowed to participate in the classification study.[6]

[6] The study stated: "The participation of outside parties and representatives is not authorized or contemplated. While participation by the MCO is inappropriate during the process leading to the initial technical decision, it can participate and present arguments as an authorized representative of its members during any appellate process." (7a)

The Classification Study showed, and it is undisputed, that the Housing Officers continued to perform the same duties while classified as Corrections Officers that they performed before April, 2012 while classified as Resident Unit Officers. At page 7 of the study, it was reported that:

> "Almost all employees interviewed indicated that they were performing the same duties in their new and old positions before and after April 2012. Those that did report a change had typically been relocated or reported that their duties had become more difficult." (12a)

B. The Classification Study Conclusion Regarding RUOs

The Classification Study concluded that the 2,415 employees who had formerly been classified as RUOs were correctly classified as COs. The rationale for the decision regarding the RUOs was set forth as follows:

> "Taken as a whole, the following evidence requires the conclusion that any differences are not significant enough to warrant classification of housing unit positions as RUOs:
>
> - The *appointing authority's statement* as to the incomplete and abandoned implementation of the treatment team.
> - The *appointing authority's statements* that the positions are not participating in treatment team activities at a level meaningful enough to be seen as a primary focus of the positions.
> - The *appointing authority's statements* that all officers are expected to provide a level of service similar to those activities identified by employees as examples of treatment.
> - The establishment of hundreds of new positions with a treatment focus in the prisons.
> - The failure of the majority of the housing unit employees to recognize themselves as being part of a treatment team before or after 2012.
> - The *appointing authority's statements* that the positions reporting treatment duties perform them sporadically and insufficiently for them to be seen as a primary or major focus of the positions.
> - The *appointing authority's statements* that COs and other classes are expected to perform the same reporting examples identified by employees.

- The reported infrequency by employees of their reporting duties.
- The lack of discussion of reporting duties by supervisors and statements that some RUO reporting duties had been delegated to other positions.
- The absence of reported medication delivery duties by employees, supervisors, and the appointing authority."

(17a)(Emphasis added)

In sum, the Classification Study conclusion was based essentially on three things: (1) the failure of many of the former RUOs to identify themselves as members of a treatment team, (2) the creation of hundreds of new positions with a treatment focus, and (3) statements by the appointing authority. These appointing authority's statements were from a May 22, 2013, memo, barely a page long, from Tony Lopez, Director of Human Resources in the Department of Corrections, to Susan Cooper, OCSC Manager and the response to a few questions directed to the DOC. (1a - 5a)

The statement from the DOC, accepted in the Classification Study, that the "establishment of hundreds of new positions with a treatment focus" affected the work of the RUOs was inconsistent with the fact that the (former) RUOs all said that their jobs had not changed in any way. Further, the assertion that hundreds of new positions had been added was false, as was demonstrated when it was repeated in the Technical Review Decision, discussed below.

The DOC also stated that Prison Counselors were added to assist in treatment team determinations. At the time of the "abolishment" of the RUO and CMUO positions there were no Prison Counselors and the small number who were added simply replaced and did the same work as Assistant Resident Unit Supervisors, whose positions were eliminated. (99a - 102a)

Importantly, the failure of many RUOs to identify themselves as members of a treatment team was clearly related to confusion between the existence of housing unit treatment teams and mental health treatment teams, as was evident from the desk unit responses, and this confusion was fully shared by the Technical Review Officer, as will be discussed below.

C. The Classification Study Conclusion Regarding CMUOs

Desk audit interviews were done with the housing unit CMOs (the former CMUOs) but no mention was made of their responses in the Classification Study. It was later revealed that the responses had not been entered into the spreadsheet which collated the responses and were, thus, not considered. Thus, the decision was based solely on a comparison of the job duties of the CMUO classification and the CMO classification. The study concluded that were significant differences in the duties, with the CMUO required to provide more direct and specialized care. The study concluded, with reference to nothing other than statements of the DOC, that the focus of the CMUO duties was "consistent with the selective position requirement for experience providing advanced life support, first aid, and health care procedures…" (18a - 20a) While the classification study did not so state, this selective position requirement was specifically for CMUOs working at the Duane Waters facility, which requires the CMUOs assigned there to drive ambulances and provide emergency medical care. These CMUO positions with this selective position requirement were not abolished. The CMUOs working at Woodland Center Correctional Facility have never had or been required to have this selective position requirement and there was no evidence cited that they did not perform the job duties of CMUOs. To the contrary, the evidence demonstrated that they did perform the listed CMUO job duties. Nevertheless, the Classification Study concluded that they were only doing the work of the CMO position.

D. The Technical Classification Complaint

Michigan Civil Service Commission Rule 8-3.1(a) provides that classification decisions can be challenged by filing a Technical Classification Complaint. The rule provides that this complaint is assigned to a Technical Review Officer (a TRO), who considers the evidence and issues a Technical Review Decision. Rule 8-3.3(b)(1) explicitly prohibits the TRO from

conducting a hearing, although prior to 1997, previous iterations of the Commission rules had permitted hearings in classification appeals.

