State Bar of Michigan

Administrative Law Journal

A publication of the State Bar of Michigan Administrative Law Section

Michigan Supreme Court Announces "Separate" Agency-Review Standard

By Patrick J. Wright[1]

The separation-of-powers doctrine is at the root of both the federal and Michigan constitutions. At the federal level, one area where reliance on separation-of-power arguments has failed is in attempts to curtail the rise of the administrative state. Through broad delegations from Congress and the court-created *Chevron*[2] doctrine, the federal agencies have been given tremendous latitude to interpret the statutes that guide their conduct and to write the rules that those agencies enforce. In *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90 (2008), the Michigan Supreme Court cited separation-of-powers principles and rejected *Chevron* deference as a model for Michigan.

The crux of the court's holding applied to statutory interpretations in a contested case and is contained in the first paragraph of its opinion:

> [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. An agency's interpretation, to the extent it is persuasive, can aid in that endeavor.[3]

But the *Rovas* court did more than merely setting forth a standard of review; it explicitly rejected *Chevron* and discussed and clarified a wide range of administrative issues.

The role of the administrative state in our three-branch political system has vexed federal and state courts almost since its creation. In 1952, United States Supreme Court Justice Robert Jackson, a former New Dealer, cogently identified the problem:

> The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. They also have begun to have important consequences on personal rights. They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.

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Annual Meeting Program A Success

By Mark J. Burzych, Fahey Schultz Burzych Rhodes, PLC,
Administrative Law Section Chair

On September 18, 2008 at the State Bar of Michigan Annual Meeting in Dearborn, the Administrative Law Section hosted its Annual Program consisting of an expert panel of presenters that discussed the Best Practices in Developing an Administrative Record. The panel consisted of William K. Fahey, founding member of Fahey Schultz Burzych Rhodes, PLC, who represented the private practitioner point of view; Gerald Whalen, Chief Assistant Attorney General, Alcohol and Gambling Enforcement Division, who represented the Attorney General perspective; Gregory Holiday, Administrative Law Judge Manager, State Office of Administrative Hearings and Rules, who represented the perspective of Administrative Law Judges; Robert Kehres, Director of Regulatory Affairs, Michigan Public Service Commission, who represented the perspective of an Order Writer staff; Ken Ross, Commissioner of the Office of Financial and insurance Regulation, who represented the perspective of the agency head and decision maker in administrative hearings; and Ingham County Circuit Court Judge Joyce Draganchuk, who represented the perspective of the reviewing court on appeal of final agency decisions.

Mr. Fahey emphasized the need to demystify your case by avoiding the use of acronyms and industry jargon. With regard to discovery, if available in the administrative hearing process, he suggested that any discovery should be focused and purposeful and in responding to discovery, practitioners should be forthright and answer discovery completely. In relation to making an administrative record, Mr. Fahey reminded the audience that you should present your case with your witnesses and exhibits and not rely on making your case in cross examination of your opponent's witnesses.

Mr. Whalen emphasized that you must know and understand the agency's enabling statute and administrative rules. He reminded the audience that lawyers should know the players – the structure of the agency and decision makers, the assistant attorneys general who represent the agency, the administrative law judges or hearing commissioners and the agency staff. Mr. Whalen reviewed the various authorities for judicial review and encouraged the practitioners to study the various court rules and seek appeal under the correct provision. See MCR 7.101, 7.103, 7.104 and 7.105. Finally, Mr. Whalen encouraged practitioners to use outdated technology – the telephone! Mr. Whalen encouraged thorough discussion before the hearing between counsel, to determine, among other things, whether there are common issues for stipulation.

Mr. Holiday reviewed where the various administrative law judges are in Michigan and discussed the similarities and differences between all of these administrative law judges. Mr. Holiday also discussed the results of a survey that he conducted of all of the administrative law judges regarding the issues presented at the annual meeting program. The purpose of Mr. Holiday's survey was to get the perspective of administrative law judges regarding best practices in developing administrative records, to provide the administrative law judges' perspective on hints and tips for practitioners that appear before administrative agencies. He sought opinions on examination skills, cross examination skills,

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Courts have differed in assigning a place to these seemingly necessary bodies in our constitutional system. Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.[4]

The delegates to the 1961-2 Constitutional Convention were aware of these issues since the growth of the administrative state largely occurred during the time between Michigan's 1908 and 1963 Constitutions. In drafting Article 6, Section 28, the delegates were seeking to curtail, not increase, agency power.

