State Bar of Michigan

Administrative Law Journal

A Publication of the State Bar of Michigan Administrative & Regulatory Law Section

Chair's Column

By Kimberly A. Breitmeyer

Fall 2011, Issue 45

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First, on behalf of the Council and myself, thank you to my immediate predecessor, Richard Patterson, for his chairmanship over the past year. Under Rich's leadership, we amended our Bylaws, published quarterly editions of this Journal, began an exciting new Law Student Writing Competition, and hosted three successful programs with the Michigan Tax Tribunal, the Attorney General's Office, and with the Director of the newly-created Michigan Administrative Hearing System. Thankfully, Rich agreed to serve as an ex-officio member of the Council over the upcoming year.

Council and Officer Elections

Thank you to two of our existing Council members who generously volunteered to serve another term on the Council -- Michael S. Ashton and Michael J. Watza. We appreciate your continued service to the Section.

At the annual meeting in Dearborn, the Section voted to elect two new Council members for three year terms — Christine Mason Soneral, Vice President and General Counsel of Utility Operations at ITC Holdings Corp., and J. Patrick Howe of Howard & Howard, who regularly practices before the Liquor Control Commission. Welcome! The Council also elected the following officers: Jon Christinidis as Chair-Elect; Michael Matheson as Secretary, and Michael Ashton as Treasurer (third term). In addition, former Council member and past Chair, Stephen Gobbo, will serve as the Section's liaison to the Board of Commissioners. He was also recently installed as Chair of the Representative Assembly for 2011-12.

September 2011 Annual Business Meeting and Program.

The Section conducted its annual business meeting on September 16, 2011. Chief Deputy Director of the newly-created Department of Licensing and Regulatory Affairs (LARA) and Executive Director of the new Michigan Administrative Hearing System, Mike Zimmer, was our featured program speaker. He advised our members on important changes to the uniform administrative hearings system, which is now the largest central panel of adjudicators in the United States.

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The *Administrative Law Journal* is published by the Administrative Law Section of the State Bar of Michigan, 306 Townsend Street, Lansing, Michigan 48933-2012. Send proposed articles to Jack Dempsey, Dickinson Wright PLLC, at this email address: *jdempsey@dickinsonwright.com*

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He also updated us on the efforts of the newly created Office of Regulatory Reinvention, which is currently seeking input from the public: *http://www.michigan.gov/lara/0,4601,7-154-10576_35738-254962--,00.html*. Please take the time to offer your questions or comments as the office culls through tens of thousands of existing rules and regulations to determine whether changes or elimination of the rules and regulations are appropriate with the goal of fostering economic growth.

There may be future opportunities for the Council and Section to provide input on planned revisions to the Michigan Administrative Procedures Act and the creation of Uniform Hearing Rules. Mr. Zimmer responded to many questions from the audience about these important changes. Please see his article in this issue.

Upcoming Events

The Council met on October 19 and hopes to plan luncheon programs beginning in December. Chief Judge Kimbal R. Smith of the Michigan Tax Tribunal will be the featured speaker at a luncheon event hosted by the Section scheduled on Friday, December 16, 2011 at the Kellogg Center. The Taxation and Public Corporation Sections are again co-sponsoring the event. Some of the other ideas being pursued are programs involving the Liquor Control Commission, the Public Service Commission, and the Department of Human Services. Please stay tuned.

Administrative Law Journal

As I step into my new role as Chair this year, Co-Editors Gary Gordon and Jack Dempsey and Council and newsletter committee member Christine Mason Soneral will need some additional assistance in producing relevant and timely articles from your experiences in your practice or in your particular area of expertise. Please contact any of them with a proposed article or idea for addressing issues facing our membership. Thank you to our regular contributors, including Ronald Richards of Foster, Swift, Collins and Smith, P.C. Jennifer Copland, Adjunct Professor of the MSU College of Law, has also offered to serve as a regular contributor.

In addition, we hope to continue our annual Law Student Writing Competition. Information relative to that will be disseminated to the law schools shortly.

