ADMINISTRATIVE LAW: MICHIGAN SIDES WITH *MARBURY*, NOT *CHEVRON*, ON AGENCY DEFERENCE

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I. INTRODUCTION

Michigan appellate courts rendered important decisions on administrative law during the *Survey* period, June 1, 2007 to May 31, 2008.

In two highly significant cases, the Michigan Supreme Court sought to clarify the standard of judicial review to be applied to decisions by Michigan administrative agencies. With seemingly opposite outcomes, the court signaled to lower courts that they are not bound by agency interpretations of law while constricting the courts' power to determine whether an agency rule is "arbitrary or capricious."

The executive branch also took an action of significance regarding administrative law during the *Survey* period. The Governor created a new administrative post of "Automobile and Home Insurance Consumer

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Advocate" designed to provide Michigan automobile and home insurance consumers with "access to an effective regulatory system that strengthens insurance oversight, prevents abuse, and maintains representation of consumers' interests." [1]

Perhaps most unique of all developments, the Governor was called upon to conduct an administrative proceeding that involved the potential removal of the Mayor of the City of Detroit.

II. JUDICIAL SCRUTINY OF ADMINISTRATIVE AGENCY ACTIONS

The federal courts have frequently wrestled with the standard to be employed in reviewing administrative agency decisionmaking. The federal *Chevron* doctrine,[2] under which deference is accorded to agency decisionmaking under certain circumstances, is a frequent subject of judicial and scholarly contention.[3] During the *Survey* period, the Michigan Supreme Court had the opportunity to employ a *Chevron*-type approach or announce its own guiding principles for how Michigan courts will evaluate agency decisions on appeal.

A. In re Complaint of Rovas: *"Respectful Consideration," Not "Deference," for Agency Interpretations of Law*

The court's decision in *Rovas*[4] is a landmark clarification of the standard of judicial review for administrative agency adjudications. The outcome settles the question and signals a return to stricter judicial scrutiny of administrative agency interpretations of law in Michigan. [5]

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1. Executive Order No. 2008-2 (2008), Office of the Governor, Jennifer M. Granholm, *available at* http://www.michigan.gov/gov/0,1607,7-168-21975-184819--,00.html (last visited Jan. 25, 2009).

2. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

3. The *Chevron* doctrine has been the subject of recent critical analysis. *See* Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673 (2007); Linda Jellum, Chevron's *Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 ADMIN. L. REV. 725 (2007); Daniel J. Gifford, *The Emerging Outlines of a Revised* Chevron *Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783 (2007); Ann Graham, *Searching for* Chevron *in Muddy Watters: The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229 (2008); John S. Kane, *Refining Chevron—Restoring Judicial Review to Protect Religious Refugees*, 60 ADMIN. L. REV. 513 (2008); Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593 (2008).

4. 482 Mich. 90, 754 N.W.2d 259 (2008).

5. The author's firm represented plaintiff-appellant SBC Michigan in *Rovas*.

The case began in April 2001, when William and Sandra Rovas, customers of SBC Michigan (SBC), filed a complaint with the Michigan Public Service Commission (PSC) over a $71 charge on their phone bill.[6] The complaint's main allegation charged a violation of Section 502(1)(a) of the Michigan Telecommunications Act.[7] That section prohibits a telecommunications provider from "[m]ak[ing] a statement or representation . . . that is false, misleading, or deceptive." [8] While not explicitly interpreting the term "false" in its decision, the PSC found that SBC had violated the statute and fined it $15,000.[9]

On review of the agency's decision, while quibbling with what it found to be the PSC's implicit interpretation of "false" as encompassing a statement that is merely incorrect, regardless of intent to deceive, the Michigan Court of Appeals affirmed because the panel believed it was "charged with giving great deference to the PSC's construction of a statute which the Legislature has required the PSC to enforce."[10]

The Michigan Supreme Court granted leave to appeal and directed the parties to address four questions.[11] The first and most important from a jurisprudential standpoint was: "what legal framework appellate courts should apply to determine the degree of deference due an administrative agency in its interpretation of a statute within its purview."[12]

The Michigan Supreme Court reversed. Justice Young, writing for the majority in a 4-3 decision, invoked *Marbury v. Madison*[13] and the Michigan Constitution to find that agency interpretations of law are not binding on the courts.[14] In an important summary statement, the court held:

> [I]n accordance with longstanding Michigan precedent and basic separation of powers principles, we hold and reaffirm that an agency's interpretation of a statute is entitled to "respectful consideration," but courts may not abdicate their judicial responsibility to interpret statutes by giving unfettered deference to an agency's interpretation. Courts must respect legislative decisions and interpret statutes according to their plain language.

