ADMINISTRATIVE LAW

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I. INTRODUCTION

Michigan appellate courts rendered decisions on administrative law during the 2010 *Survey* period regarding the intersection of administrative law and what may be regarded as certain private rights.[1]

II. THE MICHIGAN SUPREME COURT CASE

In *McNeil v. Charlevoix County*,[2] the Michigan Supreme Court held that local health agencies have the authority to promulgate binding regulations and may grant citizens the ability to bring a private cause of action to enforce those regulations.[3] Antrim, Charlevoix, Emmet, and Otsego counties organized a district health department called the Northwest Michigan Community Health Agency ("NMCHA") under

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1. The court of appeals also issued a per curiam decision regarding jurisdiction to hear an appeal of a property classification decision by the State Tax Commission. Iron Mountain Info. Mgmt., Inc. v Naftaly, 286 Mich. App. 616 (2009), *leave to appeal granted*, 486 Mich. 1038 (2010).

2. 484 Mich. 69 (2009).

3. *Id.* at 72-3.

Part 24 of Michigan's Public Health Code ("PHC").[4] The NMCHA promulgated the Public Health Indoor Air Regulation of 2005 ("the regulation"), which created restrictions and placed requirements on employers regarding smoking.[5] The regulation involved these provisions: it prohibited smoking in all public places; it required employers who do not entirely prohibit smoking indoors to designate an NMCHA-approved smoking room; and it prohibited employers from firing, refusing to hire, or retaliating in any way against an employee seeking to exercise his or her right to the NMCHA-required smoke-free environment.[6] The issues before the court were: (1) whether the PHC "authorizes a local health department to create, and a county board of commissioners to approve, regulations that control smoking in the workplace;" and (2) "whether such a regulation, providing employees with a private cause of action to seek its enforcement, interferes with Michigan's at-will employment doctrine."[7] Below, the court of appeals upheld the agency's authority and the regulation in its entirety.[8] The Michigan Supreme Court found the regulation was promulgated consistent with the PHC, and that the private cause of action fit within the public policy exception to the State's at-will employment doctrine.[9]

The plaintiff residents of Charlevoix County had challenged the NMCHA's ability to make and enforce regulations[10] under Part 126 of the PHC, known as the Michigan Clean Indoor Air Act ("MCIAA").[11] The "plaintiffs further argued that . . . the MCIAA grant[ed] owners and operators of public places the discretion to choose whether" to allow smoking, to be smoke-free, or to designate a smoking section.[12] Finally, the plaintiffs argued the regulation contained requirements for a smoking room that were more stringent than similar requirements under the MCIAA and, therefore, the regulation conflicted with State law and must be invalidated.[13] The plaintiffs also argued that the private cause of action created by the NMCHA conflicted with the "right of an employer to discharge an employee at will" and was invalid to the extent the regulation impinged on that right.[14]

4. MICH. COMP. LAWS ANN. §§ 333.2401-98 (West 1978).
5. *McNeil*, 484 Mich. at 73.
6. *Id.* at 74.
7. *Id.* at 72-73.
8. *Id.* at 73.
9. *Id.*
10. *Id.* at 74.
11. MICH. COMP. LAWS ANN. § 333.12601-17 (West 2010).
12. *McNeil*, 484 Mich. at 74.
13. *Id.*
14. *Id.* at 75.

A. The Majority Opinion

The Michigan Supreme Court affirmed the court of appeals decision, holding: (a) 7-0 that NMCHA had the authority to promulgate such regulations; and (b) 4-3 that the regulation did not interfere with the State's employment at-will doctrine.[15] The majority opinion, written by Justice Weaver, adopted the gist of the court of appeals' opinion and supplemented it with a response to Justice Markman's partial concurrence and partial dissent.[16]

The Court held the plain language of the MCIAA allowed local health organizations to promulgate regulations since, under Part 24 of the PHC, local health departments like the NMCHA have duties to "endeavor to prevent disease, prolong life, and promote the public health ...[and] prevent[] and control ... diseases."[17] The Court held that Part 24 allowed local health departments to "[a]dopt regulations to properly safeguard the public health."[18] In addition to those provisions specific to local health departments, general provisions of the PHC applicable to the MCIAA mandated liberal construction in order to protect the "health, safety, and welfare" of Michigan's citizens.[19] This liberal spirit of construction, the court stated, "evince[s] a legislative intent to permit regulation of the kind at issue here."[20] The court also agreed with defendants that the only limitation faced by local health boards was that the regulations they promulgate must "be at least as stringent" as the state law standard.[21]

A specific portion of the regulation granting persons a private cause of action merited a separate analysis because it implicated Michigan's at-will employment doctrine.[22] Generally, under that doctrine, an employer

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15. *Id.* at 73.