New Student Liaison

University of Detroit-Mercy law student (J.D. expected in 2013), Kelly Houk, was appointed as the Section's Student Liaison and will be regularly attending Council meetings to better connect us to the interests and needs of law students. She will also assist us in soliciting participation in the Law Student Writing Competition and contribute her own writing talents to our *Administrative Law Journal*.

I will be taking a short respite from some of my duties as Chair while on maternity leave this Fall, during which time Chair-Elect Jon Christinidis will ably fill in for me where needed. Thank you to the Council for supporting me, and I look forward to serving you in the coming year. I welcome any comments or suggestions you may have, and I may be reached at *kim.breitmeyer@gmail.com* at any time.

Reinvention in Action:

The Michigan Administrative Hearing System as an Example of Governor Snyder Creating Efficient and Effective Government

By Michael Zimmer

Governor Rick Snyder's vision to reinvent government and to create efficient and effective service delivery programs is realized in the Michigan Administrative Hearing System (MAHS) created by Executive Order 2011-4.

. . . Governor Snyder has created the single largest central panel of administrative adjudicators in the country, the first central panel to include both first and second step appeal processes, and the central panel vested with the widest jurisdictional base.

The newly created MAHS is charged with providing centralized contested case adjudications in an efficient, fair, and timely manner. At its formation, MAHS collapsed the functions previously vested in the State Office of Administrative Hearings and Rules (SOAHR) (non-rule), the Michigan Tax Tribunal, the Workers' Compensation Board of Magistrates, the Workers' Compensation Appellate Commission, and the Michigan Employment Security Board of Review.

In MAHS, Governor Snyder has created the single largest central panel of administrative adjudicators in the country, the first central panel to include both first and second step appeal processes, and the central panel vested with the widest jurisdictional base.

MAHS employs over 150 full-time adjudicators (administrative law judges and gubernatorial appointed Magistrates, Commissions, and Board of Review members), plus over 20 contract ALJs and other attorneys in support capacity. Collectively, MAHS is responsible for a diverse caseload that is expected to include over 225,000 in its first year.

Subsequent to the creation of MAHS, Governor Snyder issued another executive order significantly impacting administrative hearings – Executive Order 2011-6 – establishing the Michigan Compensation Appellate Commission. This change merged the appellate functions previously vested in the Michigan Employment Security Board of Review and the Workers' Compensation Appellate Commission into a single entity better able to respond nimbly to expanding or contracting caseloads.

MAHS is now responsible for conducting contested case adjudications under literally hundreds of statutes and handles case referrals from most state departments. Its six largest caseload areas are:

1. *Department of Corrections*: Last fiscal year, the caseload in this area exceeded 83,000. Through a change in DOC process, that caseload is expected this year to be reduced to approximately 35,000.
2. *Department of Human Services*: This diverse caseload includes licensing, public benefit, and Medicaid eligibility and disability caseloads. MAHS is on track to handle over 50,000 cases in this area.
3. *Unemployment Agency, Department of Licensing and Regulatory Affairs*: MAHS has diverted significant resources into this area in recent years to respond to a spike in unemployment appeals. Our previous high intake in unemployment appeals was over 50,000 cases. We expect to have exceeded that in the just-completed fiscal year.
4. *Michigan Compensation Appellate Commission (MCAC)*: MCAC is responsible for appeals from administrative law judges assigned to Unemployment Agency appeals, as well as Board of Magistrate decisions in Worker's Compensation Appeals. It has a pending appellate caseload of over 5,000.
5. *Worker's Compensation Board of Magistrates*: A panel of gubernatorial appointed magistrates, this body currently has over 14,000 open cases.
6. *Michigan Tax Tribunal*: MAHS has also channeled significant resources into this area to respond to in-

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creasing claims. While rapid progress has been made, over 12,000 Entire Tribunal and over 21,000 Small Claims appeals remain pending.

