STATE BAR OF MICHIGAN

Administrative Law Journal

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

Chair's Spring Note

By Richard A. Patterson, *State Office of Administrative Hearings and Rules*

Spring 2011, Issue 43

Table of Contents

First, a reminder that Attorney General Bill Schuette will speak at a luncheon meeting of the section in conjunction with the Environmental and Public Corporation Law Sections on May 19, 2011. Details of the time and place are contained in the registration form enclosed. At this point, we are unsure as to the specific subject of this talk, but with all the changes occurring in state government, it should be interesting. A question and answer session will follow.

The council has decided not to hold the luncheon meeting with the Public Service Commission and staff as anticipated this year, principally due to the fact of changes in the Commission anticipated in July. It was further decided that scheduling the program after that would be difficult due to summer schedules and potential conflicts with other potential fall programs. It is anticipated it will be held again next May, however.

With the consent of the council I have signed the diversity pledge, as requested by President Jenkins on behalf of the section and would encourage members who feel inclined to do so individually. This can easily been done on the SBM website.

If you have not already done so, please complete the survey recently sent by SBM. This will enable the Bar to obtain members opinions on services provided and enable them to address those in the future.

Finally, the annual meeting has been set for Friday, September 16, 2011 in con junction with the SBM annual meeting at the Hyatt Regency in Dearborn. The business meeting will be from 10 to 10:30 a.m. with a program to be announced from 10:30 to noon.

Enjoy the long awaited and well deserved Spring weather. Hopefully, we can also take time from our professional obligations to enjoy the start of Summer.

2010-2011
Section Council

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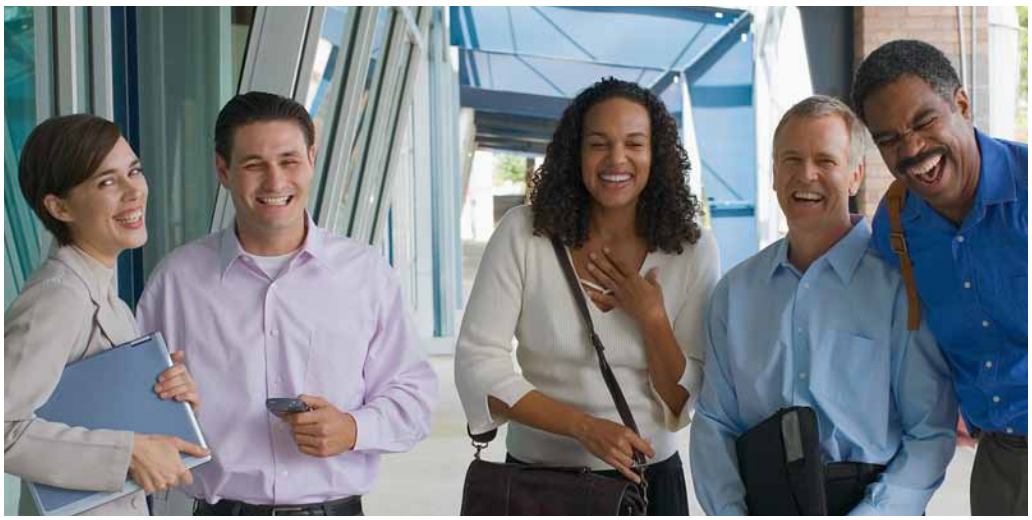
The views expressed in this publication do not necessarily reflect those of the Administrative Law Section of the State Bar of Michigan. Publication of an author's material does not constitute an endorsement of the views expressed.