Plaintiff-Appellant William Henderson, on his own behalf and on behalf of all other similarly situated, and represented by MCO, filed a Technical Classification Complaint on October 4, 2013. In support of the complaint, MCO provided extensive evidence, identified as exhibits to the complaint. (78a - 600a) This evidence included all of the documents regarding the history of the RUO and CMUO positions, including the job specifications, which are periodically reviewed and which are required to be attested to as accurate.[7] (103a - 191a) The record includes side by side comparisons of the job duties of RUOs and COs.(192a - 193a) The evidence submitted by Plaintiffs also included, as noted, affidavits from employees performing the RUO and CMUO functions, and included copies of all of the reports that an RUO is required to prepare. (205a - 284a) Plaintiffs also submitted post orders, which set forth in detail what the officer assigned to each particular post in the prison is required to do. (297a - 412a)

The evidence in support of the Technical Classification Complaint included the questions asked of both the employees (413a - 423a) and their supervisors (507a - 512a) in the Classification Study and a detailed analysis of the responses. (462a - 506a; 513a - 520a)

Along with the complaint Plaintiffs submitted a brief in which we argued that, contrary to the conclusions in the Classification Study, the extensive evidence provided showed that the former RUOs were, in fact, performing as treatment team members but failed to identify themselves as doing so because of a lack of common understanding of the term "treatment team." Plaintiffs also argued that the evidence showed that there were not hundreds of new positions created with a

[7] Civil Service Rule 4-2 states, "Civil service staff shall provide for both a periodic and ongoing review of positions in the classified service to ensure positions continue to be properly classified."

treatment team focus.[8] And the complaint argued that the appointing authority's statements were not themselves evidence and were completely unsupported by evidence. The DOC never produced a single document setting forth any change in the functions of the RUOs or in the functions of the housing unit treatment teams. While Assistant Resident Unit Supervisors were being gradually replaced by lower paid Prison Counselors, the RUOs continued to perform the same tasks, fill out the same reports, and provide the same information about the prisoners as they had been doing. In fact, there jobs became more critical because of the overall reduction in the supervisory staff in the housing units.

A more complete summary of the evidentiary record is set forth in the brief in support of the Technical Classification Complaint (23a - 77a) the Application for Leave to Appeal to the Employment Relations Board (666a - 700a) and the Brief to the Circuit Court in support of the appeal from the decision of the Civil Service Commission. (795a - 847a; 883a - 896a)

As noted, The Department of Corrections presented no evidence. The record evidence consisted only of that submitted by Plaintiffs.. In response to the Technical Classification Complaint, the DOC filed only a short position statement, (601a - 606a) contending that the reason the employees continued to perform the same duties after the abolishment of their positions was because they had been incorrectly classified prior to that abolishment. In sum, the Department argued that the jobs had been misclassified for decades because the positions had "never developed as contemplated."

[8] The 400 "newly hired" mental health professionals were not newly hired and did not have housing unit treatment team functions. They had been working in the prisons but carried on the books as employees in the Community Mental Health Department. In 2011 a bookkeeping entry transferred them to the books of the Department of Corrections, where they continued to work in Health Care Services.

E. The Technical Review Decision Regarding RUOs

On July 25, 2014, the TRO issued the Technical Review Decision. (607a - 665a) While the undisputed evidence was that the jobs of the employees involved were unchanged, the TRO concluded that they had changed. She concluded that there was an increase in the number of health care professionals and that they were participating in the housing unit treatment teams. Thus, she stated the basic question, "What has changed," and answered:

> "The answer is that the appointing authority has decided to take a different approach to the provision of treatment. This change is reflected in the hiring of over 400 mental health professionals and replacing supervisory custody positions with Prison Counselors and Corrections Program Coordinators." (Technical Review Decision, 630a)

This was again stated later in the decision:

> The TRO cannot second-guess the staffing decisions made by the DOC. The appointing authority has decided to reconfigure the DOC's approach to treatment, which includes a re-evaluation of the duties of housing unit officers in relations to treatment teams. This change in approach is substantiated by the increase in professional treatment staff. (Technical Review Decision, 643a)

And again:

> "The appointing authority has decided to greatly increase the number of healthcare staff on treatment teams. While the input of the housing unit officers is still utilized, the actual treatment decisions are made by the healthcare professionals on the team." (Technical Review Decision, 663a)

And this was stated yet a fourth time in the decision:

> "The primary role of the affected officers is to provide custody within a housing unit. Their responsibility includes reporting to the health care professionals regarding the behavior of prisoners. The professionals on the treatment team decide what treatment will be provided to each prisoner, and the officers perform their portion of the planned treatment." (Technical Review Decision, 665a)

The Technical Review Officer rejected the argument that the unsupported statements of the employer were not evidence, repeatedly emphasizing that, "The DOC has complete authority to decide its organizational structure and to assign duties to its staff," and "It is the appointing

authority's right to change the approach used to provide treatment to prisoners and to determine the level of treatment team participation assigned to staff." (Technical Review Decision, 621a)[9] Finally, she concluded that the answers to the desk audits established that the former RUOs were not performing the treatment team duties and other duties set forth in the RUO job specification, relying largely, as had the Classification Study, on the answer to the question about participation in a treatment team and to the DOC's statements. The affidavits of officers were disregarded. The more detailed analysis of the desk audit responses was disregarded. Further, acknowledging that the supervisors said that the RUOs were participants in treatment teams, she stated that they were entitled to their opinion but the OCSC did not need to give it any weight. (Technical Review Decision, p 622a)

F. The Technical Review Decision Regarding CMUOs

The Technical Review Decision noted, as had the Classification Study, that the CMUO and CMO positions shared few job duties. The decision also noted that the Classification Study had failed to reference the results of the desk audits. The responses to the desk audits, which had been belatedly provided to MCO and were then considered by the Technical Review Officer, showed that all of the respondents described themselves as participating in treatment teams and performing all of the duties described in the job classification. This led the Technical Review Officer to the surprising conclusion that the job duties set forth on the job specification for CMUO were "not applicable" to the position of CMUO. She wrote:

> The job duties listed on a specification must be considered within the context of the job description at the beginning of the specification. If the position's work does not meet the job description, the job duties of that specification are not applicable to the specific position being reviewed. In this instance, the CMUO calls for a higher

[9] MCO never contended that the Department of Corrections could not change the approach used to provide treatment to prisoners or that it could not change its organizational structure and the assignment of duties to staff. What MCO contended was that the DOC had not done this, that nothing had changed.