Section 28 discussed both agency fact finding and legal determinations. Thus, the court took care to delineate the precise agency activity at issue in *Rovas* – interpreting a statute in the course of a contested case – and also to clarify the standard of review for other agency activities such as rulemaking and fact finding in contested cases.

Regarding rulemaking, it must first be determined whether the Legislature improperly delegated its authority to make laws. The court's citation for this proposition, *Taylor v Gates Pharmaceuticals*, 468 Mich 1, 10 n 9 (2007), is interesting. In *Taylor*, the court discussed the federal intelligible-principle standard, whereby almost any delegation is proper. The court then indicated that Michigan law is similar. But unlimited delegations are difficult to square with separation-of-powers principles since the Legislature in effect would be giving its legislative power to the executive. Unmentioned in *Rovas* was the court's 2005 remand order in *DPG York, LLP v Michigan*, 474 Mich 987 (2005), wherein the court cited to past decisions with a more stringent delegation standard. Regardless of the proper delegation standard – an area to which the court will likely return to fairly soon – once that hurdle has been cleared courts only review whether the agency rule exceeds the authority granted by the statute.

The second agency activity discussed was fact finding. The court analogized the review of fact finding in contested cases to "an appellate court's review of a trial court's findings of fact in that an agency's findings of fact are entitled to deference by a reviewing court."[5] It then described the standard of review for agency fact-finding challenges:

> Similar to the clear error standard of review for circuit courts, under the constitutional and statutory standards of review, a reviewing court must ensure that the finding is supported by record evidence; however, the reviewing court does not conduct a new evidentiary hearing and reach its own factual conclusions, nor does the reviewing court subject the evidence to review de novo.[6]

But *Rovas* concerned neither rulemaking nor fact finding in a contested case; rather, it was about a statutory interpretation that occurred in a contested case. In deciding that issue, the court began by discussing separation-of-powers principles, and noted that since *Marbury v Madison*[7], it has been the duty of the courts to interpret laws. Deferential standards of review to agency interpretation of statutes such as "reasonableness" or "abuse of discretion" were rejected since they would "threaten the separation of powers principles discussed earlier by allowing the agency to usurp the judiciary's constitutional authority to construe the law and infringe on the Legislature's lawmaking authority."[8] The court clarified that the proper standard of review is the respectful-consideration standard set out above.

One question the court clearly reserved was the proper standard of review of a long-standing agency interpretation of a statute (a question not presented in *Rovas*). In such a case, reliance interests on that interpretation may alter the review standard.

Another area where the court was clear was in its rejection of the *Chevron* doctrine:

> This Court has never adopted *Chevron* for review of state administrative agencies' statutory interpretations, and we decline to adopt it now. . . . [T]he unyielding deference to agency statutory construction required by *Chevron* conflicts with this state's administrative law jurisprudence and with the separation of powers principles discussed above 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.[9]

One bit of the federal regime that the Michigan Supreme Court did not explicitly explore was the relationship between rulemaking and adjudication/contested cases. In the federal

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system, agencies have the ability to choose either method by which to create "rules" and the federal courts apply the same deferential standard of review to either choice. *Rovas* did not fully explain the relationship between rulemaking and adjudication.

But *Rovas* has provided much-needed clarity to a number of administrative issues. Importantly, the Michigan Supreme Court indicated that in contrast to federal law, separation-of-powers principles do significantly limit state agency power. The full extent of these bounds will likely need to be provided in future cases. Practitioners would be wise to consider foundational issues such as separation of powers, delegation, and the role of rulemaking in future litigation. Michigan has chosen both to have administrative agencies and to maintain historic separation-of-powers principles. What that fully entails awaits development.