While it is still a new entity, MAHS has an aggressive agenda for change and improvement. MAHS is launching a new docketing software application in many of its major adjudicative areas. We are right-sizing the Michigan Tax Tribunal's adjudication and staffing to respond to historic caseload levels. We are re-scoping different processes to improve timeliness in Department of Human Services case referrals. We have established productivity and timeliness standards in all areas of MAHS. We have established case-specific performance benchmarks in all adjudicative areas. We have developed "Uniform Hearing Rules" to apply in most MAHS adjudicative areas. We have launched pilot programs in limited adjudicative areas involving webcam hearings and paperless files.

All of these actions, when put together, are creating a more efficient and effective adjudication system that is delivering better service for Michigan citizens. This is reinvention in action.

About the Author

Mike Zimmer is Chief Deputy Director of the newly-created Department of Licensing and Regulatory Affairs (LARA) and Executive Director of the new Michigan Administrative Hearing System. This article is a synopsis of a presentation recently made at the Administrative Law Section's September 2011 Annual Business Meeting on September 16, 2011. Mr. Zimmer's undergraduate degree is from Michigan State University, and his law degree is from George Washington University.

Michigan Constitution Article 6, Section 28:
A Guarantee of Judicial Review?

By Mark J. Burzych and Matthew C. Wyman

Introduction

On May 23, 2011, the Michigan Supreme Court issued its opinion in *Midland Cogeneration Venture Limited Partnership v. Naftaly,* 489 Mich 83 (2011).

The question before the Court asked: does the Michigan Constitution article 6, section 28, confer upon the circuit courts subject matter jurisdiction to review a State Tax Commission ("STC") decision regarding property classification? More broadly, this case presents the issue of whether parties have a constitutional right to judicial review of administrative agency decisions, findings or orders.

Specifically at issue is Michigan Constitution article 6, section 28, which states:

> *All final decisions, findings, rulings and orders of any 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 courts as provided by law.*

And MCL 211.34c(6), which states in relevant part:

> *An appeal may not be taken from the decision of the state tax commission regarding classification complaint petitions and the state tax commission's determination is final and binding for the year of the petition.*

The Court of Appeals held that the Constitution does not confer a right to judicial review, relying on MCL 211.34c(6), the Michigan Legislature's attempt at "statutory preclusion" of judicial review.[1] The case's outcome on appeal to the Supreme Court hinged on the Court's interpretation of the "as provided by law" clause in article 6, section 28. The Court of Appeals and the STC read it as a bar to judicial review when the applicable law – MCL 211.34c(6) – so provides; the plaintiffs read the clause not as a bar to review, but as a mechanism as to how a party exercises her constitutional right to judicial review.

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Procedural History

The plaintiffs submitted to the Board of Review a dispute regarding how their respective local tax assessors classified certain property owned by the plaintiffs. After receiving an adverse decision from their local Boards of Review, plaintiffs then appealed the Board's decision to the STC. In each case, the STC affirmed the tax assessor's determination.

Each plaintiff filed a complaint with the circuit court contesting the STC's decision. The STC moved for summary judgment, arguing that the circuit courts lacked jurisdiction to review its decisions pursuant to MCL 211.34c(6). The circuit court denied the STC's motions and entered orders granting the plaintiffs the relief sought.

The Court of Appeals reversed the circuit court and remanded the matter for an entry of an order granting summary disposition in favor of the STC in each case. Specifically, and pertinent to the scope of this article, the Court of Appeals held that the right to appeal an administrative finding to the courts under article 6, section 28, was properly precluded by MCL 211.34c(6), the statute applicable to the STC.

The Court of Appeals reasoned that a party may appeal an administrative finding pursuant to article 6, section 28, unless the law provides otherwise; namely MCL 211.34c(6), which bars an appeal of the STC's findings and decisions at issue.

The Supreme Court's Decision

The Supreme Court reversed the Court of Appeals and held that under article 6, section 28, of the Michigan Constitution, the circuit courts have subject matter jurisdiction over appeals from the STC regarding property classifications when certain elements are met with respect to the administrative decision and when the Legislature provides no other means of judicial review of the STC decision. More importantly, the ruling stands for the broader proposition that the Legislature may not preclude judicial review by statute.