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6. *Rovas*, 482 Mich. at 94, 754 N.W.2d at 262.
7. MICH. COMP. LAWS ANN. § 484.2502(1)(a) (West 2008).
8. *Id.*
9. *Rovas*, 482 Mich. at 95, 754 N.W.2d at 263.
10. *Id.* at 96, 754 N.W.2d at 263.
11. *Id.* at 107, 754 N.W.2d at 269.
12. SBC Mich. v. Mich. Pub. Serv. Comm'n, 480 Mich. 977, 741 N.W.2d 834 (2007).
13. 5 U.S. (1 Cranch) 137 (1803).
14. *Rovas*, 482 Mich. at 92-93, 754 N.W.2d at 262.

> An agency's interpretation, to the extent it is persuasive, can aid in that endeavor.[15]

As part of an extensive review of Michigan precedents on the standard for reviewing agency interpretations of law,[16] the court acknowledged that its own case law "ha[d] not been entirely consistent regarding the subject of the amount of deference to be given when an administrative agency . . . construes a statute governing the area regulated by the agency."[17] Ultimately, the court announced that Michigan courts should henceforth follow the standard articulated in *Boyer-Campbell v. Fry*,[18] where the court held that an agency's interpretation of law is entitled to "respectful consideration."[19]

The court explained: "'Respectful consideration' is not equivalent to any normative understanding of 'deference' as the latter term is commonly used in appellate decisions."[20] The court considered "deference" as suggesting a standard of review less than the strict *de novo* standard that an appellate court would give to a circuit judge's construction of a statute.[21] "Given that statutory construction is the domain of the Judiciary," the court wrote, "it is hard to imagine why a different branch's interpretation would be entitled to more weight than a lower court's interpretation."[22]

In distinguishing the "respectful consideration" standard from a "deference" standard, the court rejected the federal *Chevron* doctrine, which requires a federal court reviewing a federal agency's interpretation of law to defer to that interpretation if Congress has not directly spoken to the precise question and the agency's answer is based on a permissible construction of the statute.[23] In part, this rejection of *Chevron* depended upon the different treatment afforded judicial review of administrative agency decisions under the Michigan Constitution, which enshrines a right to such review.[24] The court concluded by stating:

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15. *Id.* at 101, 754 N.W.2d at 266.
16. *Id.* at 99-108, 754 N.W.2d at 265-70.
17. *Id.* at 102-03, 754 N.W.2d at 267 (quoting *In Re* MCI Telecomm., 460 Mich. 396, 424 n.4, 596 N.W.2d 164, 180 n.4 (1999)).
18. 271 Mich. 282, 260 N.W. 165 (1935).
19. *Rovas*, 482 Mich. at 108, 754 N.W.2d at 270.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 109-10, 754 N.W.2d at 270-71.
24. MICH. CONST. of 1963, art. VI, § 28.

> The vagaries of *Chevron* jurisprudence do not provide a clear road map for courts in this state to apply when reviewing administrative decisions. Moreover, the unyielding deference to agency statutory construction required by *Chevron* conflicts with this state's administrative law jurisprudence and with . . . separation of powers principles . . . by compelling delegation of the judiciary's constitutional authority to construe statutes to another branch of government. For these reasons, we decline to import the federal regime into Michigan's jurisprudence.[25]

Applying the "respectful consideration" standard to the facts of the case, the *Rovas* court concluded that the PSC's interpretation of "false" under the statute was erroneous.[26] Under the doctrine of *noscitur a sociis* (the principle that a word is given meaning in the context of surrounding words in a given statute), the court construed "false" in the context of Section 502(1)(a)'s phrase "false, misleading, or deceptive" as prohibiting statements made by a provider that are intentionally false.[27] Accordingly, the court reversed the PSC's finding against SBC.

In dissent, Justice Kelly stated:

> I see no meaningful distinction between the various names the court has given to the proper standard of review [of agency interpretations of law] over the years. However, I see a noticeable lowering of the standard in the majority's actual application of it in this case. . . . This case risks sending the unfortunate message that, from now on, reviewing courts need not afford agency decisions any careful consideration at all. I cannot join the majority in sending this message.[28]

The *Rovas* minority went on to accuse the court of failing to give careful consideration to the factual basis for the PSC's finding against SBC and of relying too heavily on the court of appeals' interpretation of the PSC's decision, which the minority believed to be erroneous itself.[29] According to the minority, the PSC had made findings that supported assessing a penalty against SBC even under the court's interpretation of Section 502(1)(a).[30]

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25. *Rovas*, 482 Mich. at 111, 754 N.W.2d at 271-72.
26. *Id.* at 114, 754 N.W.2d at 273.
27. *Id.* at 114-15, 754 N.W.2d at 273-74.
28. *Id.* at 119, 754 N.W.2d at 273-74 (Kelly, J., dissenting).
29. *Id.* at 121-27, 754 N.W.2d at 277-80.
30. *Id.* at 124-26, 754 N.W.2d at 279.