Announcements

Now Accepting Nominations for Administrative & Regulatory Law Section Council Positions

Do not miss the perfect opportunity to help shape state legal policy, expand or develop leadership skills, organize professional events, contribute to the *Administrative Law Journal*, and to learn more about the practice of Administrative Law from legal practitioners and decision makers alike. Administrative & Regulatory Law Section Chair-Elect Kim Breitmeyer is currently accepting nominations for Administrative & Regulatory Law Section council members for 2011-2012. There are a total of 12 council members plus one ex-officio member. All council members must be members of the Administrative & Regulatory Law Section. There are four vacancies for three-year terms expiring in 2014. You may submit your nominations to Ms. Breitmeyer by contacting her at the Bureau of Commercial Services, P.O. Box 30018, Lansing, MI 48909; Phone: (517) 604-0157; e-mail: *breitmeyerk@michigan.gov*. Council member elections will take place at the Administrative & Regulatory Law Section's Business Meeting during the State Bar of Michigan's Annual Meeting at the Hyatt Regency, 600 Town Center Drive, in Dearborn starting at 10:00 AM on Friday, September 16, 2011.



Invite someone you know to join the fun.

Invite someone to join the section.

Section membership forms can be found at http://www.michbar.org/sections

Michigan Supreme Court: Insurance Commissioner Exceeded Statutory Authority When Promulgating Administrative Rules Banning the Use of Insurance Credit Scoring

By Kimberly A. Breitmeyer, Co-Editor, *Administrative & Regulatory Law Journal*

Note: *In the Spring 2010 Edition of the Administrative Law Journal, we set forth the facts and policy underlying this case in greater detail. In this edition, we are focusing on the decision's analysis of an agency's authority to interpret its statutory scheme and to promulgate administrative rules. Please feel free to submit your own opinion regarding the evolution and future of this area of Administrative Law.*

On July 8, 2010, in a 5-to-4 decision, Justice Corrigan, writing for the Court majority, invalidated administrative rules 500.2151 to 500.2155 banning the use of credit reports in determining "personal insurance"[1] rates, because the Insurance Commissioner at the time "exceeded her authority" in promulgating the rules. *See Ins Inst of Michigan v Comm'r, Fin & Ins Servs,* 486 Mich 370; 785 NW2d 67 (2010). In doing so, the high court vacated the judgment of the Court of Appeals and reinstated the trial court order striking down the rules as "illegal, invalid, and unenforceable" and permanently enjoining the Office of Financial and Insurance Services (now known as the Office of Financial and Insurance Regulation, or "OFIR") from enforcing them.[2]

Legal Standards Applied

The Court majority and dissent applied the test for judicial review of agency rule making set forth in *Luttrell v Dep't of Corrections*, 421 Mich 93, 100; 365 NW2d 74 (1984) and the recently articulated test regarding deference to an agency's interpretation of the statutes it enforces, *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008), with wildly different approaches and conclusions:

> (1) Whether the rule is within the matter covered by the enabling statute, (2) if so, whether it complies with the underlying legislative intent; and (3) if it meets the first two requirements, [whether] it is neither arbitrary nor capricious. *See Luttrell, supra* at 100.
>
> An agency's construction of a statute 'is entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons,' but 'the court's ultimate concern is a proper construction of the plain language of the statute.' [citations omitted]. '[T]he agency's interpretation cannot conflict with the plain meaning of the statute.'" *See Ins Inst of Mich, supra* at 385 (quoting *In re Complaint of Rovas, supra* at 108.)

The Majority's Rationale for Refusing to Defer to the Agency's Interpretation of the Insurance Code.

The majority reasoned that the rule failed under the first prong of the *Luttrell* test, because the Insurance Code specifically permits the practice of insurance scoring. More specifically, the Insurance Code provides that insurers, and not OFIR, develop specific rating plans to be used to establish insurance rates, subject to statutory limitations, including that the rates are not "excessive, inadequate, or unfairly discriminatory." *See id.* at 386 and MCL 500.2403(d) and MCL 500.2603(d). The plan must also reflect "reasonably anticipated reductions in losses or expenses." *See Ins Inst of Michigan, supra* at 387 and MCL 500.2110a. The majority reasoned that, "[t]he plain meaning of this provision is that an insurer may establish a plan that it reasonably anticipates will reduce *its own* losses or expenses [emphasis in original]," and not necessary to effect "*industry-wide* losses or expenses [emphasis in original]," as the dissent and OFIR interpreted the statute to require. *See Ins Inst of Michigan, supra* at 395. The use of insurance scores would merely reallocate the costs, imposing higher rates on those with better credit scores and lower rates on those with less desirable credit scores.