Endnotes

1 Patrick J. Wright is the Senior Legal Analyst at the Mackinac Center for Public Policy and authored the Center's *amicus* brief in *Rovas*.

2 *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

3 *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 93 (2008).

4 *Federal Trade Comm v. Ruberoid Co*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting).

5 *Rovas*, 482 Mich at 101.

6 *Id.*

7 5 U.S. (1 Cranch) 137 (1803).

8 *Id.* at 102.

9 *Id.* at 111.

In Memoriam – Willa Mae King

Willa Mae King, the first female African-American appointee to the Michigan Public Service Commission, died on June 11, 2008. Born on February 3, 1932, she graduated from the Detroit College of Law and was admitted to the Michigan Bar in 1971. She was appointed by Governor William Milliken to a post as MPSC commissioner on August 9, 1977, and served until February 9, 1980.

Her passing elicited this commentary from Daniel Demlow, who served as MPSC chairman during Ms. King's tenure:

> "It was my pleasure to know and work with Commissioner King. Long after my memory of the decisions we made, the agreements and disagreements elude me; what remains is the clear memory of Willa Mae the person. She had a smile for everyone and a hearty laugh that was infectious, but above all she was the most gracious of people. She genuinely cared about those she worked with and those she worked for and did so with class and dignity. She will be missed."

Announcements

Steven D. Hughey Named Chief of Public Service Division

Steven D. Hughey was named chief of the Public Service Division of the Michigan Attorney General's office on June 28, 2008, after serving for a decade in the division as one of the attorneys with direct case responsibility. His new responsibilities include providing counsel to the Michigan Public Service Commission and its staff, supervising the representation of the State of Michigan before federal energy and telecommunications regulatory agencies, and managing the affairs of the division. Hughey joined the Department of Attorney General in 1988 and has also served in the Revenue, Finance & Development, and Corrections Divisions. He received his law degree from the University of Detroit-Mercy and has an undergraduate degree from Michigan State University.

In Our Next Issue

Next issue, we'll feature coverage of the historic removal proceedings involving the mayor of Detroit, described by the governor as "an administrative hearing" and a landmark precedent for future removal proceedings.

We'll also feature coverage of the state's new energy policy signed into law by the governor on October 6, 2008.

Submissions

The Administrative Law Journal welcomes unsolicited manuscripts, particularly those dealing with issues of law, government, and public policy in Michigan, and letters to the editor. There is no average or expected length to submissions.

Inquiries, information, suggestions, and items for publication can be directed to the Publications Committee: Jack Dempsey of Dickinson Wright PLLC (*jdempsey@dickinsonwright.com*) and Kim Breitmeyer of the Michigan Department of Labor and Economic Growth (*breitmeyerk@michigan.gov*).

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the effect of opening and closing statements, knowledge of case law, administrative agency rules and enabling statutes, and the practitioner's familiarity with the case file. Interestingly, the results of the survey varied between agencies. The overriding best practice as determined by the administrative law judges was preparation. It was important to the administrative law judges that attorneys before them reviewed the case file, had consulted with their client and witnesses before the hearing, understand their settlement parameters, consulted with opposition before the hearing, have an organized presentation, and focus on the issues in the dispute. Mr. Holiday has agreed to present the results of his survey in a more detailed presentation in Lansing for the Administrative Law Section on December 12, 2008 at a Luncheon Lecture at the Kellogg Center in East Lansing. More information will soon be published.

Mr. Kehres described what order writer staffers do, presented the best practices and poor choices for record development, described legal challenges to agency jurisdiction and provided his best advice. Mr. Kehres described the differences between "staff drafted' orders and "attorney drafted" orders. Mr. Kehres recommended that practitioners focus on important issues and provide a sound basis for the administrative law judge to rule in their favor in the administrative law judge's proposal for decision or the agency's final order. Further , practitioners should keep the agency's public policy determinations in mind during the case. Mr. Kehres reminded the lawyers to "skip the passion" since there is no jury! Mr. Kehres reminded the lawyers in attendance to not mislead the agency, not to attack or impugn the character of witnesses, not to spend too much time challenging procedural determinations made by the administrative law judge after the hearing and not to leave any doubt what your client's position is. Finally, Mr. Kehres reminded the audience to try to influence the staff of the agency to your position, since the agency adopts the staff view approximately 75% of the time.