B. Michigan Association of Home Builders v. Director of Department of Labor & Economic Growth: *Review of Agency Rulemaking Limited to Administrative Record, Sans Remand*

By contrast to its decision in *Rovas*, the Michigan Supreme Court held in a separate case[31] that judicial review of agency rulemaking is more limited than in cases involving statutory interpretation.[32]

In *Home Builders*, the plaintiff association brought an action in Ingham County Circuit Court for declaratory and injunctive relief against the Michigan Department of Labor and Economic Growth (DLEG), challenging the agency's revision of the Michigan Uniform Energy Code (MUEC) as noncompliant with the Single State Construction Code Act (Act).[33] The circuit court granted the Association a preliminary injunction.[34] During subsequent discovery, the Association developed studies purporting to demonstrate that the revised MUEC was not cost-effective, a criterion required by the Act.[35] The DLEG filed a motion in limine to exclude the Association's expert witnesses, who would testify on the basis of data in the new studies (and had not testified during the rulemaking process), arguing that the court's review was limited to evidence in the administrative record.[36] The court denied the motion.[37]

On appeal from the denial of the motion in limine, the court of appeals reversed the circuit court.[38] The court held:

> no legal basis exists for the trial court to conduct either a review de novo or a trial de novo in determining whether [DLEG's] promulgation of the revised MUEC is valid. . . . [T]he court's review should be limited to the factual record created by the department during the rulemaking process.[39]

The court then instructed the circuit court that, if it should find that the DLEG had not considered all relevant factors, or that the propriety of the agency rule could not be evaluated on the basis of the available

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31. Mich. Assoc. of Home Builders v. Dir. of Dept. of Labor & Econ. Growth, 481 Mich. 496, 750 N.W.2d 593 (2008).

32. *Id.*

33. MICH. COMP. LAWS ANN. § 125.1501 *et seq.* (West 2008).

34. Mich. Assoc. of Home Builders v. Dir. of Dept. of Labor & Econ. Growth, 276 Mich. App. 467, 472, 741 N.W.2d 531, 534 (2007).

35. *Id.* at 472-73, 741 N.W.2d at 534-35.

36. *Id.* at 473, 741 N.W.2d at 535.

37. *Id.*

38. *Id.*

39. *Id.* at 478, 741 N.W.2d at 538.

administrative record, the court could remand the matter to DLEG for further development of the factual record.[40]

The Association petitioned the Michigan Supreme Court for leave to appeal. In lieu of granting leave, the Court, in a 6-1 decision, issued a memorandum opinion affirming in part and vacating in part.[41] Specifically, the Court held that judicial review of agency rulemaking is limited to the administrative record, but that such record may not be expanded by remand to the administrative agency.[42] The court applied the legal maxim *expressio unius est exclusion alterius* (the expression of one thing is the exclusion of another), reasoning that because the Michigan Administrative Procedures Act (APA) explicitly provides for remand to an agency for expansion of the administrative record in a contested case but makes no such provision in the context of rulemaking, remand in the context of the latter proceeding is not authorized by statute.[43]

Justice Weaver did not concur and would have granted leave to appeal.[44]

III. STATE VERSUS LOCAL REGULATION

In *Czymbor's Timber, Inc. v. City of Saginaw*,[45] the Michigan Supreme Court held 4-3 that Department of Natural Resources (DNR) Rule 299.3048, which the DNR promulgated pursuant to its exclusive authority to regulate hunting under the Natural Resources and Environmental Protection Act, failed to provide an administrative mechanism to regulate hunting in cities, since the rule only mentions townships.[46] Therefore, the court upheld a Saginaw ordinance that prohibited the discharge of firearms and other weapons within city limits and made no exception for hunting.[47]

Justice Weaver, dissenting, viewed the majority's reasoning as "be[lying] basic concepts governing the applicability of administrative rules."[48] Under her opinion for the minority, the DNR was statutorily mandated with the task of exclusively regulating all hunting in the state, and, to the extent that Rule 299.3048 was read as restricting the DNR's