Both the majority and the dissent pointed to MCL 500.210 for the Insurance Commissioner's rulemaking authority:

> The commissioner shall promulgate rules and regulations in addition to those now specifically provided

> by statute as he may deem necessary to effectuate the purposes and to execute and enforce the provisions of the insurance laws of the state in accordance of the provisions of [the APA].[3]

Because the majority found that the Insurance Code permits the use of credit scores as a rating factor or to establish a "premium discount plan"[4] under Chapter 21 of the Code, it held that OFIR lacked the authority to ban the practice. *See Ins Inst of Michigan, supra* at 400. The majority rejected OFIR's argument that insurance scoring "inherently violates the Insurance Code's prohibition on rates that are 'unfairly discriminatory.'"[5] *See Ins Inst of Michigan, supra* at 406-407. The majority also found persuasive documents both within and outside of the trial court record that "demonstrate a direct, linear relationship between insurance scores and risk for both automobile and homeowners policies." *See id.* at 406. It did not limit its analysis to the administrative record, as urged by OFIR. See id. at 384 n 16.

The majority also discounted admittedly inconclusive evidence that credit reports are inherently inaccurate and unreliable, emphasizing that the OFIR, other state agencies and the state banking and finance industries regularly rely upon credit reports to make a variety of important decisions affecting Michigan residents. *See id* at 402-405. In addition, federal law requires the dissemination of an "adverse action notice" to a consumer who is denied a benefit based at least in part on his credit report information. The consumer may then challenge the denial and the accuracy of his credit report. *See id.* at 406, n 33 (quoting *generally* 15 USC 1681.) The majority did not reach the procedural due process and arbitrary and capricious arguments due to its conclusion that, even if those concerns are valid, they constitute "harmless error" and are not outcome determinative. *See id.* at 384. It also found that the OFIR waived any procedural challenges by arguing that remand to the trial court was unnecessary and requesting a review of the substantive issues raised. *See id*. at 384.

The Dissent's Rationale for Deferring to the Agency and Critiques of the Majority Opinion

By contrast, Justices Cavanagh, Hathaway and Kelly's dissent would affirm the Court of Appeals decision vacating the trial court's order and would hold that, "[b]ecause setting rates using insurance scoring is not clearly permissible under any chapter [of the Insurance Code], . . . the OFIS rules do not violate the legislative intent behind the Insurance Code." *See id.* at 426. The dissent characterizes the relevant inquiry as not whether insurance scoring is permitted by the Insurance Code, but "whether rules banning the use of insurance scoring in setting insurance rates are within the matters covered by MCL 500.210." *See id.* at 411. It found all three prongs of the test articulated in *Luttrell, supra*, satisfied. The dissenters argue that the burden then shifts to the insurance industry plaintiffs to demonstrate that a total ban on the use of credit scores is "inconsistent with the Code." *See id.* at 417. They conclude that the first prong of the test is met, because the rules are "within the matter covered by the Insurance Code." *See id.* In doing so, the dissent emphasizes the legislative intent of the Insurance Code contained within both MCL 500.210, and the preamble of the Insurance Code, which indicates that the purpose of the Code is "to provide for the continued availability and affordability of automobile insurance and homeowners insurance in this state and to facilitate the purchase of that insurance by all residents of this state at fair and reasonable rates . . . ." *See id.* at 418; PA 218 of 1956.

They point out that "insurance scoring" is not specifically enumerated as a permissible rating factor in MCL 500.2111, and that OFIR has determined that setting rates based on insurance scores is not a "premium discount plan" within the meaning of MCL 500.2110a. *See Ins Inst of Michigan, supra* at 418-419. They noted that the administrative record included concessions from insurers that the use of credit scores does not reduce insurance companies' overall losses but merely "reallocates" the amount each insured pays, depending upon his insurance score. *See id.* at 419. The dissent believes this practice to be an "unapproved rating factor," rather than a "discount," and that the practice is not necessarily reasonable or "likely to identify significant differences in mean anticipated losses or expenses." *See id.* at 420-422. It criticizes some of the reports relied on by the majority as analyses of data from other states or focused on only one factor or variable. In addition, most of the reports were conducted by the insurance industry itself. *See id.* at 425-426.