> order of involvement in the provision of direct therapeutic or specialized health care." (Technical Review Decision, 61a)

In other words, she concluded that the position requires more of the employees than that they perform all of the job duties set forth in the job specification. She then proceeded to compare composite position descriptions of the CMO position and of the CMUO Paramedic/Emergency Medical Technician at the Duane Waters facility – which was not the composite position description for the abolished positions at Woodland Center. (660a) Essentially she concluded that the therapeutic care provided to mentally ill prisoners at Woodland required the ability to drive an ambulance. Based on this comparison and the astounding conclusion that the job duties were not applicable to the job, the Technical Review Officer concluded that the former CMUOs were properly classified as CMOs.

In sum, the TRO concluded that the former RUOs were not performing the RUO duties and so were correctly classified as COs, while also concluding that the CMUOs were performing the CMUO duties but were, nevertheless correctly classified as CMOs. It seemed that the facts were unrelated to the conclusions.

G. The Appeal to the Employment Relations Board and the Responses of the TRO and the DOC

Civil Service Rule 8-3.4 provides that a technical review decision may be appealed to the commission. Rule 8-7.1 provides that appeal to the commission must be filed with the Employment Relations Board, which makes a recommendation to the commission. On December 1, 2014, MCO filed an Application for Leave to Appeal to the Employment Relations Board, (666a - 700a) arguing, *inter alia,* that the decision of the Technical Review Officer showed that she was confusing mental health treatment, provided by the Qualified Mental Health Professionals (QMHPs) in the Mental Health Services Division of the Bureau of Health Care Services, with rehabilitative treatment provided in the housing units by the employees working there, and that the

mental health treatment teams (whose numbers had not, in any event, been increased) had nothing to do with housing unit treatment teams. MCO filed a motion to accept new evidence regarding corrections medical health care because of the TRO's erroneous conclusions. (701a - 753a)

The Technical Review Officer filed a brief in response to MCO's application for leave, (754a - 772a) and stated that she had no objection to the admission of this new evidence but that it was not material because "mental health treatment is not the primary issue under consideration." (759a) The TRO, thus, conceded this essential point, that mental health treatment was completely unrelated to housing unit rehabilitative treatment. She wrote what she called a "clarification," as follows:

> "While there was some inconsistency in the language used to describe staff and treatment in the housing units, the TRO takes this opportunity to *clarify* the Technical Decision. There are two treatment concepts that must be differentiated: mental health treatment and rehabilitative treatment. Mental Health treatment is solely the responsibility of the QMHPs. Officers are not qualified to provide that treatment and have never been involved in those decisions.
>
> The DOC has stated that mental health professionals may give input regarding treatment provided in the housing units, but rehabilitative treatment decisions are primarily made by the supervisors and professional counseling staff.
>
> The conclusion section of the Technical Decision (page 58) addresses the CO's (the former RUO's) responsibility to report to "healthcare professionals on prisoner behavior." This should have been more accurately worded as reporting to "professional or supervisory staff on prisoner behavior." The housing unit officers provide information to others who make the decisions regarding treatment, rehabilitation and classification of prisoners."

(Technical Review Officer's Response to Application for Leave to Appeal, 760a)

Thus, the Technical Review Officer "clarified" that while she had stated in the Technical Review Decision that the RUO positions had somehow changed because of the addition of more than 400 newly hired mental health care professionals to the housing unit treatment teams she had really meant that it was the addition of Prison Counselors and "other professional counseling staff"

which had somehow changed the RUO duties. (760a) The TRO also conceded that the 400 mental health professionals supposedly hired by the DOC had already been working in the Prison Health Care. They were simply transferred from the payroll of the Department of Community Health to the Department of Corrections. While asserting that it made a difference which payroll they were on, she said it did not matter since the additional professional treatment participation referenced in her decision was not that of the mental health professionals but of Prison Counselors. At the same time, in responding to MCO's argument that the housing unit treatment team responsibilities were not affected by the hiring of Prison Counselors for the reason, *inter alia*, that there were no Prison Counselors at the time the RUO positions were abolished, she stated, "The MCO states that there were no Prison Counselors at the time the RUO positions were abolished. That is irrelevant." (758a) Nor was it relevant to the TRO that the Prison Counselors were simply replacing Assistant Resident Unit Supervisors. (757a)

It is worth noting that while the TRO thus conceded that the health care professionals did not participate in the treatment team decisions in the housing units, the Department of Corrections filed a brief in response to the Application for Leave to Appeal (773a - 779a) and continued to make the same discredited and abandoned argument, asserting that over 400 health care professionals transferred from the Department of Community Health were making treatment decisions in the housing units. (DOC Response to App for Leave, 777a) At the same time as it argued that the treatment team functions and the RUO responsibilities had changed because of the addition of these health care professionals (which did not happen) the DOC also argued that the RUO jobs did not change for the reason that even before the abolishment of the positions the employees had not been performing the RUO functions. The DOC argued that the reason the jobs had not changed was because they had "never developed" as contemplated. (778a)

H. The Employment Relations Board Decision and Recommendation

As discussed, in reaching the conclusion that the former RUOs and CMUOs were not doing the work of those classifications, the Classification Study and the Technical Review Decision had each relied not only on the desk audit responses but also on statements from the DOC that the treatment team functions, which differentiated the two positions from the lower classified positions, were changed by the assignment to the housing units of 400 health care professionals and newly hired Prison Counselors. The TRO later conceded that the health care professionals did NOT participate in the treatment decisions and she did not dispute the fact that there were no Prison Counselors at the time of the position "abolishment."

