Judicial

Administrative

Review

By Donald E. Erickson

"Administrative law relates to the powers, functions, and procedures of the various administrative agencies and the methods provided for judicial review of their decisions."[1] As Professor Don LeDuc noted in his treatise, "Administrative Law is not a unified or limited field like torts or contracts, nor is it simply procedural in nature."[2] In addition, certain aspects of the way Michigan courts treat administrative law subjects reveal differences and apparent contradictions, which can create confusion for practitioners in the area of administrative law. In this context, it can become difficult to determine the likely outcome of many issues in administrative law. In Const 1963, art 6, § 28, even the people have demonstrated ambivalence toward administrative agency adjudications—accepting the need for decision-making by administrative agencies but not fully entrusting final decisions to administrative agencies.

Law and Michigan Courts

An administrative agency has no inherent power. Any authority agencies may have is vested in them by statute or by the constitution. Administrative determinations are enforceable only in the manner provided by statute.[3] The power and authority to be exercised by administrative agencies must be granted by clear and unmistakable statutory language since a doubtful power does not exist, and an express grant of power is subject to a strict interpretation.[4] But these limitations upon agency power are not self-executing and are meaningless without the availability of appropriate judicial review.

In judicial opinions reviewing decisions by administrative agencies, much duality or ambivalence can be found. Perhaps the relationship between administrative agencies and Michigan courts is somewhat symbiotic. Courts are satisfied to have this form of alternative dispute resolution available but are wary of ceding too much legal independence. Agencies enjoy improvement in public perception of fairness when their actions are affirmed but prefer to avoid reversals. This article will survey some of the differences and apparent contradictions in the context of three subjects: availability of judicial review, standards for reviewing administrative decisions, and judicial reluctance to review administrative appeals. The objectives of this article are to provide updated

information to practitioners regarding these subjects and to present some rationales to reconcile some of the apparent contradictions found in case law.

Availability of Judicial Review

Litigants seeking judicial review of decisions by administrative agencies have three potential avenues of relief: review prescribed in the statutes applicable to the particular agency; appeal pursuant to MCL 600.631, which allows appeals from such decisions to the circuit court; or the method of review provided by the Administrative Procedures Act (APA), MCL 24.201.[5] A lawyer should review each avenue in turn to determine where appellate jurisdiction lies.[6]

The legislature can restrict the right to judicial review of decisions by administrative agencies so long as the restriction does not conflict with Const 1963, art 6, § 28.[7] That provision states in relevant part:

> *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.*

In the case of a conflict between this constitutional provision and an applicable statute, the constitutional provision would control.[8]

In summary, appellate jurisdiction to review decisions made by administrative agencies depends upon what constitutional or statutory provision applies. In addition, if no other constitutional or statutory provision for judicial review applies, a practitioner might explore seeking judicial review via superintending control under Const 1963, art 6, § 13.[9]

Standards for Reviewing Administrative Decisions

It goes beyond the purpose of this article to develop an exhaustive discussion of all judicial statements on the scope of judicial review of administrative decisions. But differences and apparent contradictions seem to appear in court opinions discussing the standards of review.

Fast Facts:

- Appellate jurisdiction to review decisions made by administrative agencies depends upon what constitutional or statutory provision applies.
- Differences and apparent contradictions seem to appear in court opinions discussing the standards of review for administrative decisions.
- Administrative law practitioners should carefully preserve and forcefully pursue appellate issues they present to minimize or avoid potentially debilitating judicial delay.

Courts frequently adopt broad statements regarding the limitations on judicial review. In one form or another, Michigan courts most frequently describe limitations upon the standards of judicial review with statements such as courts do not substitute their judgment for that of an administrative agency, and a reviewing court gives deference to the expertise of administrative agencies.

From the viewpoint of any party seeking review of an agency's decision, the problem with these statements stems from hyperbole in the first statement and a non-contextual understanding of the second statement. Extended logically, the rule that courts do not substitute their decision for that of an agency creates an oxymoron nullifying or frustrating the mandate for judicial review, which can be found in either Const 1963, art 6, § 28 or any applicable statute. If courts truly did not substitute their judgment for that of an administrative agency, then judicial review would become an expensive and meaningless process. What other justification can judicial review have beside the possibility that an agency erred and should be reversed—substitution of a judicial decision for an agency decision? On the other hand, the so-called deference rule implies that judicial deference to an agency's expertise should be automatic with little regard for the nature of the issue involved or its context. Thus, the substitution rule and the deference rule warrant further evaluation.