40. *Home Builders*, 276 Mich. App. at 479, 741 N.W.2d at 538.
41. *Mich. Ass'n of Home Builders*, 481 Mich. 496, 750 N.W.2d 593.
42. *Id.* at 498, 750 N.W.2d at 595.
43. *Id.* at 500-01, 750 N.W.2d at 596-97.
44. *Id.* at 502, 750 N.W.2d at 597.
45. 478 Mich. 348, 733 N.W.2d 1 (2007).
46. *Id.* at 357-58, 733 N.W.2d at 6.
47. *Id.* at 357-59, 733 N.W.2d at 6-7.
48. *Id.* at 370, 733 N.W.2d at 13 (Weaver, J., dissenting).

authority to regulate hunting in cities, such a reading would result in an "impermissible abridgement" of the DNR's authority.[49] The minority also framed the issue as one of field preemption, stating that "[w]hen the state reserves exclusive jurisdiction to regulate a field, a municipal corporation cannot regulate the same field if the regulation results in a conflict between state . . . and local regulations."[50]

IV. STATUTORY INTERPRETATION: PLAIN LANGUAGE DOCTRINE

In *Ross v. Blue Care Network of Michigan*,[51] the Michigan Supreme Court held 5-2 that the Commissioner of the Office of Financial and Insurance Regulation (OFIR) may reject the recommendations of an independent review organization (IRO) on issues of medical necessity and clinical review.[52] Under the Patient's Right to Independent Review Act (PRIRA),[53] a patient may request that OFIR review a denial of emergency medical coverage by his or her insurer. An IRO then makes a "recommendation" to the Commissioner as to whether the received medical services were necessary. The court of appeals found that, under PRIRA, the Commissioner was required to defer to an IRO on this issue.[54] Reversing, the Supreme Court applied "plain language" treatment to the term "recommendation," which PRIRA employs thirteen times to describe an IRO's analysis.[55]

Justice Kelly, dissenting, reasoned that PRIRA's express statement that the Commissioner may review an IRO's recommendation "to ensure that it is not contrary to the terms of coverage" limited the Commissioner's ability to reject an IRO's recommendation to that basis only, under the maxim *expressio unius est exclusio alterius*.[56]

Justice Cavanagh would have denied leave to appeal.[57]

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49. *Id.* at 370-71, 733 N.W.2d at 13.

50. *Id.* at 361, 733 N.W.2d at 8.

51. 480 Mich. 153, 747 N.W.2d 828 (2008). The author's firm represented respondent-appellant Blue Care Network of Michigan in *Ross*.

52. *Id.* at 155, 747 N.W.2d at 830.

53. MICH. COMP. LAWS ANN. § 550.1911 (West 2008).

54. Ross v. Blue Care Network of Mich., 271 Mich. App. 358, 380, 722 N.W.2d 223, 236 (2006).

55. *Ross*, 480 Mich. at 147, 747 N.W.2d at 838.

56. *Id.* at 184, 747 N.W.2d at 845 (Kelly, J., dissenting).

57. *Id.* at 190, 747 N.W.2d at 848 (Cavanagh, J., denying leave).

V. RESIDENCY REQUIREMENTS FOR PUBLIC BENEFITS

In *Chrisdiana v. Department of Community Health*,[58] the court of appeals held that a Department of Community Health manual governing eligibility for Medicaid, Emergency-Services-Only Medicaid, and Maternity Outpatient Medical Services, which sets out a residency requirement and defines a "resident" as a person who lives in Michigan and intends to remain indefinitely or who "entered the state of Michigan for employment purposes," does not violate either state or federal law.[59]

VI. PUBLIC SERVICE COMMISSION AUTHORITY

A. Utility Ratemaking

In *In re Application of Detroit Edison Co.*,[60] the court of appeals dealt with the question of whether prohibitions on rate increases could be interpreted to apply on an overall, rather than on an element or class, basis. The court held that the Public Service Commission's ratemaking authority empowers it to increase certain rates while reducing others to yield no overall increase to customers.[61] It also held that the PSC had authority to require a utility's customers to provide support for a Low-Income and Energy Efficiency Fund for geographic areas and customers outside of the utility's service territory, given statutory authorization.[62] In the absence of specific statutory authority, however, the court held that the PSC could not require a utility to impose a charge on its customers to support funding of a renewable energy program.[63] Deferring to agency expertise in a decision that predated *Rovas*,[64] the court held that the PSC's working capital and short-term debt calculations and determination of a test year to evaluate the utility's revenue requirements were matters within its ambit of authority.[65]

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58. 278 Mich. App. 685, 754 N.W.2d 533 (2008).
59. *Id.* at 690, 754 N.W.2d at 537.
60. 276 Mich. App. 216, 740 N.W.2d 685 (2007).
61. *Id.* at 227, 740 N.W.2d at 693.
62. *Id.* at 230-31, 740 N.W.2d at 695.
63. *Id.* at 232, 740 N.W.2d at 696.
64. *See* Mich. Bell. Tel. Co. v. Mich. Pub. Serv. Comm'n, 332 Mich. 7, 50 N.W.2d 826 (1952).
65. *Detroit Edison Co.*, 276 Mich. at 235, 740 N.W.2d at 698.

