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

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PLAINTIFFS-APPELLANTS' REPLY TO DEFENDANTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

The Court of Appeals recognized that Const 1963, art 6, § 28 required a determination as to whether a decision of the Civil Service Commission was authorized by law, applying the requisite arbitrary and capricious standard. At the same time, it held that in making this determination the court was precluded from considering the evidentiary record. Henderson argued that it was impossible to determine the arbitrary and capricious issue without some examination of the evidence. The Commission now agrees. It has changed its earlier position and acknowledges that the arbitrary and capricious standard incorporates evidentiary review. (Supp Br, pp 2, 16) In order to prevent such review, it proposes to narrow the authorized by law standard of review and expand the scope of permissible agency action, freeing agencies to engage in arbitrary and capricious conduct. The Commission is so desperate to shield its decision making from review that it would effectively eviscerate the constitutional requirement for "direct review" of "all final decisions, findings, rulings and orders." Const 1963, art 6, § 28.

ARGUMENT

I. ADMINISTRATIVE AGENCY DECISIONS, FINDINGS, RULINGS AND ORDERS WHICH ARE ARBITRARY AND CAPRICIOUS CANNOT BE AUTHORIZED BY LAW.

The Court of Appeals held that in reviewing a decision of the Civil Service Commission in a matter where no hearing had been held, it was required by art 6, § 28 of the Constitution to determine only whether the decision was authorized by law, and it relied on court of appeals authority which identified four factors to be examined in making that determination, as follows:

> "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 [which] is arbitrary and capricious' is not authorized by law." *Brandon Sch Dist v Michigan Educ Special Services Ass'n*, 191 Mich App 257 (1991).

The Court of Appeals also relied upon *Brandon* for the principle that, "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." (Slip op, p 8)

This Court has directed the parties to address the issue of whether the Court of Appeals gave proper meaning to the "authorized by law" scope of review in the constitution.

Henderson accepts that the four-factor test is an accurate articulation of the "authorized by law" scope of review. However, Henderson contends that the Court of Appeals erred in concluding that where no hearing was held it was precluded from reviewing the evidentiary record. As Henderson has consistently argued, without a review of the evidence it is impossible to determine whether an agency action is arbitrary and capricious, and the constitutional requirement for direct review of all "findings" and "decisions" is rendered meaningless.

Contrary to its earlier position, the Commission in its supplemental brief has now acknowledged that the four-factor test requires an evidentiary review, stating at page 2 of its brief that, "the four-factor test . . . is not faithful to the text of the Constitution because it incorporates evidentiary review standards." For this reason, the Commission contends that the four-factor test must be modified by eliminating the factor that the decision not be arbitrary and capricious. This result-oriented contention does not withstand analysis.

At page 27 of its brief, the Commission argues that "the fact that 'arbitrary and capricious' is part of the current test creates an unnecessary tension and invites overreaching by reviewing courts," relying on a passage from *Wescott* in which the court observed that "tension" could arise "when, for example, there might be an absolute dearth of evidence supporting an agency's decision, which would seem to render the decision completely arbitrary and capricious, yet the rule against examining the evidentiary support for the decision would appear to mandate

a holding affirming the decision." *Wescott v Civil Service Comm'n*, 298 Mich App 158, 163 n 4 (2012).[1]

What the *Wescott* court and the Commission identify as a "tension" is more accurately characterized as a conflict. The Commission would resolve this conflict by eliminating the arbitrary and capricious factor from the four-factor test since without that factor there is no need to examine the record. In sum, the Commission makes the surprising and utterly outrageous argument that an agency can be "authorized by law" to make decisions which are arbitrary and capricious and with no evidentiary basis.

II. NEITHER THE LANGUAGE OF THE CONSTITUTION NOR THE CONVENTION RECORD SUPPORTS THE LIMITATION ON THE SCOPE OF REVIEW ADVOCATED BY THE COMMISSION.

A. The text of the Constitution requires review of the evidentiary record.

The Commission argues that its suggested limitation on the scope of review – that review of a decision is not be undertaken to determine whether the action is arbitrary and capricious – is "faithful to the text of the Constitution." To the contrary, the Commission ignores the plain text, which specifically states: "This review shall include, as a minimum, the determination whether such *final decisions, findings, rulings and orders* are authorized by law;" (Emphasis added). The Court of Appeals and the Commission have focused on review of the Commission's decision but have altogether ignored the constitutional mandate for direct judicial review of findings, rulings and orders. "Findings" can only refer to the findings of fact supporting the decision and "rulings" to a variety of evidentiary or other issues. Every phrase of the constitution must be

[1] This was precisely the circumstance in the instant case. There was an absolute dearth of evidence supporting the Commission decision, thereby making it arbitrary and capricious, but the Court of Appeals held that it could not examine the record evidence and concluded that the decision was authorized by law.

given effect: no phrase should be rendered surplusage or nugatory. *In re Proposals D & H*, 417 Mich 409, 421 (1983). The Commission's selective reading of the constitutional text would deny effect to these essential words.