A basic tenet of constitutional law is when a section of the constitution conflicts with a statute, the constitution wins; the Legislature may not take away what the constitution grants. Staying true to this basic tenet, the Michigan Supreme Court held that while the Legislature cannot statutorily preclude judicial review, article 6, section 28, is not an absolute guarantee of judicial review of every administrative decision. In order for judicial review to apply: (1) the administrative decision must be a "final decision" of an administrative agency; (2) the agency must have acted in a "judicial or quasi-judicial" capacity; and (3) the decision must affect private rights or licenses. *Midland Cogeneration Venture slip opinion, p. 10.*

It was uncontested that the challenged STC decisions were final decisions of a quasi-judicial agency. The Court, relying on Mich Const 1963, article 9, section 3 (requiring the Legislature to provide uniform taxation of property), concluded that the STC decisions affected private rights because the plaintiffs have an interest in the proper interpretation of the statutory definitions of their property. An erroneous interpretation of the statute could impermissibly increase their tax burden. *Id, pp 11-13.*

The Legislature provided no other mechanism for judicial review when it enacted MCL 211.34c(6). Despite the STC's argument to the contrary, the plaintiffs could not seek a refund in the Michigan Tax Tribunal because the Tribunal lacks jurisdiction over STC classification decisions. *Midland Congregation Venture Ltd Partnership v City of Midland,* order of the Michigan Tax Tribunal, entered April 21, 2010 (Docket No. 383162).

The Supreme Court rejected the Court of Appeals and the STC's reliance on *McAvoy v. H.B. Sherman Co*, 401 Mich 419, 258 NW2d 414 (1977), for the argument that "as provided by law" meant that the Legislature has the authority to limit the jurisdiction of the circuit courts.

In *McAvoy*, the Court held that "the phrase "as provided by law" clearly vests the Legislature with the authority to exert substantial control over the mechanics of how administrative decisions are to be appealed. *McAvoy,* 401 Mich at 443 (emphasis added), citing *Viculin v Dept of Civil Service*, 386 Mich 375; 192 NW2d 449 (1971). It would be inaccurate to contend that article 6, section 28, guarantees an unencumbered, *de novo* right to appeal. The very wording of the provision states otherwise. Article 6, section 28, specifically provides that such rulings "shall be subject to direct review by the courts as provided by law." *Id.*

The holding in *Midland Cogeneration Venture* follows *McAvoy* in that "as provided by law" means the Legislature will provide the manner of judicial review – the "how," "when," and "what" of the appeal. MCL 211.34c(6), on the other hand, is not an exercise of the control over the mechanics of an appeal to the courts of STC classification decisions. *Midland Cogeneration Venture, p 14.* Rather, it is a complete prohibition of court review. *Id.* (emphasis added).

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The Court in *Midland Cogeneration Venture* held that "the phrase 'as provided by law' in article 6 section 28, does not grant the Legislature the authority to circumvent the protections that the section guarantees. If it did, those protections would lose their strength because the Legislature could render the entire provision mere surplusage. And given that no other mechanism for review of STC classification decisions exists, the last sentence of MCL 211.34c(6) violates article 6, section 28." *Id.* at p. 15. Even more, the circuit court would have jurisdiction under the Revised Judicature Act, which allows appeals of decisions by state agencies when judicial review "has not otherwise been provided by law." *Id.* at p. 17; MCL 600.631.

The *McAvoy* and *Midland Cogeneration Venture* courts recognize that just because a party has a right to appeal, she does not have *carte blanche* to perfect her appeal in any manner she sees fit. The Legislature may enact, and in many instances has enacted, laws that govern the process of the appeal, but it may not enact laws that abolish the right to appeal.