B. Telecommunications Regulation

In *In re Petition of Sprint Communications Co. LP*,[66] the court of appeals was called upon to determine whether the maintenance fees imposed by the Metropolitan Extension Telecommunications Right-of-Way Oversight Act (METRO Act),[67] apply only to certain telecommunications facilities *owned* by telecommunications providers, not to such facilities *leased* by providers.[68] The court regarded this issue as "a question of pure law."[69] First, though, it needed to address whether its review was de novo due to the particular appellate process involved in the case.[70]

The METRO Act created the Authority and charged it with assessing fees in return for allowing providers access to public rights-of-way in the state.[71] The Authority's "exclusive power to assess fees on telecommunication providers owning telecommunication facilities in public rights-of-way"[72] encompassed interpretations of the Act and actions to determine provider complaints about assessments. The Act also provided that the PSC would have jurisdiction to review decisions of the Authority on a de novo basis.[73]

In this case, the Authority had ruled upon a provider's request and clarified that fees applied both to the owner of a facility in the public right-of-way as well as any provider leasing the same facility.[74] The PSC, on review of the Authority's decision, reached the opposite conclusion.[75]

Upon review of the PSC's quasi-appellate decision, the court of appeals had to decide how to rule on the contention that the court should defer to the Authority's interpretation of the statute at issue. The court concluded that "it would be unreasonable to give any special deference to the METRO Authority's interpretation of the statute at issue when reviewing de novo a determination by an agency that is not itself required to give deference to the METRO Authority."[76]

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66. 277 Mich. App. 311, 745 N.W.2d 520 (2007).
67. MICH. COMP. LAWS ANN. § 484.3101 *et seq.* (West 2008).
68. *In re Sprint*, 277 Mich. App. at 312, 745 N.W.2d at 521.
69. *Id.*
70. *Id.* at 313, 745 N.W.2d at 521.
71. *Id.* (citing MICH. COMP. LAWS ANN. § 484.3103 (West 2008)).
72. MICH. COMP. LAWS ANN. § 484.3103(3) (West 2008).
73. MICH. COMP. LAWS ANN. § 484.3117 (West 2008).
74. *In re Sprint*, 277 Mich. App. at 312-13, 745 N.W.2d at 521.
75. *Id.* at 313, 745 N.W.2d at 521.
76. *Id.*

On the merits, and under a de novo standard of analysis, the court of appeals held that the plain language of the Act supported the PSC's conclusion that only ownership, not leasing, of facilities required payment of fees under the Act.[77] Since the statutory language did not refer to a provider as occupying part of the public right-of-way, but, rather, to a "provider's facilities" occupying part of a right-of-way, the focus of the statute was "on how many feet of right-of-way the facilities occupy, not how many feet of facilities are in use by a given provider."[78] Similarly, the court held, other provisions of the Act speak of application to owners and refer to ownership while "leasing of facilities is not otherwise discussed in the METRO Act."[79] Consequently, the court reversed the Authority and held that "the duty to pay the fee falls on the owner of those facilities, irrespective of whether the owner is utilizing or leasing those facilities."[80]

In *In re McLeod USA Telecommunications Services*, the court of appeals dealt with another issue arising under the METRO Act.[81] Here, a township challenged the PSC's approval of a telecommunications provider's permit, contending that the provider cannot request permit provisions from the PSC additional to or different from the standard language provided for in the Act.[82]

In a per curiam decision, the court of appeals concluded that the Act authorized the PSC to amend the permit form and to impose a change to the environmental insurance provision, where the agency's decision was based on its conclusion that the provider did not pose a danger of environmental contamination.[83] In the court's view, "the most important principle to observe when resolving this case is that subsections of a statutory section 'are not to be read discretely, but as part of a whole.'"[84] Therefore, the provisions of the Act, "[w]hen read as a whole . . . indicate a comprehensive process allowing the PSC to interact with the parties to impose reasonable permit terms that reflect the practicalities of the situation."[85] The court also ruled that the PSC decision did not