The dissent also critiques the majority's "harmless error" analysis in dismissing OFIR's procedural challenges and opines that it failed to give "respectful consideration" to the agency's interpretation of its statutes, and erroneously shifted the burden of proof to the OFIR. *See id.* at 411-412. However, it finds that the insurers were not deprived of due process, because after the rules took effect, the insurers were entitled to individual contested case hearings before a specific rate could be invalidated. *See id.* at 427-428. The dissenters worry that to create a right to a contested case hearing before new rules are promulgated would "cripple an agency's authority to promulgate rules and be duplicative of the procedural protections already present in the APA." *See id.*

The dissent accuses the majority of ignoring the administrative record, contrary to recent precedent, and of "displacing an agency's choice between two reasonably differing views," contrary to agency deference precedent. *See id.* at

414. The dissent points out that, if only the administrative record is considered, "much conflicting evidence exists on whether insurance scoring is predictive of loss." *See id.* at 413. As a result, the dissent is concerned that the proper separation of powers exists, in that, "[t]o allow a court to make factual findings based solely on a record made in the court would allow the judiciary to substitute its own judgment for that of the agency. Moreover, it would allow the courts to usurp the authority that the Legislature granted to administrative agencies." *See id.* at 416.

Three Justices Concurred in Result but Disagreed Regarding the Scope of the Administrative Record.

Justices Weaver, Young and Markman concurred in the result but addressed the procedural issues that the majority dismissed as "harmless error" by rejecting the precedent set for judicial review of an administrative rule in *Mich Ass'n of Home Builders v Mich Dep't of Labor & Economic Growth*, 481 Mich 496; 750 NW2d 593 (2008). *See id.* at 410. The concurring justices would overrule the decision to the extent that it limited the review of an administrative rule to the administrative record that could not be expanded on remand to the administrative agency. The justices would hold that review of the OFIR rules is not limited to the administrative record. *See id*.

Conclusions

As you can see from the divided opinion of the Supreme Court, the concepts of judicial review of agency rulemaking and agency deference remain controversial and somewhat unsettled within the State of Michigan, especially since the majority did not reach the procedural arguments raised by the insurance industry and the agency. What we do know is that "respectful consideration" of an agency's interpretation of a statute it enforces has its limits, and an agency's rationale may not prevail in the face of conflicting information found outside of the agency's administrative record.

Endnotes

1 The Michigan Insurance Code defines "personal insurance" to include "private passenger automobile, homeowners, motorcycle, boat, personal watercraft, snowmobile, recreational vehicle, mobile-homeowners and non-commercial dwelling fire insurance policies . . . underwritten on an individual or group basis for personal, farmily, or household use." *See* 2005 AACS, R 500.2151(2).

2 The State House passed legislation that would ban the use of credit reports in determining insurance rates on December 16, 2009. The bill currently remains before the Committee on Economic Development and Regulatory Reform. House Bill 5634 (introduced by Rep. Woodrow Stanley) is tie barred to House Bills 5627-5635, all of which remain in committee since December 2009.

3 Similar language can be found in MCL 500.2484 and MCL 500.2674.

4 MCL 500.2111 enumerates specific factors that can be used in establishing and maintaining a premium discount plan (e.g., use of seat belts, smoke detectors, etc.), and MCL 500.2110a provides that additional factors can be used, as long as the factor used is "consistent with the purposes of this act and reflects reasonably anticipated reductions in losses or expenses" and are "uniformly applied to all the insurer's insureds." *See also Ins Inst of Michigan, supra* at 390.