With regard to MCO's motion to admit new evidence regarding corrections medical health care, the ERB recommended denying the motion "given its limited relevance to the issue of the newly created positions' proper classifications." (782a) It is difficult to discern from this cryptic statement whether the ERB had acknowledged, as did the Technical Review Officer, that the mental health professionals had nothing to do with the job duties of the former RUOs and CMUOs. Although it is far from clear, it appears that the very brief Employment Relations Board recommended decision, adopted by the Civil Service Commission, relied only on the desk audit responses. The decision cited the desk audit responses that a majority of the former RUOs said they were not members of a treatment team and said that "the work examples showed activities most consistent with Corrections' Officer's duty of observing prisoners." (780a - 782a)

With regard to the former Corrections Medical Unit Officers, the ERB decision stated only that "the record does not demonstrate that they provide direct therapeutic intervention or specialized health care to prisoners, which is expected of Corrections Medical Unit Officers."

The ERB decision also stated, as had the Technical Review Officer, that the DOC had the authority to create positions and assign their duties.

I. The Civil Service Commission Decision

In a two sentence Final Decision, the Civil Service Commission adopted the Recommended Decision of the Employment Relations Board as its own. (783a - 786a)

V. THE CIRCUIT COURT DECISION

The Circuit Court reversed the decision of the Civil Service Commission on two grounds, that it was not supported by competent, material and substantial evidence on the record, and, alternatively, that it was arbitrary and capricious, in that it was unsupported by any evidence. (897a - 905a)

VI. THE COURT OF APPEALS DECISION

The Court of Appeals summarized the record before concluding that the record could not be considered on appeal from a Civil Service Commission classification decision. Interestingly, in summarizing the Technical Review Decision, at page 3 of the slip opinion, (1085a) the court quoted the precise paragraph from the TRO decision regarding the addition of health care professionals to the housing unit treatment teams which the TRO had "clarified" to state that there were no health care professionals on the treatment teams.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review is *de novo* for the questions of law enumerated by the Court – questions which concern Const 1963, art 6, § 28 and the scope of judicial review therefrom. Constitutional issues are reviewed *de novo*. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011); *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). The interpretation of statutes and court rules is likewise reviewed *de novo*. *CAM Constr v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002). The appropriate standard of review is, itself, an issue of law reviewed *de novo*. *Palo Group Foster Care, Inc v Mich Dep't of Social Services*, 228 Mich App 140, 145-146; 577 NW2d 200 (1998).

II. THE "AUTHORIZED BY LAW" SCOPE OF REVIEW APPLIED AS A MINIMUM UNDER CONST 1963, ART 6, § 28 TO THE CIVIL SERVICE COMMISSION'S ABOLISHMENT OF THE RESIDENT UNIT OFFICER AND CORRECTIONS MEDICAL UNIT OFFICER CLASSIFICATIONS

At issue are the competing interpretations by the Circuit Court and the Court of Appeals of Const 1963, art 6, § 28, which provides as follows:

> 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 court 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. (Emphases added.)

Simply stated, the Circuit Court was correct to apply the authorized-by-law standard *as a minimum* and also to apply the substantial evidence test to the Civil Service Commission's abolishment of the Resident Unit Officer and Corrections Medical Unit Officer classifications.

The Circuit Court's decision comported with traditional rules of constitutional

interpretation. "Every" phrase of the Michigan Constitution must be given effect; no phrase should be rendered surplusage or nugatory. *In re Proposals D&H*, 417 Mich 409, 421; 339 NW2d 848 (1983); *Baker v General Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980) (statutory construction rule). That is exactly what the Circuit Court did in this case: it honed in on, and effectuated, the constitutional phrase "as a minimum." While the defendants sought to restrict the court's review solely to the authorized-by-law standard, the Circuit Court understood and applied the phrase "as a minimum" to allow for the substantial evidence test as well. The Circuit Court reasoned as follows:

> Defendants argue that because a hearing was not required in this case, this Court's review is limited to a determination of whether the Commission's final decision was authorized by law. However, this Court notes that Article VI, Section 8 requires such a determination as a *minimum* standard of review. *Viculin v Dept of Civil Service*, 386 Mich 375, 392; 192 NW2d 449 (1971) 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. Furthermore, the Commission itself sent the Appellants in this case a notice stating that the decision is subject to review under MCR 7.117 and MCL 24.301-24.306; the standards of review contained in MCL 24.306 were included in the Commission's notice. Therefore, 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. (Op at p 3, emphasis in original) (899a)

This reasoning – which surveyed constitutional provisions, statutes, and court rules in concise fashion – was correct.

The Court of Appeals, however, reversed the Circuit Court, and sought to distinguish *Viculin*, on the ground that the substantial evidence test applied *only* in cases where a hearing was required. *See* COA Op at 7 (1089a) (stating that the substantial evidence test is applicable "only in cases where a hearing is required") (citing *Attorney General v Mich Pub Serv Comm*, 206 Mich App 290, 295-296; 520 NW2d 636 (1994)). This was not a distinction recognized, endorsed, or even suggested by this Court in *Viculin*. As noted by the Circuit Court, the holding of *Viculin* did

not hinge upon the issue of whether a hearing was required or not. (Op at 3) (899a)

In *Viculin*, this Court held that the Michigan Constitution mandated "direct review" by the judiciary of the Civil Service Commission's decisions – review which was not *de novo* but still encompassed the substantial evidence test. *Viculin*, *supra* at 392 ("[W]e hold as follows:… 2. Art 6, § 28, neither guarantees nor permits *de novo* review of final decisions of the State Civil Service Commission. The scope of review is that stated by the constitution, 'whether the same are supported by competent, material and substantial evidence on the whole record.'"). Indeed, the Michigan Constitution itself states that the authorized-by-law standard applies "as a minimum" – not as a maximum. And consistent with both the Michigan constitution and statutory standards such as the Administrative Procedures Act, the Michigan Court Rules expressly provide for both the process and the scope of review applicable in this appeal including the substantial evidence test:

> The court may affirm, reverse, remand, or modify the decision of the agency and may grant further relief as appropriate based on the record, findings, and conclusions.
>
> (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).