The Commission points to another important principle of constitutional interpretation – "the rule of common understanding," which seeks to effectuate the intent of the people who adopted the constitution. *Straus v Governor*, 459 Mich 526, 533 (1999). What meaning would the citizens who adopted the constitution in 1963 have given to the language providing for "direct review of all final decisions, findings, rulings and orders of any administrative agency" to determine whether they were authorized by law? They would have understood this language to give them a meaningful appeal from agency decisions and protect them from administrative agency abuse. They surely would not have understood that language to mean, as the Commission now asserts, that administrative agencies, those unelected bodies with such significant power, could be authorized by law to exercise that power in an arbitrary and capricious fashion and without a meaningful level of judicial review.

B. The Constitutional Convention record demonstrates, contrary to the contention of the Commission, that an evidentiary review was contemplated to determine whether the action was authorized by law.

The Commission argues that its position is supported by the record of the Constitutional Convention and helpfully includes in its appendix the record of the convention debate on art 6, § 28, which was presented to the convention by the committee on the judicial branch as Committee Proposal 95. However, a review of the record demonstrates that rather than supporting the position of the Commission it supports the position of Henderson.

The Commission correctly states that "the most instructive tool for discerning the circumstances surrounding the adoption of the provision is the floor debates in the Constitutional

Convention record." (Supp Br, p 18, quoting *House Speaker v Governor*, 443 Mich 560, 580-581 (1993)). Proposal 95 was a completely new constitutional provision. Mr. Danhof, chair of the committee on the judicial branch, in introducing the proposal, stated:

> The proposed language is designed, in the main, to afford a full and adequate method of review of administrative agency decisions consistent with established principles of sound administrative practice. (Appellees' App'x, p 14b)

Mr. Danhof was speaking of the proposal in its entirety. The *full and adequate review* was not reserved for decisions where there had been a hearing.

The proposal was viewed by the delegates as necessary because of the growth of administrative law, [2] and the importance of protecting the public from possible abuse.

> *Mr. Krolikowski:* In the opinion of the committee a constitutional provision is necessary in order to assure a judicial review of administrative agencies and appended thereto a minimal scope of review . . . (*Id* at 17b)

> *Mr. Iverson:* And it has thereby become necessary to protect the people in their right of appeal and their right to be heard in another branch of the government, namely, the judicial branch, on matters affecting their person, their property or their business. (*Id* at 18b)

The need for a "full and adequate" review was repeatedly emphasized.

> *Mr. Krolikowski:* It was the opinion of the committee that this proposal is necessary to assure full and adequate protection from administrative decisions and findings." (*Id* at 18b)

Protection from administrative agency abuse was an oft-stated theme. Review was a means to give "proper protection to the people of the State of Michigan." (*Id* at 18b).

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[2] That growth has continued in the 55 years since the adoption of this constitution, making meaningful judicial review even more essential. It is ironic that at a time when "the administrative state" is being roundly criticized by many on the political right, and when the United States Supreme Court has begun to limit the power of administrative agencies through expanded review and diminished deference, the Michigan Attorney General asks the Michigan Supreme Court to expand the power of administrative agencies and limit judicial review – to give to agencies the power to be arbitrary and capricious.

As discussed, the proposal, which was adopted with minor changes not material here, provided for "direct review" of all final decisions, findings, rulings and orders of any administrative officer or body. What, a delegate asked, is direct review?

> *Mr. Ford:* Does direct review mean a trial de novo?
>
> *Mr. Leibrand:* It certainly does not. It means a review of the exact record. It is a review of the exact record that was made before the administrative body. [Appellees' App'x, p 44b]

The most extensive debate concerned the substantial evidence scope of review explicitly required where a hearing had been held, and whether the constitution should establish a standard requiring that the decision, findings, rulings and orders be supported by the whole record, or that they not be clearly erroneous in view of the whole record. The discussion as to the authorized by law standard was less extensive but significant, and it supports the unsurprising position of the delegates that administrative agencies cannot be allowed to function in an arbitrary or capricious manner.

The Commission's brief selectively and misleadingly quotes from this section of the record as it seeks to avoid the application of the arbitrary and capricious standard to its actions – even though this standard was recognized in the floor debates as an essential protection against arbitrary agency action. The Commission quotes the following language from a discussion of art 6, § 28, with a critical ellipsis:

> All that second sentence says is that the review that is to be exercised by the court, as a minimum, shall determine first whether the decision of that administrative tribunal is authorized by law. In other words, did it exceed the law? Did it get into a field it shouldn't have gotten into, that it wasn't authorized to get into? . . . And the other thing that is says is this – and this is all it says – it says if it's such a decision that a hearing is required, then they've got to make their decision based on reliable, probative and substantial evidence on the whole record.
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> [Appellees' App'x, p 52b, quoted in Commission's Supp Br, pp 22-23.]