16. *Id.* The majority omitted the portion of the court of appeals opinion, *McNeil v. Charlevoix Cnty.*, 275 Mich. App. 686 (2007), addressing the issue of preemption of the regulation by the PHC, finding that portion unnecessary for resolution of the case. *See McNeil*, 484 Mich. at 73.

17. *Id.* at 76-77; MICH. COMP. LAWS ANN. § 333.2433(1).

18. *McNeil*, 484 Mich. at 76-77; MICH. COMP. LAWS ANN. § 333.2435(d); *see also* MICH. COMP. LAWS ANN. § 333.2441(1) (local health departments may adopt regulations "necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department").

19. *McNeil*, 484 Mich. at 78. *See* MICH. COMP. LAWS ANN. § 333.1111(2) in conjunction with § 333.2401(2), which applies "general definitions and principles of construction" in article 1 of the PHC to "all articles in [the] code."

20. *McNeil*, 484 Mich. at 78.

21. *Id.* at 76-77. The court found the regulation more restrictive than the standards set by the MCIAA and, therefore, held the requirement to be met.

22. *See id.* at 78-81.

may discharge an employee for any or no reason.[23] Three public policy exceptions to this rule were established in *Suchodolski v. Michigan Consolidated Gas Co.*[24] An employee may not be discharged "in violation of an explicit legislative statement," for "refusal to violate the law in the course of employment," or "for exercising a right conferred by a well-established legislative enactment."[25]

Though it recognized the regulation was not a legislative statement, enactment, or law, the court held that it fell under one of these three exceptions because the regulation grants employees certain rights and is approved by the boards of commissioners in each of the NMCHA's counties.[26] Combined with the Legislature's public policy of minimizing the harmful effects of smoking,[27] these facts supported the holding that the regulation was consistent with the exceptions enumerated in *Sucholdolski*.[28] Thus, the agency's authority regarding the cause of action was upheld.

B. The Partial Concurrence and Partial Dissent

While Justice Markman concurred with the majority in upholding NMCHA's authority to promulgate the regulation restricting indoor smoking (when acting with county boards of commissioners), he dissented from the conclusion that county boards of commissioners can create a private cause of action, stating that it conflicted with the State's at-will employment doctrine.[29] He maintained that because local governments only have authority insofar as is granted by the State, and because the State had granted authority to county boards of commissioners only to the extent that the ordinances they pass "do not

23. *Id.* at 78-79.

24. 412 Mich. 692 (1982).

25. *McNeil*, 484 Mich. at 79 (citing *Suchodolski*, 412 Mich. at 695-96). The court did not identify a specific exception under which the regulation fell, stating the regulation was "consistent with the exceptions" to the at-will employment doctrine. *Id.*

26. *Id.*

27. *Id.* As stated in Parts 126 and 129 of the PHC.

28. *Id.*

29. *Id.* at 102 (Markman, J., concurring in part and dissenting in part). In addition, Justice Markman addressed whether the regulation was enacted pursuant to properly delegated authority, an issue the parties were asked to brief but the majority did not address. Justice Markman ultimately found the non-delegation doctrine did not apply. *Id.* at 103.

contravene the general laws of the state," the regulation was beyond the county boards' authority.[30]

Justice Markman objected to extension of the *Suchodolski* exceptions to local regulations. First, he argued that a local regulation, almost by definition, does not make up statewide public policy.[31] Further, employers would be unduly burdened by having to comply with local public policies, which could be different for every county.[32] Second, he maintained that each *Suchodolski* exception "requires a valid 'statutory right or duty,' a 'law,' or a 'well-established legislative enactment' before it is applicable."[33] Here, he argued, the court confronted a mere regulation and, thus, the plain terms of the exceptions forbid classifying it as part of the State's public policy.[34]