5 Chapters 21, 24 and 26 of the Insurance Code define an "unfairly discriminatory" rate as follows:

"A rate for a coverage is unfairly discriminatory in relation to another rate for the same coverage if the differential between the rates is not reasonably justified by differences in losses, expenses, or both, or by differences in the uncertainty of loss, for the individuals or risks to which the rates apply. A reasonable justification shall be supported by a reasonable classification system; by sound actuarial principles when applicable; and by actual and credible loss and expense statistics or, in the case of new coverages and classifications, by reasonably anticipated loss and expense experience. A rate is not unfairly discriminatory because it reflects differences in expenses for individuals or risks with similar anticipated losses, or because it reflects differences in losses for individuals or risks with similar expenses." *See* MCL 500.2109(1)(c); MCL 500.2403(1)(d); MCL 500.2603(1)(d).

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 Energy, Labor and Economic Growth (*breitmeyerk@michigan.gov*).

Supreme Court Re-opens Door to Permit Challenges Based on Environmental Concerns

By Timothy Lundgren, Varnum LLC

In late December, the Michigan Supreme Court reversed direction on whether the Michigan Environmental Protection Act ("MEPA") allows plaintiffs a circuit court challenge to Michigan Department of Environmental Quality ("DEQ") permitting decisions wholly apart from the administrative process and judicial review already provided for under state law. *See Anglers of the AuSable, Inc. v. Department of Environmental Quality*, ___Mich___ (2010). For practitioners of administrative law, the case raised the interesting question of whether MEPA provides an alternative avenue for direct judicial review of DEQ permitting decisions, perhaps without the substantive and procedural limitations encountered under traditional judicial review.

MEPA allows "any person" to bring an action in circuit court for conduct that has or is likely to "pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources." MCL 324.1703(1). In addition, MEPA also allows any person to intervene in an administrative proceeding by asserting that the proceeding "involves conduct that has, or is likely to have, the effect of polluting, impairing, or destroying the air, water or other natural resources or the public trust in these resources." MCL 324.1705(1). It also instructs officials overseeing such administrative proceedings to make a determination about the alleged pollution, impairment, or destruction of natural resources or the public trust, and requires that "conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare." MCL 324.1705(2). MEPA explicitly supplements all other administrative and regulatory procedures provided by law. MCL 324.1706.

Thus, MEPA provides an opportunity for "any person"[1] to challenge "any person" over alleged harms to natural resources or the public trust in either or both circuit court and administrative proceedings. In 2004, the Supreme Court addressed the question of whether MEPA thus provided a separate avenue for challenging an administrative decision, apart from the judicial review provided under the statute setting forth the administrative process. *Preserve the Dunes, Inc. v. Dep't of Environmental Quality*, 471 Mich 508 (2004).

The court has thus opened the door to MEPA challenges to DEQ-issued permits on the basis that such permits would lead to conduct harming the environment.

In *Preserve the Dunes* (in which plaintiffs challenged the issuance of a sand dune mining permit), the Court held that MEPA was not a vehicle for reviewing a DEQ permit decision outside of the customary administrative review process. The court noted that MEPA provided a point of entry into the administrative process for parties who wished to intervene. 471 Mich 520. However, it refused to recognize that MEPA provided an additional avenue for judicial review of an administrative decision. The Court held that, "[a]n improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA." 471 Mich 519. The Court noted that judicial review of an administrative decision remains available under the applicable governing statute, the Revised Judicature Act, or the Administrative Procedures Act, as appropriate. *Id*. Thus, the Court foreclosed a separate challenge to DEQ permitting decisions via MEPA.

Significantly (and of importance to the plaintiffs in *Preserve the Dunes*), the customary avenues for challenging administrative decisions contain time bars to such actions, while MEPA does not. Thus, the Court of Appeals decision allowing a MEPA challenge to the permit itself, which was overturned by the Supreme Court, raised concerns in the state's business community that any permit could be challenged, even long after the time bar provided for in the applicable rules, under MEPA. These concerns were allayed by the Supreme Court's holding in *Preserve the Dunes*.