Yet the Court of Appeals rejected all of this and ruled to the contrary – it concluded that only the authorized-by-law standard applied. It made two key errors. *First*, it bypassed the applicable Court Rules largely on the notion that they merely provided the procedure for review, not the judicial scope of review. (COA Op at 9-10.) (1091a - 1092a) This distinction, which

seems to ignore the actual text of the Rules, created a false dichotomy between the process and the scope of review. The two are intertwined; no aspect should be rendered nugatory. In fact, the Court Rule's standards are perfectly consistent with the Michigan Constitution and the *Viculin* decision – both to agency decisions in general and to the Civil Service Commission in particular – applying the substantial evidence test. The Court Rules at issue here describe more than when, where, and how to file court orders. They mandate ("shall specifically identify") the terms of substantive review – including but not limited to determining if the decision is supported by "competent, material, and substantial evidence on the whole record." Such terms should be interpreted and effectuated according to their plain meaning. *In re Chrzanowski*, 465 Mich 468, 482; 636 NW2d 758 (2001); *see also, Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

Second, the Court of Appeals also erred in concluding that no review standard beyond authorized-by-law applied here on the ground that the Michigan Legislature had not provided for it:

> This Court has stated that Const 1963, art 6, § 28 establishes a minimum standard of review without forbidding a more stringent review. *Palo Group Foster Care, Inc v Mich Dep't of Soc Servs*, 228 Mich App 140, 145; 577 NW2d 200 (1998). Plaintiffs argue along the same lines. However, plaintiffs provide no authority that would allow a circuit court sua sponte to apply a stricter standard, and this Court indicated in *Palo* that it was the role of the Legislature to provide for stricter review. *Id.*

(COA Op at 8, n5) (1090a) Respectfully, plaintiffs did not request or suggest that the Circuit Court *sua sponte* should apply a stricter standard, and the *Palo Group* decision did not make such an exclusive pronouncement about the Legislature's role. The court in *Palo Group* did not restrict the phrase "authorized by law" to mean "authorized solely by the Legislature." The decision went in a different direction altogether. The court in *Palo Group* stated that "nothing in

the APA or the Michigan Constitution precludes the Legislature from providing for review *de novo* in the circuit court." *Palo Group*, 228 Mich App at 145. The court then concluded that the Legislature had, in fact, provided for *de novo* review under MCL 400.725 (concerning the denied renewal of plaintiff's adult foster care facility license). *Id*. This did not support reversal of the Circuit Court's decision here. Moreover, the Michigan legislature has in fact authorized this Court to issue the Michigan Court Rules, which, as noted above, provide for both the process and the scope of review for the judiciary. *See* MCL 600.223.

Yet more fundamentally, the Court of Appeals committed an error in allowing the Civil Service Commission itself rather than the Constitution to dictate the applicable standard of judicial review. That is, in holding that the substantial evidence test *only* applied where "a hearing is required," the Court of Appeals has allowed the Commission to insulate itself from the substantial evidence test merely by precluding a hearing. Specifically, the Commission has promulgated Civil Service Rule 8-3.3(b)(1) which *expressly forbids* Technical Review Officers from conducting hearings. Even though extensive records and affidavits with exhibits were submitted to the Technical Review Officer in this case, there was no "hearing" – nor even the possibility of one. Thus, under this narrow reading of art 6, § 28, the Court of Appeals allows the Commission, by the issuance of one rule, to limit the ability of the courts to review its actions.

In this regard, it must be noted that art 6, § 28 provides that "Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law." Here, the Court of Appeals by so narrowly limiting the authorized-by-law standard and precluding a review of the record has essentially made all findings of fact conclusive. It literally pointed to one document in the record, a demonstrably flawed and erroneous classification study, to foreclose all other evidentiary review. (COA Op at 12) (1094a) ("Regarding whether the

decision was arbitrary and capricious, the CSC predicated its decision on an extensive and detailed classification study…") This is clearly contrary to the expressed intention of the drafters to grant such conclusive effect only in one kind of administrative proceeding. *Feld v Robert & Charles Beauty Salon*¸ 435 Mich 352, 362; 459 NW2d 279 (1990); *City of Coldwater v Consumers Energy* Co, 500 Mich 158, 170-171; 895 NW2d 154 (2017) (applying the interpretive rule of construction "*expressio unius est exclusio alterius*" that the expression of one thing is the exclusion of another).

The decision by the court below, effectively allowing this restriction of judicial review by a litigant, was erroneous on multiple levels. It is, after all, the Michigan courts, and not another arm or branch of government, which are vested with the judicial power and which set the legal standards for review. Const 1963, art 3, § 2 (separation of powers); art 6, § 1 (judicial power). This is a foundational principle which gains significance when it is the other arm under review, as a litigant, attempting to sway the judiciary's role in our constitutional framework.

III. IN REVERSING THE CIRCUIT COURT, THE COURT OF APPEALS FAILED TO GIVE PROPER MEANING TO THE "AUTHORIZED BY LAW" CONSTITUTIONAL STANDARD

Even if this Court were to hold that the substantial evidence test was not required in the absence of a hearing, it would still be required to conclude that the Court of Appeals committed reversible error by failing to give proper meaning to the authorized-by-law standard – the other ground upon which the Circuit Court relied for its decision. Contrary to the reasoning of the Court of Appeals below, this standard does not foreclose review of the evidentiary record. To the contrary: the Michigan courts can only determine whether an agency or the Commission complied with the authorized-by-law standard by conducting a "direct review" of the evidentiary record. Const 1963, art 6, § 28.