C. The Concurring Opinion

Justice Cavanagh authored an opinion concurring in full with the majority[35] but further explaining his view that local agencies have the authority to grant citizens private causes of action to enforce properly promulgated regulations.[36] Justice Cavanagh argued that the regulation qualified as a "legislative statement" under *Suchodolski* because boards of commissioners act as local legislative bodies under authority granted by the Legislature.[37] This chain of authority, he wrote, qualifies local enactments as legislative statements.[38]

D. Standing and Michigan Citizens for Water Conservation v. Nestle Waters North America, Inc.

Although initially *McNeil* might appear to conflict with Michigan law on standing, review of recent Michigan Supreme Court authority suggests harmony. In 2007, the court shaped the doctrine of standing in a case involving alleged violations of the Michigan Environmental

30. *Id.* at 107-108 (citing MICH. COMP. LAWS ANN. § 46.11(j)). Under MICH. COMP. LAWS ANN. § 46.10b, boards have authority to punish violations of a county ordinance with up to 90 days in jail or up to $500 in fines. *McNeil*, 484 Mich. at 109.

31. *Id.* at 115.

32. *Id.*

33. *Id.* at 116.

34. *Id.* The majority responded to the dissent by reiterating the arguments set forth in the court of appeals opinion that the majority adopted as its own. *See id.* at 82-87.

35. *Id.* at 88 (Cavanagh, J., concurring).

36. *McNeil*, 484 Mich. at 90-99.

37. *Id.* at 90.

38. *Id.*

Protection Act ("MEPA").[39] Plaintiffs claimed they were injured under MEPA[40] when the Defendant siphoned water from wetland areas that were not directly used by the plaintiffs.[41] The court held that because plaintiffs did not enjoy a "recreational, aesthetic, or economic" interest in those wetlands, they did not suffer a "concrete, particularized injury in fact" and, thus, possessed no standing to sue.[42] "No matter how pervasive the environmental damage in an ecosystem," the court held, "plaintiffs must still . . . establish their injury in fact."[43]

Because of the common issue of standing, it might seem that the decisions in *Michigan Citizens* and *McNeil* arrive at competing conclusions. *Michigan Citizens* held that plaintiffs suffered no injury-in-fact sufficient to support standing because any damage to property did not cause them cognizable harm.[44] Although *McNeil* did not discuss injury-in-fact, the majority opinion implicitly assumed that negative health effects of secondhand smoke were sufficient injury for a private party to bring a cause of action.[45] In short, *Michigan Citizens* is a case concerning the parameters of the standing doctrine; *McNeil* is a case where standing was not discussed but assumed.

Additionally, *McNeil* concerned regulations promulgated by local health agencies, while *Michigan Citizens* concerned an enactment of the Michigan Legislature. One of the issues in *McNeil* – the potential clash between a locally-created cause of action for retaliation and the broader state's at-will employment doctrine – was not implicated in *Michigan Citizens*.

III. THE COURT OF APPEALS CASES

In *Land v. L'Anse Creuse Public School Board of Education*,[46] the Michigan Court of Appeals upheld the State Tenure Commission's decision to reinstate a public school teacher who was discharged after photographs of her at a private event circulated at the school where she was employed.[47] While at a party aboard a vessel on Lake St. Clair, the teacher was photographed, without her knowledge, while engaged in

39. Michigan Citizens for Water Conservation v. Nestle Waters N. Am., Inc., 479 Mich. 280 (2007).

40. MICH. COMP. LAWS ANN. § 324.101-.107(West 1995).

41. *Nestle*, 479 Mich. at 287.

42. *Id.* at 297.

43. *Id.* at 299.

44. *Id.*

45. *Id.*

46. No. 288612, 2010 WL 2135356 (Mich. App. May 27, 2010).

47. *Id.* at *1.

certain activities.[48] The photos were posted online without her consent and became known within the school system and community.[49] The local school board discharged the teacher because "her moral authority and professional responsibilities as a role model" were undermined by the conduct depicted in the photographs.[50] As a tenured teacher, she challenged the dismissal before an administrative law judge, who preliminarily found that the board had "reasonable and just cause" for the discharge.[51] She appealed to the State Tenure Commission ("Commission"), challenging the finding for cause.[52] The Commission granted her challenge, finding that the conduct occurred off public grounds, did not involve school activities, and did not concern her duties as a teacher.[53] These factors and others led the commission to hold that the teacher "did not engage in professional misconduct" and, therefore, the board did not prove reasonable and just cause for her discharge.[54] Absent a showing of professional misconduct, the Commission held, "any negative publicity arising from petitioner's conduct did not provide reasonable and just cause for petitioner's discharge."[55]