Constitutional History & Intent

While it was not addressed by the Supreme Court, the plaintiffs' briefs to the Court discussed the constitutional drafting history at length. The constitutional history of article 6, section 28's drafting supports the position that it guarantees a right of judicial review. The heart of the debate was the separation of powers doctrine -- the need to maintain a distinction between the executive branch's agency powers and the rulings of the judiciary. Prior administrative abuse made it "necessary to protect the people in their right of appeal and their right to be heard in another branch of government, namely, the judicial branch, on matters affecting their person, their property, or their business." *2 Official Record, Constitutional Convention 1961, p. 144 (Comments of Iverson)*. "When an individual acts in the capacity of a prosecutor, a jury, and a judge – it doesn't matter whether he is affecting a privilege, a right or a license, we are going to give that person his day in court." *Id. p. 1451 (Comments of Boothby)*.

The drafters were intent on protecting the citizenry from arbitrary state action and the binding effect of administrative agencies when they debated article 6, section 28. It would be contrary to their intent to read "as provided by law" as prohibiting judicial review when ensuring judicial review was so important in the debate. The Supreme Court recognized judicial review's importance in *Midland Cogeneration Venture*, essentially echoing the Constitutional Convention: "Article 6, section 28 guarantees judicial review of administrative decisions."

Conclusion

Article 6, section 28, provides a right to judicial review of agency decisions, as long as: (1) the decision is a final decision of an administrative agency; (2) the agency acted in a judicial or quasi-judicial capacity; and (3) the decision affected private rights or licenses. Further, unlike Congress' authority to preclude judicial review of administrative decisions, the Michigan Legislature may not preclude judicial review by statute.

About the Authors

Mark J. Burzych earned a B.A. from Michigan State University and J.D. from the University of Michigan. Matthew C. Wyman earned a B.A. from the University of Michigan and J.D. from DePaul University College of Law. Both are attorneys with the Lansing firm of Fahey Schultz Burzych Rhodes, PLC.

Endnotes

1 Under the federal system of judicial review of administrative agency decisions, Congress has the authority to preclude judicial review by statute, so long as Congress does so in clear and unambiguous language. See, *5 USC §701(a)(1)*; *Dept of Environmental Protection v Civil Service Comm,* 579 NE2d 1385 (NY 1991), *Block v Community Nutrition Inst,* 467 US 340, 349 (1984). Even if Congress clearly and explicitly precludes judicial review, a federal agency's decision can still be reviewed by an Article III court if constitutional issues or issues related to the *ultra vires* actions of the agency are raised. See, *Webster v Doe*, 486 US 592 (1988); *Bartlett v Bowen,* 816 F2d 695, 703 (DC Cir 1987).

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. See page 1 for contact information.

Recent Administrative Law Case Activity

By Ronald D. Richards Jr., *of Foster, Swift, Collins & Smith, P.C.*

Introduction

Notable administrative case law activity in the last quarter included two published and three unpublished Michigan Court of Appeals decisions.

The two published decisions involve these issues: (1) whether a state agency exceeded its authority in enacting a rule requiring identical library services to citizens of another jurisdiction; and (2) whether the Michigan Public Service Commission erred in allowing a gas utility to collect funds from its customers for a program designed to offer some protection against service interruptions to distressed ratepayers. The three unpublished decisions involve these issues: (1) whether an interconnection agreement between telecommunications carriers must include a facilities charge clause; (2) whether the Department of Energy, Labor & Economic Growth exceeded its authority in refusing to accept for filing proposed articles of organization for a limited liability corporation; and (3) whether an agency's alleged violation of its own internal rules can create a due process violation.

Department of Education's Library Services Rule Is Invalid Because Department Lacked Underlying Enabling Authority For That Rule

The Court of Appeals held that a library is not required to provide identical services to citizens of another jurisdiction who do not pay taxes or fees for those library services. *Herrick v Dep't of Educ*, ___ Mich App ___ (Docket No. 300393, dec'd August 16, 2011). There, a public library provided services to individuals living within its jurisdictional area and maintained outside-service contracts with outlying municipalities. In some cases, the library offered different library services to residents of the contractual service area than those provided to residents of its district. The Michigan Department of Education passed a rule that a library could not get state aid if it offered different services to outside-service area residents compared to residents in its jurisdictional area. The library sued for declaratory judgment to invalidate the rule. The trial court ruled the rule was invalid.