What did the ellipsis omit? This key part of the quotation: "Certainly, if we are to have a government of law, we can't object to that. We can object to individuals running over our private rights, just *on their own whim, caprice* or because of the *autocratic* nature they have assumed." [Appellees' App'x, p 52b, emphasis added.] This was an important notion woven into the very sentence of art 6, § 28 setting forth the "authorized by law" clause: the Convention was concerned that agencies should not be allowed to act "on their own whim" or "caprice."

The Commission argues that the "authorized by law" clause requires only that a reviewing court inquire into whether the agency action violated a discrete statute or constitutional provision. (Supp Br, p 28) The Constitutional Convention record squarely refutes such a restrictive view. As pointed out in the floor debates, it was already possible to challenge an agency action on the ground that it violated a statute or constitutional provision. Committee Proposal 95 was not necessary for this.

> *Mr. Nord:* . . . The present system we have, without Committee Proposal 95, does guarantee government according to law, even in administrative tribunals. They cannot get away with violating the law. If they depart from the statutory authority, there can always be an appeal on that. That is one of the grounds for appeal, always has been, and always will be. Secondly, if they do something which deprives somebody of a constitutional right, that is appealable. That always has been, and that always will be. Therefore, if there is a violation of the law that is always appealable and always been appealable; that will be without this committee proposal.
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> [Appellees' App'x, p 42b]

In short, the whole point of art 6, § 28 was to provide *greater judicial review* than simply assessing whether an agency action violated a statute or constitutional provision. The Commission's current position to the contrary would nullify what the Constitutional Convention debated and achieved.

The fallacy of the Commission's argument for its proposed limited scope of review is revealed most clearly at p. 29 of its supplemental brief, where it writes,

> "When the Commission makes a classification decision, the Constitution requires that decision to be based on the 'respective duties and responsibilities' of the positions. Const 1963 art 11, § 5, ¶ 4. The continued requirement to comply with the governing statues and the Constitution should serve to mitigate any trepidation that this narrower test would allow agency decisions to go unchecked."

Where is the check? Who determines whether there is compliance with the governing statute and the constitution? Who determines whether the classification decision is based on the respective duties and responsibilities of the positions? Without any examination of the record, required to determine whether the Commission's classification decision was arbitrary and capricious, there is no check. There is no direct review of the agency's decisions, findings, rulings and orders.[3] The Commission seems to be suggesting that it can be trusted to adhere to constitutional requirements and standards. Obviously, the constitution requires direct review not blind trust. It is reasonable to expect that administrative agencies will respect their constitutional and statutory boundaries but it is necessary to provide a means to correct them if they fail to do so. As the convention record shows, it was because the delegates understood that administrative agencies could not be trusted not to exceed or abuse their power that they decided that judicial review was necessary.

[3] In the instant case the Commission did not comply with its constitutional obligation. It did not base its classification decision on the duties and responsibilities of the positions, as it was undisputed that the duties and responsibilities had not changed. As the record so clearly shows, because it was explicitly stated by the Director of the Department of Corrections, the decision was based on the Department of Corrections' need to save money by paying the Resident Unit Officers and Corrections Medical Unit Officers less than the commission had determined they were entitled to in light of their duties and responsibilities. That is the argument Plaintiffs have been making but it cannot be addressed on direct review without reference to the record.

CONCLUSION

The Commission correctly points out that it is required by Const 1963, art 11, § 5 to classify positions in the civil service according to their duties and responsibilities. For approximately three decades Resident Unit Officers and Corrections Medical Unit Officers in the Department of Corrections had classifications which recognized that their duties and responsibilities were more difficult and extensive than those of the lower classified Corrections Officers or Corrections Medical Officers, and they were accordingly compensated at a higher rate. Their duties and responsibilities did not change. Nothing changed but their pay. The alternative and inconsistent contentions from the Department of Corrections, that the jobs had somehow changed or that, if they hadn't changed, it was because they were always misclassified, were completely countered by the evidence. That the Civil Service Commission gave its imprimatur to the effective demotion of these 2,500 Department of Corrections employees was an abdication of its constitutional responsibility. The Circuit Court correctly recognized that the record evidence demonstrated that the Commission decision was arbitrary and capricious. The Court of Appeals erroneously concluded that it could not look at the record evidence. This decision made no sense and deprived these 2,500 employees of the full and adequate review of all decisions, findings, rulings and orders, to which they were entitled. The contention now made by the Commission that it can engage in arbitrary and capricious action is truly shocking and should be decisively rejected by this court.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certified that on July 13, 2018, a copy of the foregoing document was served upon the attorneys of record of all parties in the above cause by using the TrueFiling system, which will send notification of such filing to those who are currently on the list to receive email notices for this case.

/s/ *Mary Ellen Gurewitz*
MARY ELLEN GUREWITZ (P25724)