Mr. Ross described what he likes to see in a record when issuing a decision as an agency head. He likes to see a complete and detailed record that addresses all of the factual issues in dispute and clearly and succinctly analyze all of the legal issues presented. Mr. Ross indicated that OFIR is going to investigate publishing all of his decisions on their website and conduct a thorough review of the Office's promulgated rules, particularly in relation to practice and procedure rules for administrative hearings in the agency. Finally, Mr. Ross commented on the recent Michigan Supreme Court opinion in re Complaint of Rovas Against SBC Michigan, 482 Mich 90 (2008) on the issue of the level of deference a reviewing court will give to an agency's interpretation of the statute that it is authorized to administer.

Judge Draganchuk emphasized the need to create a legible record. To that end, Judge Draganchuk emphasized that practitioners should treat the administrative hearing room just as they would a trial In Circuit Court. She emphasized how important it is to speak clearly and loudly, and not talk over each other during the hearing so that a legible transcript can be created. On judicial review, she indicated how important it is to address only the arguments raised on appeal. She directed some comments to agencies regarding credibility determinations. She discussed at great length the judicial review standards, particularly the competent, material and substantial evidence standard. She discussed the Michigan Supreme Court opinion in *MERC v. Detroit Symphony Orchestra*, 393 Mich 119 (1974) and the Court's discussion of the substantial evidence standard. She also discussed the deference a reviewing court may give to an administrative law judge's credibility determinations in the proposal for decision in the event of a conflict between the PFD and the final agency order.

All in all, the annual program was a big success. The panelists were thoughtful and instructive to the Section's members. The participants each took away practice tips surely to assist them in their practice.

Programming Notice

On December 12, 2008, the Administrative Law Section will host a luncheon program entitled "Administrative Hearings - What ALJs Want You to Know" featuring ALJ Manager, Gregory Holiday at the Kellogg Center Riverside Room at 12:00 Noon. Judge Holiday will present the results of the survey of Michigan administrative law judges related to issues important to ALJs. The cost is $20 for members and $40 for non members, which includes lunch. Contact Mark J. Burzych at mburzych@fsblawyers.com for more information.

Registration information can be found at http://www.michbar.org/adminlaw/pdfs/DecALJ.pdf

Administrative Law Cases

Michigan Supreme Court

The Michigan Supreme Court's decision in *In re Rovas*, (July 23, 2008) is analyzed in Mr. Wright's article in this issue. The case began in April 2001, when William and Sandra Rovas, customers of SBC Michigan ("SBC"), filed a complaint with the Public Service Commission ("PSC") over a $71 erroneous charge on their phone bill that was subsequently reversed. The customers alleged that SBC violated Section 502(1)(a) of the Michigan Telecommunications Act. That section prohibits a telecommunications provider from "[m]ak[ing] a statement or representation . . . that is false, misleading, or deceptive." While not explicitly interpreting the term "false" in its decision, the PSC found that SBC had violated the statute and fined SBC $15,000.

On appeal, while criticizing the PSC's implicit interpretation of "false" as encompassing a statement that is merely incorrect, regardless of whether the statement was intended to deceive, the 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."

In a 4-3 decision, the Michigan Supreme Court reversed. Justice Young , writing for the majority, invoked *Marbury v Madison* and "separation of powers principles" as part of an extensive review of Michigan cases that have sought to articulate and apply a standard for reviewing agency interpretations of law. 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." Ultimately, the Court announced that Michigan courts should henceforth follow the standard articulated more than 70 years ago in *Boyer-Campbell v Fry*, 271 Mich 282; 260 N.W. 165 (1935), in which the Court had held that an agency's interpretation of law is entitled to "respectful consideration."