Now, reversing the precedent in *Preserve the Dunes*, the Court in *Anglers* has held that DEQ could be a defendant in a MEPA action challenging a permitting decision, based on the alleged harm that would result from the activity permitted by DEQ. The majority in *Anglers* concluded that: "The

Supreme Court Re-opens . . .

Continued from page 6

permit from the DEQ serves as the trigger for the environmental harm to occur. The permit process is entirely related to the environmental harm that flows from an improvidently granted, or unlawful, permit." *Anglers*, slip op. at 7.

The court has thus opened the door to MEPA challenges to DEQ-issued permits on the basis that such permits would lead to conduct harming the environment. The impacts of this decision could be considerable. These challenges can presumably be brought wholly outside and without regard to the administrative process for challenging a permit, and so constitute a possible second bite at the apple for opponents of a permit. Conceivably, this decision would allow a plaintiff or intervenor in an unsuccessful permit challenge to take a second shot at the permit under MEPA in the circuit court, where they would not necessarily be held solely to the record of the administrative hearing below as they would in an appeal of the contested case. It could effectively be an opportunity to retry the case employing new theories, strategies, and perhaps even new evidence.

Motions for rehearing have been filed by the defendants in *Anglers*, including the Attorney General. The Attorney General's motion is based on arguments that the issue is actually moot (because the permitted activity requires an easement over state land, which the defendant has quitclaimed back to the state), and that the existing administrative and judicial permit appeal processes provide the proper forums for addressing citizens' concerns about permits. As of the date of the writing of this article, the Court has not yet ruled on the motion for rehearing. The recent change in composition of the Court, and the elevation of Justice Young (who wrote a strongly-worded dissent to *Anglers*) to Chief Justice makes a grant of rehearing seem more likely in this case than in the general run of cases.

About the Author

Tim Lundgren is a partner at Varnum LLC and chair of Varnum's Water Practice Group. Tim practices in environmental law, renewable energy, telecommunications, and administrative/regulatory law. He also serves on the section Council.

Endnotes

1 The meaning of "any person" and the standing issues it raises is a topic for another article, although the Supreme Court also has been grappling with that issue recently.

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 three Sixth Circuit Court of Appeals decisions and one unpublished decision from the Michigan Court of Appeals. Those cases are summarized below.

The Sixth Circuit cases involve, respectively, (1) interpreting a telephone carrier's obligation to disclose customer contracts to competing carriers under the Federal Telecommunications Act; (2) whether a writ of mandamus can issue against the federal Office of Special Counsel for failure to investigate a claim; and (3) whether a federal agency, Board of Immigration Appeals, properly interpreted its own rules in denying relief on an immigration matter. The unpublished Court of Appeals decision concerns whether a writ of mandamus can issue against the Department of Community Health to compel the Department to conduct a nursing home survey.

Sixth Circuit Decisions

Court Provides Guidance On Telephone Carrier's Duty to Share its Individualized Contracts With Competitor

A federal appellate court issued a ruling construing the manner in which an incumbent local exchange carrier (ILEC) must offer its retail services to a competitor local exchange carrier (CLEC) in *CMC Telecom, Inc v Michigan Bell Tel Co*, ___ F3d ___ (6th Cir 2011). There, CMC, a CLEC, filed a complaint with the MPSC challenging the manner in which AT&T, an ILEC, offers its individualized contracts to competitors for resale. After an unfavorable ruling from the MPSC,

CMC brought a federal declaratory judgment action challenging the MPSC's ruling. The district court rejected all of CMC's claims.

The Sixth Circuit largely affirmed the district court. The Sixth Circuit held that:

1. AT&T's duty under the Act to disclose the terms of its individualized contracts to CLECS so CLECs can determine the nature of these retail offerings does not violate AT&T's separate statutory duty to protect customer proprietary network information (CPNI), since the CPNI rules allow disclosure "as required by law." It noted that AT&T may be able to provide CMC with redacted versions of the individualized contracts so long as those contracts contain enough information to constitute an offer – i.e., anonymize the contracts so CMC can learn the terms on which AT&T provides individual offers without learning the identities of AT&T's customers. So it reversed the district court's ruling to the contrary.