The formulation of the authorized-by-law standard is not in dispute. As recited by the Court of Appeals below: "An agency decision 'in violation of a statute, in excess of the statutory

authority or jurisdiction of the agency, made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious' is not authorized by law." (COA Op at 10) (1092a) In so stating, the Court of Appeals cited its previous decision in *Brandon Sch Dist v Michigan Educ Special Services Ass'n*, 191 Mich App 257, 263; 477 NW2d 138 (1991).

However, the Court below went on to quote – selectively – from the *Brandon* decision and a subsequent decision, *Wescott v Civil Serv Comm'n*, 298 Mich App 158; 825 NW2d 674 (2012), which itself cited *Brandon*, for the following sentence: "When 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." *Id* at 263.

Neither the Court below nor the *Brandon* court cited any precedent for that broad statement, because there was none. Rather, the *Brandon* court qualified and explained its statement in the very next sentence: "Judicial review is not *de novo* and is limited in scope to a determination whether the action of the agency was authorized by law." *Id* (citing *Michigan Waste Systems v Dep't of Natural Resources*, 147 Mich App 729, 736; 383 NW2d 112 (1985)). Indeed, the *Brandon* court proceeded to analyze the record which predicated the insurance commissioner's decision, under challenge, not to initiate a contested case hearing: "The commissioner's order was based on a review of petitioners' claims by the staffs of the Insurance Bureau and the Attorney General. This review included an examination of the contract between the [defendant] MESSA and Blue Cross." *Brandon, supra* at 265. As a result, the commissioner's finding that the contract was outside the regulatory authority of the insurance bureau, and thus no contested case hearing was required, "was not arbitrary or capricious." *Id*.

Similarly, the *Wescott* court concluded that the Civil Service Commission did not act arbitrarily or capriciously by declining to consider the findings of two other agencies (the Social

Security Administration and the State Employees' Retirement System Board) regarding the plaintiff's request for disability benefits. This conclusion necessitated a review of the record. While the *Wescott* court indicated a general "rule" against reviewing the evidentiary record, it nonetheless observed that the specific findings of the two other agencies were contrary to those of the Civil Service Commission. *Wescott*, 298 Mich App at 163-164 & n 4 (concluding that the Commission was not bound to follow those agencies). And further: "In this case, there was evidentiary support for the CSC's decision, even if it was only the ophthalmologist's evaluation." *Id* at 163 n 4.

These cases, which purport to preclude any review of the evidentiary record at the same time as they engage in it, illustrate a fundamental point: The arbitrary and capricious standard, by its very terms, necessitates an evidentiary review by the Michigan judiciary. This Court defined those terms in *Bundo v City of Walled Lake*, 395 Mich 679; 238 NW2d 154 (1976), in which it held that governmental bodies even at the local level would be "subject to judicial review" to safeguard against "arbitrary and capricious" actions. This Court in *Bundo* adopted the definitions of the terms utilized by the United States Supreme Court, as follows:

> Arbitrary is: "[W]ithout adequate determining principle * * * Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, * * * decisive but unreasoned".
>
> Capricious is: "'[A]pt to change suddenly; freakish; whimsical; humorsome."

Bundo, supra at 703 n 17, quoting *United States v Carmack*, 329 US 230, 243; 67 S Ct 252; 91 L Ed 209 (1946). There is no other way to assess these standards, including but not limited to "principles" and "circumstances," than by reviewing the record.

This Court has been insistent on the importance of a factual record in other constitutional challenges to agency actions. In *Westervelt v Natural Resources Comm'n*, 402 Mich 412; 263

NW2d 564 (1978), this Court addressed two seemingly pure "legal" issues: whether the Legislature had unconstitutionally delegated its legislative power to the defendant agency to promulgate rules; and whether the agency's rules (on river usage) were invalid for having exceeded the scope of the authority granted under specific legislation. The record was sparse if not bare. The parties had reached an "unfortunate record-limiting stipulation" and the trial court opinion recited only two facts of consequence (the number of river users on weekends, and money involved in river activities). To determine whether the agency had properly effectuated the Legislature's mandate, this Court remanded for development of the factual record: "this Court must be certain that on the record…a state of facts exists that justifies regulation of the use of the rivers in questions" and the regulations were reasonably calculated" to effectuate the legislative goals. *Id* at 450. As this Court lamented: "the present state of the record does not allow us, with fairness to the trial judge and the parties, to adequately answer these questions." The judge's and the litigants' mistake: they "believed that the determinant issues could be decided without reference to the surrounding facts." *Id*.

In short, the Michigan judiciary simply cannot discharge its function without a review of the evidentiary record in a case. The litigants may disagree about the standards applicable to the evidentiary review, but the "direct review" itself must be conducted in order to insure adherence to constitutional safeguards – preventing arbitrary and capricious actions by governmental bodies. That is as true here as it was in the decisions discussed above. The Court of Appeals, misapprehending the meaning of the authorized-by-law standard, steered in the wrong constitutional direction when it chastised the Circuit Court for reviewing the evidentiary record.

To the extent that the lower courts in *Brandon* and *Wescott* suggested such a course, this Court may take the opportunity to guide both courts and litigants by clarifying the meaning of

"direct review" under Const 1963, art 6, § 28: "direct review" means "direct review" of "[a]ll" the findings and rulings -- the evidentiary record as well as the legal issues in a case.

