STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS

WILLIAM R. HENDERSON, and All Others Similarly Situated,

Plaintiffs-Appellants,

v.

MICHIGAN CIVIL SERVICE COMMISSION and MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendants-Appellees.

Supreme Court No. 156270

Court of Appeals No. 332314

Ingham County Circuit Court
No. 15-000645-AA

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STATEMENT IDENTIFYING ORDER APPEALED FROM AND RELIEF SOUGHT

Plaintiffs-Appellants seek leave to appeal the Court of Appeals final decision entered on June 29, 2017. (Court of Appeals Docket No. 332314).

Amici Curiae defer to the Appellants' Statement of Relief Sought.

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QUESTIONS PRESENTED FOR REVIEW

Amici Curiae defer to, and adopt as their own, the Statement of Questions Presented for Review by Appellants.

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STATEMENT OF FACTS

Amici Curiae defer to, and adopt as their own, the Statement of Facts by Appellants.

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ARGUMENT

I. STANDARD OF REVIEW

Amici Curiae defer to, and adopt as their own, the Standard of Review set forth in the Plaintiffs-Appellants' Supplemental Brief.

II. THE "AUTHORIZED BY LAW" SCOPE OF REVIEW UNDER CONST 1963, ART 6, § 28 ESTABLISHES ONLY THE MINIMUM, NOT THE MAXIMUM, STANDARD FOR JUDICIAL REVIEW OF THE CIVIL SERVICE COMMISSION'S FINAL DECISION MADE WITHOUT A HEARING.

Amici Curiae agree with Appellants that the "authorized by law" standard is the constitutional minimum, not the exclusive standard for reviewing the Commission's Decision, for the reasons set forth in the Appellants' Supplemental Brief. Amici Curiae write to amplify the following points:

Appellees concede that "authorized by law" is the "minimum" standard under Const 1963, art 6, § 28, but argue that the only circumstance triggering more than that minimum standard occurs "in cases in which a hearing is required," in which case the agency decision must also be "supported by competent, material and substantial evidence on the whole record." *Id,* Appellees' Supplemental Brief at pp. 4-5. The Court of Appeals' formulation is somewhat different:

> "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. Michigan Department of Social Services*, 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.' " Slip Op at p. 8, n. 5.* (Emphasis added).

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Palo Group did indeed hold that § 28, art 6 does not preclude the Legislature from providing for more stringent review ("§ 28 of art 6 of the Constitution merely establishes ***minimum*** review to be provided, without forbidding more stringent review") (228 Mich App at 145), but it does not state or imply that ***only*** the Legislature may impose more than the minimum review. (Emphasis in original).

To state or imply that it is only for the Legislature to impose more than the constitutional minimum standard of review, ignores the obvious: As the Commission reminds us, its powers within its sphere of authority are plenary. *Viculin v. Department of Civil Service*, 386 Mich 375; 192 NW2d 449 (1971). It is questionable at best whether a legislative attempt to impose more than the constitutional minimum standard of review on Commission decisions would be successful. As the Commission notes, it, not the Legislature, determines whether and under what circumstances it provides for evidentiary hearings. It, not the Legislature, has determined that no evidentiary hearing will be held in classification appeals. Hence, if its argument is accepted, the Commission itself gets to determine the judicial standard of review applicable to its own decisions: It may, by its own rules, provide evidentiary hearings, in which case judicial review includes the substantial evidence test. Or, as it has done regarding classification decisions, it does not provide evidentiary hearings, in which case only the minimum "authorized by law" test applies. Even if *Palo Group* means that only the Legislature may impose more than the constitutional minimum, that decision was grounded in the assumption that the Legislature at least has the power to impose more than the constitutional minimum. It should not apply to an agency which claims plenary power to establish its own rules and procedures

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without legislative oversight. To do so would enable the Commission to evade meaningful judicial review as well.[1]

Appellees' argument also fails to account for the fact that Const 1963, art 6, § 28 addresses judicial review of more than agency final decisions, rulings and orders; it also applies to agency "findings":

> "All final decisions, ***findings***, rulings and orders have been the 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, and 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.
>
> "In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation." (Emphasis added).