The Court of Appeals affirmed. The Court agreed with the library that the Department could not rely on inferred rulemaking authority. It noted that an agency may infer a degree of implied rulemaking authority from an enabling statute only when that implied authority is "necessary to the due and efficient exercise of the powers expressly granted" by the enabling statute. The Court ruled that the Department's rule was invalid since its enabling statutes did not give it express power to formulate rules for eligibility for state aid. The Court added that any legislative act requiring libraries to give equal services to all individuals, regardless of where they live and their financial contribution, would "be of dubious constitutionality." If the Legislature's authority to pass such a statute is highly questionable, an agency certainly cannot claim an implied ability to do so.

Gas Utility May Not Charge Customers to Fund the Low-Income & Energy Efficiency Fund

The Court of Appeals recently decided consolidated cases involving whether a gas utility can impose certain charges: (a) charging customers to fund the low-income and energy efficiency fund created by 2000 PA 141, and (b) use an uncollectible expense true-up mechanism to reconcile recovery of estimated losses stemming from customers who fail to pay their bills. *In re Application of Michigan Consol Gas Co*, ___ Mich App ___ (Docket Nos. 298830, 298887, dec'd July 21, 2001). Mich Con sought to include in its customer charges over $5 million in funding for the Low-Income & Energy Efficiency Fund (LIEEF). It also sought to continue to use an uncollectible expense true-up mechanism (UETM) as a way to reconcile recovery of estimated and actual losses stemming from customers who fail to pay their bills. The UETM addresses a utility's burden in supplying energy to consumers from whom it cannot collect. The MPSC ruled that Mich Con could continue its uncollectible expense true-up mechanism and charge ratepayers for funding of the LIEEF.

The Court of Appeals upheld Mich Con continuing its UETM. It ruled that the MPSC's decision and rationale on the UETM was not retroactive rate-making. It explained that the UETM is designed to defer the difference between the initially projected and the actual uncollectible expenses for a given period to a future year, and so it is not retroactive ratemaking.

But the Court reversed the MPSC's decision to allow Mich Con to charge its ratepayers for funding the LIEEF. The Court reviewed the seemingly contradicting statutory language: the Customer Choice Reliability Act (the Act),

2000 PA 141, created the LIEEF to provide shut-off protection for low-income customers and promote energy efficiency for all; but 2008 amendments to the Act left it with no reference to a LIEEF; yet 2009 amendments to the Act has some references to a "low income and energy efficiency fund" while appropriations in 2009 included provisions for the LIEEF. The Court ruled that the now-deleted provisions were the enabling legislation for the fund. It interpreted the 2008 and 2009 amendments as legislative intent to withdraw any obligation or prerogative on the part of MPSC-regulated utilities to raise money for that fund. The Court concluded that the MPSC's authority to allow a utility to recover its reasonably and prudently incurred costs does not include the authority to approve of a utility's collecting funds from its ratepayers in general to fund a program designed to offer some protection against interruptions in services, or other such relief, to distressed ratepayers.

Negotiated Interconnection Agreement Need Not Include A Facilities Charge

When telecommunications carriers negotiate an interconnection agreement, that agreement does not have to include a facilities charge. *Lucre, Inc v Verizon North, Inc*, unpublished per curiam opinion of the Court of Appeals (Docket No. 298296, dec'd October 20, 2011). Years before, Verizon and another carrier (BRE) negotiated some terms of an interconnection agreement, but submitted a few disputed issues to arbitration before the MPSC. They did not submit any issue pertaining to a facilities charge – e.g., Verizon's duty to pay for its proportionate use of BRE's transport facilities. The MPSC-approved interconnection agreement did not have a facilities charge clause in it.

Lucre later opted into the Verizon-BRE interconnection agreement. Then, Lucre demanded that Verizon pay for its proportionate share for using Lucre's transport facilities. Verizon refused, and Lucre filed a complaint with the MPSC. The MPSC dismissed the complaint, ruling that Verizon and BRE were within their rights to negotiate to exclude a facilities charge.