Const 1963, art 6, § 28 addresses not merely the availability of judicial review, it also states the following standards for judicial review:

> *This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law.*

In determining the meaning of constitutional provisions like this, courts consider the constitutional convention debates.[10]

Const 1963, art 6, § 28 is a new constitutional provision which arose out of Constitutional Committee Proposal 95.[11] The purpose of adopting this new constitutional provision was to protect the public from abuse of administrative power and to provide a safeguard against bureaucratic action by administrative agencies. Although the delegates concluded that the legislature would have the power to adopt even higher standards for judicial scrutiny of decisions by administrative agencies, the goal was to set a uniform minimum standard for judicial review of decisions made by administrative agencies. The level of the appropriate minimum standards was vigorously debated.[12]

With regard to fact questions, Const 1963, art 6, § 28 is designed to avoid making findings of fact conclusive[13] and is intended to avoid judicial affirmance of administrative

decisions based upon the "scintilla" rule under which only a tiny bit of evidence would be sufficient to affirm the decision of an administrative agency. On the other hand, constitutional delegates expressed a fear that adopting a new constitutional provision would lead to de novo judicial review of fact questions; thus, Const 1963, art 6 § 28 is intended only to require a review of the record made before the administrative agency and not to provide for a new hearing. Final convention action determined that the standards for review would be whether or not administrative decisions "are authorized by law" and whether or not decisions "are supported by competent, material and substantial evidence on the whole record" when a hearing is required.[14] In other words, Const 1963, art 6, § 28 creates two separate standards for judicial review.

Since 1963, the Michigan Supreme Court has interpreted Const 1963, art 6, § 28 and has said with regard to fact questions that Const 1963, art 6, § 28 requires Michigan courts to consider both sides of the record, and therefore, has said that judicial review must necessarily entail a degree of qualitative and quantitative evaluation of the evidence considered by an agency.[15] On the other hand, with regard to legal questions, the Michigan Supreme Court has ruled that the standard for judicial review is de novo review.[16]

Despite these Supreme Court opinions regarding standards for judicial review, confusion or contradictions have arisen in reviewing agency fact-finding decisions as well as in the context of reviewing agency decisions regarding questions of law. Based on the constitution and Michigan Supreme Court precedent cited above, one needs to question or, at least, reconsider, the "substitution" and "deference" standards for judicial review that have been routinely relied upon in many Michigan Court of Appeals opinions.

Opinions frequently state the substitution and deference rules in an abstract, virtually absolute form such as:

> *A reviewing court must give due deference to the administrative expertise of [an agency] and may not substitute its judgment for that of the agency.*[17]

Such a virtually absolute form of the standards limiting judicial review evidences an approach to judicial review that, at best, backs away from the courts' constitutional and statutory duty to conduct appellate review. For legal questions, this formulation eschews the de novo standard of review. For facts questions, a more valid and reasonable statement of the substitution rule would be to say that a court will substitute its opinion or judgment for that of an administrative agency only when there is competent, conflicting evidence.[18] Such a statement of the rule is more akin to the constitutionally adopted standard, which requires support by competent, material, and substantial evidence on the whole record. In any event, neither the constitution nor the statutes governing appeals preclude substitution of judicial judgment for that of an administrative agency. Instead, constitutional and statutory standards for judicial review concern when and how much a court will undertake to substitute its judgment for that of an agency decision.[19]

In summary, by adopting broad limits upon the standards for judicial review, Michigan court opinions sometimes seem overeager to abstain from the appellate duties imposed upon them by Const 1963, art 6, § 28 and applicable statutes. For fact questions, it might be appropriate to defer to an agency's choice between conflicting evidence, but even then there should be some qualitative and quantitative evaluation of the evidence considered by an agency.[20]