That "findings" are treated as distinct from "final decisions," "rulings" and "orders" is significant. It means that not just agency final decisions, but the findings underlying those decisions, are "subject to direct review by the court as provided by law." Determining whether such "findings" are authorized by law requires a qualitative consideration of those findings. That can be accomplished only by some consideration of the evidentiary record.

The Court of Appeals noted that hearings are required where deprivation of a protected property interest is threatened, *citing York v. Civil Service Commission*, 263 Mich App 694

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[1] Appellees' Supplemental Brief mischaracterizes Appellants' argument in this regard: Appellants do not argue in this case that it was improper *per se* for the Commission to eliminate evidentiary hearings in classification matters; it is the combination of that with the Commission's argument now that by doing so, it has effectively immunized itself from meaningful judicial review of its classification decisions, that offends. It is an argument for agency decision making unfettered by meaningful judicial review.

(2004) for the proposition that classification decisions do not implicate property interests. *York* does *not* establish that classified employees have no due process property interest in the reclassification that occurred in the instant case. *York* rejected an asserted due process property interest in a request for reclassification initiated by the employee, rejecting such a property interest when "a Civil Service employee's petition for reclassification represents that employee's ***unilateral aspiration for a different job classification***…." 263 Mich App at 703 (Emphasis added). *York*'s holding that a due process guarantee of a hearing is not applicable was based on its conclusion that a "***unilateral expectation or hope for reclassification*** is not a property interest protected by the Michigan or federal Constitution." *Id. At 704* (Emphasis added). The posture of the instant case is just the opposite: Appellants seek to preserve their ***existing*** classifications (and protect themselves against the attendant loss of pay). No mere unilateral aspiration or expectation or hope is at issue.

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

The Court of Appeals incorrectly held that the "authorized by law" standard of review forecloses consideration of the evidentiary record.

As noted above, Const 1963, art 6, § 28 subjects agency "findings" as well as all final decisions, rulings and orders, for judicial review of whether they are authorized by law. Such a judicial evaluation of "findings" is impossible without some qualitative evaluation of those findings; *i.e.*, of the evidentiary record. The Court of Appeals' narrow reading of "authorized by law" to exclude a factual inquiry would perhaps be correct if the final sentence of Const 1963, art 6, § 28 first paragraph applied to judicial review of all agency findings ("findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless

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otherwise provided by law.") But, of course, that final sentence does not apply to findings of fact in proceedings other than workmen's compensation proceedings. *Expressio unius est exclusion alterius, City of Coldwater v. Consumers Energy Company,* 500 Mich 158, 170-171; 895 NW2d 154 (2017). So also with the second paragraph of Const 1963, art 6, § 28 ("in the absence of fraud, error of law, or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws and from any decision relating to valuation or allocation.") Other than in either of these two instances, Const 1963, art 6, § 28 requires that "findings" "shall be subject to direct review by the court…." Such a review requires evaluation of those findings.

IV. THE COURT OF APPEALS INCORRECTLY APPLIED THE "AUTHORIZED BY LAW" SCOPE OF REVIEW TO THE APPELLANTS' CHALLENGE.

The Court's examination of whether an agency decision is "authorized by law" necessarily includes a review of the law which is asserted as authorizing the agency's action. In this case, the parties and the lower courts agree that the law at issue is the Civil Service provision of the Constitution, Const 1963, art 11, § 5. The Court of Appeals decision (Slip Op at p. 11) correctly cites the clause of art. 11, § 5 at issue:

> "The Commission shall…***classify all positions in the classified service according to their respective duties and responsibilities,*** fixed rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications for all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service." (Emphasis added).