The court of appeals upheld the Commission's decision, denying the board's claims that the agency had acted arbitrarily and capriciously or contrary to law, and that insufficient evidence had been presented to show professional misconduct.[56] After noting the court's responsibility to "accord deference" to the Commission's factual findings, the panel sustained the decision, citing also a lack of binding precedent on the question.[57]

In *Jordan v. Department of Corrections*,[58] the court of appeals held that the Department of Corrections ("Department") policy directives do not afford inmates enforceable rights.[59] An incarcerated prisoner alleged various violations of Department policies, including the failure to provide him with sufficient underclothing and not providing sufficient seating and writing surfaces in his cell.[60] The panel held that, since the

48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at *2.
52. *L'Anse Creuse*, 2010 WL 213535, at *1.
53. *Id.* at *2-*3.
54. *Id.* at *3.
55. *Id.*
56. *Id.* at *3-4.
57. *Id.* at *7.
58. No. 289667, 2010 WL 935686 (Mich. App. March 16, 2010).
59. *Id.* at *1.
60. *Id.*

policy directives were not "properly promulgated rules," they did not have the force of law, and the prisoner had no legal remedy.[61] The court further held that duties imposed on prison wardens by the Michigan Administrative Code to create procedures that ensure compliance with the Department's policies[62] do not give prisoners legal rights upon which they can base an action for mandamus.[63] In short, because the prisoner had no legal rights that he could enforce, the trial court's grant of summary disposition was upheld for failure to state a claim.[64]

IV. AGENCY AUTHORITY TO PROMULGATE RULES

In *Wolverine Power Supply v. DEQ*,[65] the Michigan Court of Appeals was called upon to review a circuit court grant of summary disposition regarding the authority of an administrative agency to promulgate a rule regarding a party's standing to request convening of a contested case.[66]

At issue in *Wolverine* was Rule 1830, promulgated by the Michigan Department of Environmental Quality ("Department"), allowing a person to request a contested case hearing under the Michigan Administrative Procedures Act[67] after receiving notice of the Department's approval or denial of a permit.[68] The Department argued that since it had clear and broad statutory authority under the Natural Resources and Environmental Protection Act ("NREPA")[69] to promulgate rules for hearings on air emission permitting decisions, Rule 1830 was an "appropriate exercise of its authority to develop an evidentiary record on permitting issues before rendering a final agency decision."[70] The plaintiffs below had argued that Rule 1830 was invalid because it conflicted the "statutory section governing review of permitting decisions . . . that specifie[d] that the exclusive review procedure for a new source permitting decision is a petition to the circuit court."[71]

The court of appeals agreed with the trial court. It held that "the department's reliance on the general structure of the NREPA and [its]

61. *Id.* at *2.
62. *See* MICH. ADMIN. CODE, R. 791.2205(1)(h).
63. *Jordan*, 2010 WL 935686, at *2.
64. *Id.*
65. 285 Mich. App. 548 (2009).
66. *Id.* at 549-50.
67. MICH. COMP. LAWS ANN. §§ 324.101-.2521.
68. *Wolverine*, 285 Mich. App. at 550.
69. MICH. COMP. LAWS ANN. § 324.5503-.5505(2).
70. *Wolverine*, 285 Mich. App. at 552.
71. *Id.* at 552-53; MICH. COMP. LAWS ANN. § 324.5505(8).

general enabling statutes was unpersuasive."[72] Since the Legislature had designated a specific review procedure for permit to install decisions, the Department must adhere to that procedure unless and until the Legislature amended the specified review.[73]

V. CONCLUSION

During the 2010 *Survey* period, Michigan courts issued decisions on the intersection of administrative law and certain potential private rights. The Michigan Supreme Court upheld a private right of action concerning enforcement of local public health administrator regulations regarding smoking,[74] and the Michigan Court of Appeals upheld administrative agency decisions dealing with private conduct.[75]

72. *Wolverine*, 285 Mich. App. at 570.

73. *Id.* at 556-57.

74. *See McNeil*, 484 Mich. 69 (2005).

75. *See L'Anse Creuse*, 2010 WL 2135356 (Mich. App. May 27, 2010); *Jordan*, 2010 WL 935686 (Mich. App. March 16, 2010); *Wolverine*, 285 Mich. App. 548.