77. *Id.* at 315, 745 N.W.2d at 522.
78. *Id.*
79. *Id.*
80. *In re Sprint*, 277 Mich. App. at 316, 745 N.W.2d at 523.
81. 277 Mich. App. 602, 751 N.W.2d 508 (2008).
82. *Id.*
83. *Id.* at 609, 751 N.W.2d at 514.
84. *Id.* at 609-10, 751 N.W.2d at 514 (citing Lansing Mayor v. Public Serv. Comm'n, 470 Mich. 154, 167-68, 680 N.W.2d 840 (2004)); *see also* Apsey v. Mem'l Hosp., 477 Mich. 120, 130, 730 N.W.2d 695, 700-01 (2007).
85. *In re Sprint*, 277 Mich. App. at 610, 751 N.W.2d at 514.

violate the stated purposes of the Act,[86] and that the PSC had not usurped the township's ability to reasonably control its public rights-of-way.[87]

C. Interstate/Intrastate Motor Carrier Regulation

In *Behnke, Inc. v. State of Michigan*, the court of appeals held that the Michigan State Police were prohibited from issuing further citations to Michigan-based trucking companies for failure to register their trailers in Michigan where the companies participate in the International Registration Plan, which permits the companies to register their trailers in any participating jurisdiction and demands full and free reciprocity.[88]

VII. EXECUTIVE ORDER 2008-2

Under the general authority to make changes in the organization of state government deemed necessary for its effective administration,[89] the Governor issued Executive Order 2008-2[90] and created the position of Automobile and Home Insurance Consumer Advocate within the newly renamed Office of Financial and Insurance Regulation, headed by a Commissioner, within the Department of Labor and Economic Growth.[91]

The Executive Order essentially separated two functions formerly provided by the Office. It directed the Advocate to be "dedicated solely to representing and protecting the interests of automobile and home insurance consumers,"[92] while directing "the Commissioner of the Office of Financial and Insurance Regulation to focus activities on [overall] regulatory responsibilities."[93] The Advocate would exercise the "prescribed powers, duties, responsibilities, and functions [under the Executive Order] independently of the Commissioner."[94] Those functions include: "advocat[ing] for affordable, reliable, and fair automobile insurance and home insurance;" "conducting hearings . . . and investigat[ing] laws, regulations, and practices . . . from around the country to assess the impact of automobile insurance and home insurance

86. *Id.* at 618, 751 N.W.2d at 518.
87. *Id.* at 620, 751 N.W.2d at 519.
88. 278 Mich. App. 114, 120-21, 748 N.W.2d 253, 257-58 (2008).
89. MICH. CONST. of 1963, art. V, § 2.
90. 2008 Mich. Legis. Serv. Exec. Ord. 2008-2 (West), *reprinted as* MICH. COMP. LAWS ANN. § 445.2005 (West 2008), *available at* http://www.michigan.gov/gov/-0,1607,7-168-21975-184819--,00.html (last visited Jan. 25, 2009).
91. MICH. COMP. LAWS ANN. § 445.2005 (West 2008).
92. MICH. COMP. LAWS ANN. § 445.2005 (West 2008).
93. MICH. COMP. LAWS ANN. § 445.2005 (West 2008).
94. MICH. COMP. LAWS ANN. § 445.2005 (West 2008).

rates, rules, and forms on consumers in Michigan;" "submit[ing] an annual report to the Governor on findings and recommendations for administrative, legislative, or other corrective actions [relating to] . . . the interests of automobile insurance and home insurance consumers;" and "referr[ing] potential criminal conduct . . . to the Commissioner, the Attorney General, or an appropriate law enforcement agency."[95]

VIII. REMOVAL PROCEEDINGS INVOLVING MUNICIPAL OFFICIAL[96]

On May 20, 2008, the Detroit City Council filed with the Executive Office of the Governor a petition, with attachments, against the Honorable Kwame M. Kilpatrick seeking his removal from the office of Mayor of Detroit for alleged acts of official misconduct.[97] The petition invoked a little-used provision of Michigan law specifying:

> The governor shall remove all city officers chosen by the electors of a city or any ward or voting district of a city, when the governor is satisfied from sufficient evidence submitted to the governor that the officer has been guilty of official misconduct, wilful neglect of duty, extortion, or habitual drunkenness, or has been convicted of being drunk, or whenever it appears by a certified copy of the judgment of a court of record of this state that a city officer, after the officer's election or appointment, has been convicted of a felony.[98]

The purpose of this article is not to discuss the underlying issues that surrounded the filing of the petition but, rather, to summarize the proceedings that the Governor convened to determine whether to act on the filing.

In a letter dated June 3, 2008, the Legal Counsel to the Governor wrote counsel for the Mayor and the City Council to outline an initial procedure to evaluate the petition.[99] Stating that the "exercise of the

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95. *Id.*

96. A helpful, chronological compilation of documents applicable to this section is located at: Documents Regarding the Honorable Kwame M. Kilpatrick, *available at* https://mich.gov/gov/0,1607,7-168-23442_50699---,00.html (last visited Jan. 25, 2009).