Nonetheless, in reasoning that art. 11, § 5 is the law that authorizes the Commission's action, the Court of Appeals repeatedly truncates the Commission's constitutional authorization as "***to***

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classify Civil Service positions," without including the limiting clause, "***according to their respective duties and responsibilities***…." The Commission's authority is not the unfettered power to "classify all positions in the classified service;" its authority is to do so only "according to [the positions'] respective duties and responsibilities…." The Court of Appeals decision ignores the limiting clause, treating it as if it does not exist:

> "Not only does Michigan's Constitution authorize the CSC to classify Civil Service positions, but the CSC is vested with plenary powers in its sphere of authority. [citations omitted] Thus, the CSC's decision does not exceed its authority…." Slip Op at p. 11.
>
> "We cannot agree with the Circuit Court that the CSC's decision was not authorized by law. The CSC exercised its constitutional authority to classify the newly created positions, Const 1963, art 11, § 5, and nothing indicates that the CSC's decision violated a statute or resulted from procedures that were unlawful." *Id., p. 12.*

Moreover, determining whether the Commission's decision was within its constitutional authority to "classify all positions in the classified service according to the respective duties and responsibilities," necessarily includes a factual inquiry: One may determine, as Appellees argue, that the Commission's decision falls within its authority to "classify all positions in the classified service" after the most narrow of inquiries. Determining that the Commission did so "according to [the positions'] respective duties and responsibilities" requires a broader, factual inquiry; *i.e.*, to determine whether the Commission's classification decision was indeed according to the positions' respective duties and responsibilities. The narrow inquiry stops simply by answering in the affirmative, the question of whether the Commission's decision was a classification decision. The broader inquiry necessarily continues to the question, Did the Commission do so according to the positions' respective duties and responsibilities? That further question, is required by the Constitution's limiting clause on the Commission's authority.

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It cannot be answered without an inquiry into whether the Commission did so as a matter of fact.

The Court of Appeals and Appellees cite the Commission's "plenary powers within its sphere of authority," in support of the proposition that the Commission's decision does not exceed its authority. See Slip Op, p. 11, citing *Coalition of State Employee Unions v. State*, 498 Mich 312, 329; 870 NW2d 275 (2015); *AFSCME Council 25 v. State Employees' Retirement System*, 294 Mich App 1, 15; 818 NW2d 337 (2011). Nonetheless, to state that the Commission has plenary powers does not help to define what its sphere of its authority is. To do that, the constitutional provision requires the courts to examine whether the Commission's classification decision was according to the positions' respective duties and responsibilities.

Actually, the Commission's plenary authority makes the availability of meaningful judicial review even more crucial than as compared with other administrative agencies. Other administrative agencies are creatures of the Legislature, which legislatively determines whether the agency must provide an evidentiary hearing, and governs those hearings pursuant to the Administrative Procedures Act, MCL 24.201, *et seq.* Not so with the Civil Service Commission. The Commission itself, via its own rules, determines the circumstances under which it provides evidentiary hearings. By determining not to provide evidentiary hearings regarding its own classification decisions, the Commission has chosen for itself, the "authorized by law" standard of review.[2] The Commission argues for a most narrow, minimal approach to that standard of review, based on the process it has chosen for itself, rather than one capable of being imposed by the Legislature. To accept this is to invite virtually unfettered agency

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[2] Until 1997, the Commission provided evidentiary hearings in classification matters, thereby clearly subjecting itself to the constitutional "substantial evidence" test.

discretion, plenary powers with no meaningful judicial check on whether the Commission is exercising them within its constitutional sphere of authority. That is why judicial review must not stop with a conclusion that classification decisions are within the Commission's constitutional authority; judicial review must also examine whether the Commission's classification decision was "according to [the positions'] respective duties and responsibilities…."

CONCLUSION AND RELIEF REQUESTED

For these reasons, the Appellants' leave application should be granted and the Court of Appeals should be reversed.

Respectfully submitted,

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Dated: July 19, 2018

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2018, I electronically filed the foregoing document with the Clerk of the Court using the E-File system which will send notification of such filing to the other attorneys of record.

/s/ Patricia L. Nash
Patricia L. Nash, on behalf of SEIU Local 517M and MSEA Counsel Brandon W. Zuk