IV. THE COURT OF APPEALS ERRED IN ITS APPLICATION OF THE "AUTHORIZED BY LAW" SCOPE OF REVIEW STANDARD

While the Court of Appeals acknowledged the formulation for the authorized by law scope of review standard – that a decision is not authorized by law if it is arbitrary and capricious -- it misapplied that standard in the instant case.

At the outset, this Court may note that it has decided a limited number of cases involving art 6, §28. In *Viculin v Department of Civil Service, supra*, this Court considered an appeal from a CSC decision brought under art 6, § 28 and rejected the argument that it requires *de novo* review of the agency decision, writing, as discussed above, that the constitution provided for two standards of review, substantial evidence and authorized by law.

The scope of review was only tangentially addressed in *Bundo v Walled Lake, supra*, discussed above. There the court considered a local jurisdiction's non-renewal of liquor license. The principal issue addressed was whether the liquor license was a property interest such that due process guarantees were implicated. However, because the Court had previously held that liquor licensing decisions were not reviewable by the courts under the arbitrary and capricious standard, the Court stated that those previous decisions were overruled and that henceforth judicial review of a licensing decision was available under an arbitrary and capricious standard. The Court was not called upon to further explicate the meaning of the standard or to apply it, although it did adopt the definition of the terms arbitrary and capricious from a U.S. Supreme Court case.

Ross v Blue Care Network of Mich, 480 Mich 153; 747 NW 2d 828 (2008), has been cited for the proposition that a court, acting pursuant to art 6, § 28, reviews an agency decision under the authorized by law standard but that case did not require the court to analyze or apply that standard

and it did not do so. *Ross* provides no guidance on the application of the arbitrary and capricious thread of the authorized by law standard.

The United States Supreme Court, to which this Court looked in *Bundo* for guidance, has frequently been called upon to review agency decisions and to determine and apply the arbitrary and capricious standard of review. In *Motor Vehicle Mfrs Ass'n of U.S., Inc v State Farm Mut Auto Ins Co*, 463 US 29, 43; 103 S Ct 2856; 77 L Ed 2d 443 (1983), the Court wrote, in a much cited passage, as follows:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." Burlington Truck Lines v. United States, 371 U.S. 156, 168, 83 S.Ct. 239, 245-246, 9 L.Ed.2d 207 (1962). . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *See also, Encino Motorcars, LLC v Navarro*, 136 S Ct 2117, 195 L Ed 2d 382 (2016); *Southcoast Hosps Grp, Inc v NLRB, 846 F 3d 448 (2017)*.

These fundamental points, that there must be a satisfactory explanation for a decision, that it must be rationally connected to the facts, and that it cannot run counter to the evidence are simply ways of articulating and applying the relevant legal concepts implicated by the dictionary definitions of arbitrary. What the U.S. Supreme Court recognizes, and what this Court should also recognize, is that it is arbitrary to reach a conclusion which is not connected to the facts. It is arbitrary to make a decision which runs counter to the evidence.

The Court of Appeals stated that the question of whether a decision is arbitrary cannot be answered by looking at the evidentiary record. This assertion quite simply makes no sense. If the evidentiary record cannot be reviewed to see if the conclusion is rationally connected to the

facts, even applying the most deferential standard to the agency's fact finding, then no conclusion can be reached as to whether the decision is arbitrary. If the court is precluded from examining the record to determine whether the conclusion runs counter to the facts, then the court cannot determine whether the decision is arbitrary. If the court cannot determine whether the decision is arbitrary it cannot determine whether the decision is authorized by law. If a reviewing court cannot look at the record then there is, in effect, no review.

The Court of Appeals mistakenly concluded that examination of the evidence is necessarily a substantial evidence review which is impermissible in the absence of a hearing. The court is wrong. The standard articulated by the United States Supreme Court quoted above, to determine the authorized by law-arbitrary standard, is not whether there is competent, material and substantial evidence. It is a lesser standard- whether the decision is rationally related to the facts in the record or whether the conclusion is affirmatively countered by the record facts, as opposed to whether it is supported by them.

Examining the conclusions of the Civil Service Commission in this case through this light, it can only be concluded that the conclusions, both as to the former RUOs and the former CMUOs, were arbitrary. They were not related to the facts demonstrated by the record but were rather disproven by the facts. We have sometimes stated in the course of this litigation that there were no facts to support the Department of Corrections contentions or the Commission's conclusions. We stated this because the Department of Corrections had made assertions about the operation of the housing unit treatment teams which were unsupported by any documentary evidence. It is more accurate to say at this point that the facts on the record showed affirmatively that the conclusions of the Technical Review Officer, accepted by the Employment Relations Board, and adopted by the Civil Service Commission, were disproven by the record. They ran counter to the

evidence.

All of the evidence in the record supported the position of the Plaintiffs-Appellants that they had been properly classified as RUOs and CMUOs and that they were not properly classified as COs and CMOs. It can only be concluded that a decision which was completely contradicted by the record was arbitrary. The decision was, as the Circuit Court found, an improper "exercise of will." *Bundo, supra*, at 703, n17.

The Court of Appeals noted in its decision that the plaintiffs had the opportunity to submit documentation and express their critique of the *post hoc* classification study. Plaintiffs did so. They submitted extensive documentation which had not been considered in the classification study. They also submitted an extensive analysis of the responses to the desk audits. This evidence was submitted to the Technical Review Officer. As discussed above, a fundamental underpinning of the classification study conclusion was that the DOC had established hundreds of "new" positions with a treatment focus in the prisons.