The more significant confusion arises when Michigan court opinions address questions of law. On the one hand, the Supreme Court has ruled that legal questions decided by administrative agencies are subject to de novo review.[21] On the other hand, the Supreme Court has ruled that a construction given to a statute by an agency is always entitled to the most respectful consideration and ought not be overruled without cogent reasons.[22] But judicial deference does not preclude a court from rejecting an agency's interpretation.[23] Even if a reviewing court gives deference to the expertise of administrative agencies, courts must not abandon or delegate their responsibility to interpret legislative intent.[24]

In other words, Michigan courts can always review an agency's legal findings, and agency interpretations are not binding even though courts afford an agency's interpretation some deference.[25] In 1999, the Michigan Supreme Court affirmed previous rulings that an agency's determination regarding the scope of its authority is a question of law, which is reviewed de novo,[26] and that questions of statutory interpretation are questions of law, which are reviewed de novo.[27]

Const 1963, art 3, § 2 and its predecessors require the separation of the powers of the executive, judicial, and legislative branches of government. A historical review of the constitutional doctrine concerning separation of powers supports de novo review of legal questions. Justice Marshall said in *Marbury v Madison,* 5 US 137, 177–178; 2 L Ed 60, 73 (1803), "It is emphatically the province and duty of the judicial department to say what the law is."[28]

As the Michigan Supreme Court once explained:

> *We hardly supposed that anyone doubted that the construction of a statute or ordinance is a matter of law and not of fact. This is a well-recognized judicial function. It is the duty of courts to construe the language of the statute and while "the construction given to a statute*

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by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons," such construction is not binding upon the courts.[29]

In 1940, the Supreme Court was urged to adopt an interpretation of the veteran's preference act adopted by several governors, but the court said:

We have great respect for the opinion of all of our governors and will take notice of a construction given in the administration of doubtful or obscure laws by officers with a duty to perform thereunder, but in the final analysis the construction of a statute still remains in the judicial branch of our government.[30]

Likewise, the court has ruled that administrative interpretations must be rejected if not in accord with the intent of the legislature.[31] Finally, the Michigan Supreme Court has said that it is the responsibility of the judiciary to interpret legislative intent and that this responsibility cannot be delegated.[32]

Although federal precedent differs in many significant ways (beyond the scope of this article) from Michigan precedent, it is interesting to note that the United States Supreme Court has recently recognized that even when judicial deference may be appropriate during judicial review of legal questions decided by an administrative agency, deference is limited:

The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position, ... This approach has produced a spectrum of judicial responses, from great respect at one end, . . . to near indifference at the other.[33]

In summary, courts have frequently stated that they must defer to statutory interpretations adopted by administrative agencies, but such deference should be more limited than many court opinions seem to imply. Under the separation of powers doctrine, statutory construction belongs within the province of the courts, and courts should perform a de novo review of legal questions.

Judicial Reluctance to Review Administrative Law Appeals

Even though there is little question that rulings by administrative agencies are subject to judicial review, as a pragmatic matter administrative law practitioners should take into account one other factor. Courts truly prefer to avoid reviewing administrative agency decisions, and this factor can subtly affect the outcome of appellate review.

The potential results of judicial aversion to reviewing the merits of appeals from administrative agency decisions can be illustrated by events that occurred during one appeal the author participated in. In late 1996 and early 1997, the Michigan Public Service Commission issued some procedural orders in a power supply cost recovery plan case involving the Detroit Edison Company. On February 25, 1997, three parties to the administrative proceeding filed a joint petition for interlocutory review by the Ingham County Circuit Court of those commission orders. The appeal was filed in the circuit court because, in numerous previously unpublished orders, the Ingham Circuit Court and the Court of Appeals had disagreed over whether appellate jurisdiction rested in the Court of Appeals under MCL 462.26 or in the Ingham County Circuit Court under MCL 24.301. Certainly this jurisdictional question has been a significant one, but the conflicting orders of the two courts reveal that each court has a desire to have the other court handle these appeals.