The Court of Appeals affirmed. It first noted that facilities charge clauses must be included in arbitrated interconnection agreements, but not negotiated agreements. And it noted that an interconnection agreement may be partly negotiated and partly arbitrated, as in the case of the BRE-Verizon agreement. Since the BRE-Verizon agreement was negotiated in part and arbitrated in part, the Court ruled that that agreement cannot be deemed to be fully arbitrated. Given that finding, the Court then held that the agreement does not have to include a facilities charge clause. Though several authorities provide for a dedicated facilities charge, none requires that charge to be included when an agreement is negotiated. For those reasons, the Court agreed with the MPSC's dismissal of the Lucre complaint.

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DELEG's Refusal to File Articles of Organization Exceeded Its Authority

The Court of Appeals recently ruled that the DLEG's refusal to file articles of organization was unlawful. *Jackson v Dep't of DLEG*, unpublished per curiam opinion of the Court of Appeals (Docket No. 297762, dec'd June 23, 2011). In *Jackson*, the petitioner submitted articles of organization for an LLC entitled "Ottawa Guardian Services, LLC." The DELEG refused to file them, stating it treated "guardian" as a cautionary word because it interpreted the Banking Code to prohibit an LLC to act as a fiduciary. The trial court ruled that the DELEG's interpretation was not proper. It ordered the DELEG to accept the articles for filing.

The Court of Appeals affirmed and held that the DELEG had no authority for its refusal. The Court stated that the DELEG may only "simply review the documents, determine whether they substantially conform to the LLC Act's requirements, and if they do, must endorse and file them." In other words, the DELEG's role was purely ministerial. If the articles facially complied with the LLC Act, the DELEG had to file them – even if the DELEG director suspected or knew the organizing member intended to use the LLC to engage in business activities that the director believed was unlawful for an LLC. It further ruled that the DELEG may not consider the petitioner's intent in conducting its review.

Court Rejects Due Process Claim Premised On Agency Not Violating Its Own Internal Rules

The Court of Appeals rejected a doctor's claim that a state agency violated the doctor's due process rights by failing to follow its own policies. *Dep't of Community Health v Payea*, unpublished per curiam opinion of the Court of Appeals (Docket No. 293727, dec'd September 29, 2011). There, the state Department of Community Health filed a complaint against the doctor for violations of the Public Health Code. After a hearing and a proposal for decision, the Department filed exceptions with the state Board of Medicine Disciplinary Subcommittee (an entity within the state Department of Community Health). The Subcommittee suspended the doctor's medical license for violating the Code.

On appeal, the doctor alleged that the decision is reversible on due process grounds since the Subcommittee did not follow its own rules. The doctor alleged that those rules allow doctors leeway in their treatment of chronic pain. The Court of Appeals disagreed. It noted that in civil cases, "due process" means receiving notice of the nature of the case and an opportunity to be heard before a neutral decision-maker. Since the doctor had notice of all proceedings, was allowed to introduce proper evidence, and was fully heard by neutral decision-makers, there was no due process violation. The Court also reviewed the record and concluded that there was no factual basis to conclude that the Subcommittee ignored its own rules.

Save That Thought!

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Do you ever need to quickly capture a thought, list a to-do item or remember a parking spot location? Using an application like Tape-a-Talk for Android devices or Voice Memos for iPhones allows you to quickly create an audio reminder note. These apps can be very handy, making it easy to record a message and delete it after the reminder has served its purpose. Some of these applications also make it easy to send the recording as an attachment to an email. If you've ever found yourself wandering around a parking lot searching for your car—or hitting your forehead because you finally remembered what it was you were supposed to do—explore a "voice solution" through the Android Market or the Apple App Store.

If you are interested in a cross-platform note capture application this earlier tip about Evernote may prove helpful.

Every week, the Practice Management Resource Center posts a new Tip of the Week. To reach a practice management advisor, call the PMRC Helpline at (800) 341-9715 or e-mail your questions to pmrcHelpline@mail.michbar.org.