97. Letter from William H. Goodman, Special Counsel, Detroit City Council, to Jennifer M. Granholm, Mich. Governor (May 20, 2008), *available at* https://mich.gov/documents/gov/letter1_237484_7.pdf (last visited Jan. 25, 2009).

98. MICH. COMP. LAWS ANN. § 168.327 (West 2008).

99. Letter from Kelly Keenan, Legal Counsel to the Governor, to Sharon McPhail, General Counsel, City of Detroit & William H. Goodman, Special Counsel, Detroit City

power of removal by a governor is a quasi-judicial function, is limited in scope, and must be exercised in strict compliance with the law," the Governor's Legal Counsel stated that a two-step process would be followed.[100] First, the parties would be given an opportunity to raise preliminary legal issues before the Governor made a determination as to whether a hearing would be convened.[101] Second, the Governor would make a decision on whether the charges and evidence adduced against the charged official were sufficient to warrant a hearing.[102]

Following the filing of a motion by the City Council for a hearing on the merits of its petition,[103] and the filing of a motion by the Mayor for dismissal of the petition,[104] the Governor issued a "notice of hearing" on August 7, 2008, setting September 3, 2008, for the commencement of a hearing on the petition.[105] As later clarified,[106] the notice did not constitute a ruling on the Mayor's motion to dismiss.[107] The notice further directed the City Council, as petitioner, to appear and present proofs related to the charges contained in its petition.[108] It further stated

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Council (June 3, 2008), *available at* https://mich.gov/documents/gov/letter8_237491-_7.pdf (last visited Jan. 25, 2009).

100. *Id.* at 1. Similarly, a "contested case" under the Michigan Administrative Procedures Act, defined as a proceeding in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made after an opportunity for an evidentiary hearing, is a quasi-judicial matter. MICH. COMP. LAWS ANN. § 24.203(3) (West 2008).

101. Letter from Kelly Keenan, Legal Counsel to the Governor, to Sharon McPhail, General Counsel, City of Detroit & William H. Goodman, Special Counsel, Detroit City Council (June 3, 2008), at 2, *available at* https://mich.gov/documents/gov/letter8-_237491_7.pdf (last visited Jan. 25, 2009).

102. *Id.*

103. Petitioner Detroit City Council's Motion for Hearing on the Merits in the Matter of the Request for Removal of Kwame M. Kilpatrick, No. EO-2008-004-LO (Aug. 6, 2008), *available at* https://mich.gov/documents/gov/Support_244452_7.pdf (last visited Jan. 25, 2009).

104. Respondent's Motion to Dismiss the Petitioner of Detroit City Council, to the Honorable Jennifer M. Granholm, to Remove Mayor Kwame M. Kilpatrick from the Office of Mayor of the City of Detroit, or in the Alternative to Stay the Proceedings before the Governor, pending Resolution of the Charges Brought by the Wayne County Prosecutor, No. EO-2008-004-LO (Aug. 6, 2008), *available at* https://mich.gov/-documents/gov/Dismiss_244453_7.pdf (last visited Jan. 25, 2009).

105. Notice of Hearing, In the Matter of the Request for the Removal of Mayor Kwame M. Kilpatrick from the Office of Mayor of the City of Detroit No. EO-2008-004-LO (Aug. 7, 2008), *available at* https://mich.gov/documents/gov/Notice_244694_7.pdf (last visited Jan. 25, 2009).

106. Letter from John Wernet, Deputy Legal Counsel to the Governor, to Sharon McPhail, General Counsel, City of Detroit, et al. (Aug. 8, 2008), *available at* https://mich.gov/documents/gov/Keenan_244916_7.pdf (last visited Jan. 25, 2009).

107. Notice of Hearing, Aug. 7, 2008, *supra*, note 105.

108. *Id.*

that the "Respondent" Mayor would be afforded an opportunity to respond.[109]

On August 11, 2008, the Governor issued a "Prehearing Order" that prescribed "rules of practice and procedure" for the hearing.[110] These procedural requirements included: filing and service of witness list and copies of exhibits; ability to make an opening statement; presentation and cross-examination of witnesses; limitation on questioning or cross-examination of a witness to a single attorney per side; securing of testimony without subpoena; allocation of burden of proof; and closing arguments.[111] Using language very similar to that found in the APA regarding the admissibility of evidence in contested cases, the Order stated:

> [t]he rules of evidence as applied in a nonjury civil case in circuit court shall be utilized as a guideline but the Governor will ultimately determine the admissibility of any evidence and may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. The Governor may exclude irrelevant, immaterial or unduly repetitious evidence.[112]

On August 25, 2008, the Governor issued an "Opinion and Order (1) Denying Respondent's Motion to Dismiss Petition or Stay Proceedings and (2) Granting Petitioner's Motion for Hearing on the Merits."[113] The Opinion and Order contained an extensive discussion of statutory and case law argued by the parties and a decision on the course of

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109. *Id.*

110. Prehearing Order, In the Matter of the Request for the Removal of Kwame M. Kilpatrick from the Office of Mayor of the City of Detroit, No. EO-2008-004-LO (Aug. 11, 2008), *available at* https://mich.gov/documents/gov/Prehearing_244974_7.pdf (last visited Jan. 25, 2009).