2. AT&T's requirement to resell the contracts only to customers that are similarly situated to existing customers is not a condition of resale and therefore does not implicate the Federal Act's presumption of invalidity of such conditions. But the process by which AT&T determines if two customers are similarly situated may be an invalid condition on resale. Since CMC did not present its concerns about the process to the MPSC, the district court was premature in identifying the factors AT&T could use to determine customer similarity before the MPSC made any determinations regarding the process.

Federal District Court Has Jurisdiction To Issue Mandamus Against Office of Special Counsel For Failure to Investigate A Claim

In a case of first impression, the Sixth Circuit has held that a federal district court has subject matter jurisdiction to issue a writ of mandamus against the federal Office of Special Counsel for failure to investigate a claim if it determines that the Office has declined to investigate a complaint at all. But it has no jurisdiction to consider the Office's jurisdictional determinations or the merits of its investigations. *Carson v United States Office of Special Counsel*, ___ F3d ____ (No. 09-5645, dec'd 2/24/11). In *Carson*, the plaintiff was employed as a nuclear safety engineer at the Department of Energy. Since 1992, he had filed 25 complaints with the Office of Special Counsel – which is an independent investigatory and prosecutorial agency charged with investigating complaints under the Whistleblower Protection Act. The Office of Special Counsel conducted a preliminary investigation into plaintiff's claims. Finding insufficient evidence of illegal activities, it did not proceed further. The plaintiff also filed six mandamus actions against the Office of Special Counsel – five of which had been filed in and dismissed by the United States District Court for the District of Columbia. In 2008, he filed the instant lawsuit asking for mandamus to compel the Office to investigate the complaints that he filed and to make reports to the Department of Energy. The district court dismissed his case.

The Sixth Circuit affirmed. It first held that the district court had no subject matter jurisdiction to issue a writ of mandamus if it determined that the Office violated a non-discretionary statutory duty to investigate an employee's allegations. But the Court was clear that that holding did not imply that district courts have jurisdiction to review all Office of Special Counsel determinations. It has no jurisdiction to consider the Office's jurisdictional determinations or the merits of its investigations. Based on those holdings, it determined that the district court properly ruled that it had no subject matter jurisdiction to issue a writ of mandamus regarding the plaintiff's complaints.

Federal Agency's Decision Is Reversible For Relying on Unsupportable Interpretation of Administrative Rules

The Sixth Circuit has reversed the federal Board of Immigration Appeals for issuing a decision that relied on an unsupportable interpretation of an administrative rule. *Pruidze v Holder*, 632 F3d 234 (6th Cir 2011). There, the plaintiff, a then-green card holder, returned to the United States and applied for admission as a lawful permanent resident alien. The Department of Homeland Security denied his application, citing his state conviction for a controlled-substance crime. An immigration judge found the plaintiff removable and denied his application to withhold removal. The Board of Immigration Appeals affirmed.

Later, the Department removed the plaintiff. Six days later, the plaintiff moved the state court to reopen his criminal case because he entered his guilty plea without counsel. The state court set aside his conviction and redocketed the case. The plaintiff then moved the Board to reopen his removal case. The Board denied the request, interpreting an Attorney General regulation to deprive it of jurisdiction since the plaintiff was no longer in the United States.

The Sixth Circuit reversed and vacated the Board's order. It noted that the Board interpreted an Attorney General regulation to provide that the Board lacks jurisdiction to

review a motion to reopen once an alien leaves the United States (whether voluntarily or involuntarily). But the statute that empowers the Board to consider motions to reopen says nothing about jurisdictional limits of any kind. The controlling regulation requires the Board to consider the plaintiff's motion to reopen. For that reason, the Board's decision cannot be deemed reasonable and must be vacated.