The TRO was even more specific, stating that the jobs of the housing officers had changed because the DOC had hired over 400 mental health professionals, was replacing supervisory custody positions (ARUSs) with Prison Counselors, and had decided "to greatly increase the number of healthcare staff on treatment teams." This conclusion was totally wrong! The Plaintiffs established that this assertion of a change in the provision of treatment was false and the TRO "clarified" the decision to acknowledge this. The DOC did not hire 400 new mental health professionals to work in the housing units. In responding to the Application for Leave to Appeal to the ERB, the TRO "clarified" the decision. She admitted to "some inconsistency in the language used to describe staff and treatment in the housing units." She acknowledged that mental health treatment and rehabilitative treatment were distinct and "clarified" the conclusory

paragraph to state that the housing unit officers provided information not to mental health professionals but to professionals and supervisory staff. This had always been the case. The TRO thus "clarified" that the purported change in the provision of treatment by the housing unit treatment teams was actually nothing more than the addition of Prison Counselors.

But the evidence also showed that the Prison Counselors were simply lower classified and lower paid replacements for assistant residence unit supervisors, and that the total number of professionals and supervisory staff in the housing units – the Resident Unit Managers, the Assistant Resident Unit Supervisors, and the Prison Counselors -- had decreased, not increased. It was undisputed that the housing unit treatment teams and the former RUOs continued to function as they had long done. Thus, the evidence ran counter to the assertions of the Department of Corrections that there was a change in the provision of treatment in the housing units. Further, the TRO acknowledged that there were no Prison Counselors working in the housing units at the time the RUO and CMUO classifications were abolished, but inexplicably said that was "irrelevant". In sum, the conclusions of the TRO with regard to the former Resident Unit Officers were demonstrated to be not simply unsupported, but totally contradicted by the evidence. The RUOs and CMUOs were doing exactly what they had done before the so-called "abolishment."

When the TRO considered the evidence regarding the CMUOs she acknowledged that the classification study showed that they were performing all of the functions defined for their job specifications. As noted, this led the TRO to conclude that the job specification didn't accurately describe the job (!) and that the CMUOs were not providing the therapeutic services to the mentally ill prisoners at the Woodland Center Correctional Facility because they were not certified ambulance drivers like the CMUOs at the Charles Egeler Reception & Guidance Center (aka

Duane Waters) provided by the CMUOs.

The contrast between the conclusions regarding the RUOs and the CMUOs is particularly telling. The TRO concluded that the former RUOs *were not performing* the duties set forth in the job description and that they were, therefore, properly classified as COs. She concluded that the former CMUOs *were performing* the duties set forth in their job description, but that they were nevertheless properly classified as CMOs. The circuit court correctly concluded that the record demonstrated an exercise of will – an intention to support the DOC's reclassification of its employees, notwithstanding the evidence.

The Circuit Court correctly applied the arbitrary and capricious standard of review to the facts of this case. It concluded that the CSC and the DOC

> [F]ail[ ]to point to any evidence that the operations of the MDOC were in any way changed by these abolishments and creations except that the job titles and compensation rates of these positions were changed. (900a)

Contrary to the Court of Appeals' claim, the Circuit Court did not improperly reweigh the evidence or make credibility resolutions. The Circuit Court correctly concluded that there was *no evidence* to support the conclusions of the Commission and that the evidence all demonstrated that the jobs had not changed and so had been improperly reclassified. While the Circuit Court may have been unwise in suggesting that the questions in the classification study were intentionally clouded[10] it was right in recognizing that the answers to the questions were selectively misused to support the MDOC's effective reclassification of the positions.

The Court of Appeals stated that the Circuit Court improperly dictated what evidence should have been considered by the Commission when it noted that the classification study had failed to take account of the answers of the (former) CMUOs. This statement demonstrates how

[10] The Court was understandably offended by the misrepresentations of the Department of Corrections and the Commission's abdication of its constitutional responsibility.

completely the Court of Appeals went wrong. The Circuit Court correctly concluded that the Commission acted arbitrarily when it initially ignored the evidence and then reached a conclusion which was completely contrary to the evidence. This is the very definition of arbitrary.

The Court of Appeals stated further that the Circuit Court improperly noted that the required periodic Civil Service reviews of both classifications had consistently attested to their accuracy. This evidence was correctly cited as it totally contradicted the claim that the jobs had always been misclassified – a claim which was made long after the decision to abolish the RUO and CMUO positions had been effectuated. Neither the TRO nor the Commission itself ever explained why the decision to abolish the positions was made before any classification study was undertaken. Such a sudden and unexplained reversal of prior Civil Service reviews underscores that the decision was not only arbitrary but capricious – "apt to change suddenly." *Bundo, supra,* at 703, n17.

In sum, the Circuit Court correctly understood and applied the authorized by law standard while the Court of Appeals misunderstood and misapplied the standard. The Court of Appeals' decision should be reversed.

CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, and those set forth in the original Application for Leave to Appeal and reply in support, Henderson and the other Plaintiffs-Appellants respectfully request that their application for leave to appeal be GRANTED.

In the alternative, based on the submission of the Appendix and the parties' respective application and briefs, Plaintiffs-Appellants request that the decision of the Court of Appeals be REVERSED, and that the opinion and order of the Circuit Court be REINSTATED. *See* MCR 7.305(H)(1) [authorizing issuance of a peremptory order]. To the extent that this Court deems appropriate a further consideration of the applicable legal standards, Plaintiffs-Appellants request

that the case be REMANDED to the Circuit Court for further proceedings consistent with any order or opinion by this Court. *See, e.g., Ross v Blue Care Network*, 480 Mich at 155, 177.

Respectfully submitted,

SACHS WALDMAN, P.C.

By: /s/ *Mary Ellen Gurewitz*
MARY ELLEN GUREWITZ (P25724)
MARSHALL J. WIDICK (P53942)
Attorneys for William Henderson, et al.
2211 East Jefferson Ave., Ste. 200
Detroit, MI 48207
(313) 496-9441
megurewitz@sachswaldman.com

Dated: May 18, 2018