111. *Id.* at 2-4.

112. *Id.* at 3-4. *Cf.* MICH. COMP. LAWS ANN. § 24.275 (West 2008). M.C.L. Section 24.275 states:

> In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence may be excluded.

Id.

113. Opinion and Order (1) Denying Respondent's Motion to Dismiss Petitioner or Stay Proceedings and (2) Granting Petitioner's Motion for Hearing on the Merits, In the Matter of the Request for the Removal of Kwame M. Kilpatrick from the Office of Mayor of Detroit, No. EO-2008-004-LO (Aug. 25, 2008), *available at* https://mich.gov/-documents/gov/Opinion_246677_7.pdf (last visited Jan. 25, 2009).

proceedings.[114] Concluding, the Governor ruled that the quasi-judicial evidentiary hearing would go forward.[115]

Subsequent orders included: one convening a prehearing conference to finalize procedures to be followed at the evidentiary hearing;[116] appointment of a special administrative hearing assistant (an administrative law judge in the State Office of Administrative Hearings and Rules);[117] and a ruling on legal issues raised by the Respondent at the prehearing conference.[118] Particularly significant was the Supplemental Prehearing Order issued by the Governor on September 2, 2008, in which was decided the very question of the type of proceeding involved.[119] The Governor stated: "[t]his is not a criminal or civil trial by a court of law and is not subject to the rules, procedures, and evidentiary standards governing those proceedings; rather, it is an administrative or executive hearing authorized by statute."[120] Further, though not expressly covered or bound by the APA, the Governor decided to use the statute "as a guide for the process" used in the hearing.[121]

Evidentiary hearings did, indeed, commence on September 3, 2008, with the Governor sitting as presiding officer, providing an opening discussion of the proceedings, taking testimony, and ruling on objections, evidentiary issues, and requests by counsel. On the following day, the proceedings were truncated by the announcement of the resignation of

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114. *Id.*

115. *Id.*

116. Notice of Prehearing Conference, In the Matter of the Request for the Removal of Kwame M. Kilpatrick from the Office of Mayor of the City of Detroit, No. EO-2008-004-LO (Aug. 25, 2008), *available at* https://mich.gov/documents/gov/Notice_246678-_7.pdf (last visited Jan. 25, 2009).

117. Order Designating Special Administrative Hearing Assistant, In the Matter of the Req. for the Removal of Kwame M. Kilpatrick from the Office of Mayor of the City of Detroit, No. EO-2008-004-LO (Sept. 2, 2008), *available at* https://mich.gov/documents/gov/Order_246679_7.pdf (last visited Jan. 25, 2009).

118. Opinion and Order Addressing Legal Issues Raised by Respondent in Prehearing Conference, In the Matter of the Request for the Removal of Kwame M. Kilpatrick from the Office of Mayor of the City of Detroit, No. EO-2008-004-LO (Sept. 2, 2008), *available at* https://mich.gov/documents/gov/Opinion_247499_7.pdf (last visited Jan. 25, 2009).

119. Supplemental Prehearing Order, In the Matter of the Request for the Removal of Kwame M. Kilpatrick from the Office of Mayor of the City of Detroit, No. EO-2008-004-LO (Sept. 2, 2008), *available at* https://mich.gov/documents/gov/Supplemental-_247502_7.pdf (last visited Jan. 25, 2009).

120. *Id.* at 2.

121. *Id.*

the Respondent, along with other related matters, which was laid on the record by the Governor in a written statement read in open court.[122]

The Governor's reliance on the APA and contested case procedures in the matter, and decree that it was "an administrative hearing," is a landmark precedent for future removal proceedings.

122. Governor Granholm's Statement from the Bench, In the Matter of the Request for the Removal of Kwame M. Kilpatrick from the Office of Mayor of the City of Detroit, No. EO-2008-004-LO (Sept. 4, 2008), *available at* https://mich.gov/documents/gov/-Governor_247750_7.pdf (last visited Jan. 25, 2009).