Michigan Court of Appeals – Unpublished Decision

Write of Mandamus Is Awardable To Compel Department of Community Health to Perform A Survey Of A Nursing Home

The Court of Appeals ruled that a writ of mandamus can be awarded to compel the Department of Community Health to perform a Medicare survey of the plaintiff's nursing home. *Wood Care X, Inc v Department of Community Health*, unpublished per curiam opinion of the Court of Appeals (Docket No. 294480, dec'd 1/25/11). In *Wood Care,* the plaintiff asked the Department to perform a survey of its nursing home for Medicare certification. The Department refused, claiming that as a contractor of the federal government, it was not authorized to complete a Medicare-only survey of the plaintiff's facility since there was a moratorium on those surveys. The plaintiff then sued for mandamus. The trial court granted mandamus, relying on the Department's own administrative regulations.

The Court of Appeals affirmed. It first ruled that the Department had a clear legal duty to perform the survey from statute and administrative rules. The Department alone – not a federal agency – is charged with the duty to implement this State's nursing home certification process. The statutes and rules mandate that the Department conduct a survey within three months of an application. There was no reference in the rules or elsewhere that the certification process or an applicant's eligibility for certification depends on whether the federal Medicare agency authorized the Department to conduct the requested survey. Since the Department's interpretation of administrative rules was contrary to the rules' plain meaning, the Department's rule interpretation is not entitled to deference.

The Court also ruled that the certification survey is ministerial. It reasoned that the administrative rules do not distinguish between particular types of surveys or limit the Department's mandatory duty to a particular type of survey. So the duty to perform the survey was ministerial.

Finally, there was no other legal remedy since there is no appeal process to challenge the Department's refusal.

STATE BAR OF MICHIGAN | ADMINISTRATIVE & REGULATORY, ENVIRONMENTAL, AND PUBLIC CORPORATION LAW SECTIONS

LUNCHEON WITH MICHIGAN ATTORNEY GENERAL BILL SCHUETTE

THURSDAY, MAY 19, 2011

The University Club, Ballroom, 3435 Forest Rd, Lansing, MI 48910

Presented by the Administrative & Regulatory Law Section of the State Bar of Michigan, in partnership with the Environmental and Public Corporation Law Sections

Agenda

Michigan Attorney General Schuette will discuss hot topics involving the Department of Attorney General with an opportunity for questions and answers immediately following.

Thursday, May 19, 2011
11:30 a.m.–1:30 p.m. (lunch will be served at Noon)
The University Club, Ballroom
3435 Forest Rd.
Lansing, MI 48910

Cost is $20 for members of any of the sponsoring sections; $40 for non-members

To help ensure accurate lunch count, registrations must be received no later than Friday, May 13, 2011

▶ For all information about the event, please contact Kim Breitmeyer at (517) 604-0157 or by e-mail at breitmeyerk@michigan.gov.. For questions related to event registration, please contact the State Bar of Michigan at (517) 346-6300.

Register online at http://e.michbar.org

STATE BAR OF MICHIGAN | ADMINISTRATIVE & REGULATORY, ENVIRONMENTAL, AND PUBLIC CORPORATION LAW SECTIONS

LUNCHEON WITH MICHIGAN ATTORNEY GENERAL • THURSDAY, MAY 19, 2011

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❑ Please indicate whether you prefer a vegetarian meal.

Mail your check/credit card information and completed registration form to:

State Bar of Michigan
Attn: Seminar Registration
Michael Franck Building
306 Townsend Street
Lansing, MI 48933

OR

Fax back (ONLY if paying by credit card) the completed form and credit card information to:

Attn: Seminar Registration
(517) 346-6365

▶ All cancellations must be received at least 72 business hours before the start of the event. The registration fee for this event is forfeited if attendance is cancelled. Registrants who cancel will not receive seminar materials. As a courtesy to the planners, written notice of your intent not to attend is appreciated. That notice can be made by e-mail (tbellinger@mail.michbar.org), fax (517-346-6365 ATTN: Tina Bellinger), or by U.S. mail (306 Townsend St., Lansing, MI 48933 ATTN: Tina Bellinger).

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