The Court went on to explain, "'Respectful consideration' is not equivalent to any normative understanding of 'deference' as the latter term is commonly used in appellate decisions." The Court considered "deference" as suggesting a standard of review amounting to something less than the strict *de novo* standard of review that an appellate court would give to a circuit judge's construction of a statute. "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."

To further distinguish the "respectful consideration" standard from a "deference" standard, the Court discussed the federal doctrine of "*Chevron* deference," 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 at issue and the agency's answer is based on a permissible construction of the statute. The Court concluded by stating:

> 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.

Turning then to applying the "respectful consideration" standard to the facts of *Rovas*, the Court concluded that the PSC's interpretation of "false" in Section 502(1)(a) of the Michigan Telecommunications Act was erroneous. Applying the doctrine of *noscitur a sociis* (which stands for 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 only statements made by a telecommunications provider that are intentionally false. The Court therefore reversed the PSC's finding against SBC.

In dissent, Justice Kelly, writing for the minority, 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.

Michigan Court of Appeals

In *Attorney General v. Michigan Public Service Commission*, Nos. 275526, 275527 (August 7, 2008), the Michigan Court of Appeals upheld two orders of the Public Service Commission ("PSC") calculating an electricity provider's "net stranded costs" under the Customer Choice and Electricity Reliability Act ("CCERA"). The attorney general challenged the PSC's method of calculating these costs, which factor into the PSC's determination of what costs can be ascribed to deregulation of the energy industry and thus recovered by pre-deregulation utilities under CCERA. Specifically, the attorney general argued that the PSC's calculation in this case was contrary to the methodology it had employed in its own prior decisions, and that a utility must make a showing that third-party sales were a result of the utility's customers using alternative energy suppliers before those sales can be factored into the net stranded cost calculation.

The Court rejected both arguments. Noting that CCERA explicitly grants the PSC broad discretion to determine stranded costs, the Court held that the PSC was not bound by its own prior methodology for calculating such costs. The Court further held that the PSC was not required to demand evidence from a utility linking third-party sales to the utility's loss of energy supply customers.

Insurance Institute of Michigan v. Commissioner, No. 262385 (August 21, 2008), involved a declaratory action challenging the validity of administrative rules regulating insurance company use of credit report scores in setting policyholder rates. The Court of Appeals vacated a circuit court order granting a permanent injunction and declaring the rules unlawful and unenforceable and lifted the stay imposed on the commissioner's enforcement of the rules. Although the panel was split, with one judge holding that the circuit court erred in permitting plaintiffs to maintain an original action, and another concluded that the circuit court erred in failing to base its review on the administrative record and in accepting additional evidence and further erred in its conclusions on the merits, the end result was reversal.

In *Department of Agriculture v Appletree Mktg, LLC*, No. 277743 (Sept. 16, 2008) , the Court held that because the Agricultural Commodities Marketing Act sets forth new rights and requirements not found at common law, with creation of remedies for those rights that also did not exist in the common law, the remedies conferred by the Act are exclusive for any violation of the statute. Plaintiffs were thus barred from seeking damages for a violation under common law and statutory conversion theories.

Executive Branch

Executive Order 2008-2

Under the general authority to make changes in the organization of state government deemed necessary for its effective administration,[1] the governor issued Executive Order 2008-2[2] 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.[3]

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, while directing the commissioner of the Office of Financial and Insurance Regulation to focus activities on overall regulatory responsibilities. The advocate would exercise the powers, duties, responsibilities, and functions prescribed under the Executive Order independently of the commissioner. Those functions include advocating for affordable, reliable, and fair automobile insurance and home insurance; conducting hearings and investigating laws, regulations, and practices from around the country to assess the impact of automobile insurance and home insurance rates, rules, and forms on consumers in Michigan; submitting 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 referring potential criminal conduct to the commissioner, the attorney general, or an appropriate law enforcement agency.[4]

Endnotes

1 Const. of 1963, art. V, § 2.

2 MCL 445.2005.

3 This department is now the Department of Energy, Labor, and Economic Growth by virtue of Executive Order 2008-20.

4 MCL 445.2005.

Happy Thanksgiving — from the Section Council