On motion by the Public Service Commission, the Ingham Circuit Court transferred the appeal to the Court of Appeals under MCL 462.26(3). The Court of Appeals, without request from a party, remanded the case to the circuit court. The Public Service Commission appealed the remand order, and the Supreme Court summarily vacated the Court of Appeals remand order and sent the case back for a plenary decision concerning the appellate jurisdiction question.[34] After remand for plenary consideration, the appellants and the appellees filed briefs with the Court of Appeals. Although there were differences in their briefs, all parties agreed that jurisdiction belonged with

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the Court of Appeals. Two years later, the Court of Appeals issued an opinion remanding the case and finding that jurisdiction lies in the Ingham County Circuit Court.[35] The joint appellants and the Public Service Commission separately sought leave to appeal, but with two justices dissenting, the Supreme Court denied leave to appeal in 2000.[36]

In this case, the appellate process foundered on the issue of appellate jurisdiction. The underlying merits of the commission's procedural orders remained unreviewed for years until time rendered those serious legal questions moot for purposes of the case. Administrative law practitioners should carefully preserve and forcefully pursue appellate issues they present to minimize or avoid potentially debilitating judicial delay, which can arise from a reluctance of Michigan courts to be the court to conduct substantive judicial review of administrative agency decisions.

Conclusion

An attorney can play a pivotal role in determining the outcome of an administrative law case by being aware of how Michigan courts address and resolve questions concerning the avenues for appellate review and the standards for judicial review. When planning litigation strategy, an attorney should also remember the potential, self-centered reasons an agency or a reviewing court might have to rely upon a process or standards for judicial review that can frustrate attempts to obtain a judicial decision on the merits of factual or legal questions raised in administrative proceedings. ✦

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Footnotes

1. Stein et al., Administrative Law, § 1.01(1), p 1–3.
2. LeDuc, Michigan Administrative Law, Preface, p iv.
3. *Belanger & Sons, Inc v Department of State,* 176 Mich App 59, 62–63; 438 NW2d 885 (1989).
4. *Mason County Civil Research Council v Mason County,* 343 Mich 313, 326–327; 72 NW2d 292 (1955).
5. *Nestell v Bridgeport-Spaulding Community Schools Bd of Ed,* 138 Mich App 401, 404; 360 NW2d 200 (1984), and *Living Alternatives for Developmentally Disabled Inc v Department of Mental Health,* 207 Mich App 482, 484; 525 NW2d 466 (1994).
6. *Martin v Stine,* 214 Mich App 403, 408–411; 542 NW2d 884 (1995). See also, *Sullivan v PSC,* 93 Mich App 391, 395; 287 NW2d 188 (1978), and *Greenfield Constr Co v Dep't of State Highways,* 58 Mich App 49, 57; 227 NW2d 223 (1975) aff'd 402 Mich 172 (1978).
7. *Martin,* supra, at 414, and *Taylor v Secretary of State,* 216 Mich App 333, 338; 548 NW2d 710 (1996).
8. *C F Smith Co v Fitzgerald,* 270 Mich 659, 667; 259 NW 352 (1935), and *The Detroit Edison Co v PSC,* 82 Mich App 59, 72–73; 266 NW2d 665 (1978).
9. *Rental Property Owners Ass'n of Kent County v Grand Rapids,* 455 Mich 246, 269; 566 NW2d 514, 524 (1997).
10. *Burdick v Secretary of State,* 373 Mich 578, 584; 130 NW2d 380 (1964).
11. 1 Official Record, Constitutional Convention 1961.
12. 1 Official Record, Constitutional Convention 1961, pp 1440–1452, 1463–1478 and 1483–1487 and 2 Official Record, Constitutional Convention 1961, pp 2191 and 2712–2720.
13. 1 Official Record, Constitutional Convention 1961.
14. 2 Official Record, Constitutional Convention 1961, p 2714.
15. *Michigan Employment Relations Comm'n v Detroit Symphony Orchestra Inc,* 393 Mich 116, 124; 223 NW2d 283 (1974). *Accord, Midland Twp v State Boundary Comm'n,* 401 Mich 641, 672–673; 259 NW2d 326 (1977), *Ferrario v Escanaba Bd of Educ,* 426 Mich 353, 367; 395 NW2d 195 (1986), and *Goff v Bil-Mar Foods Inc (After Remand),* 454 Mich 507, 514–517; 563 NW2d 214 (1997).
16. *Cardinal Mooney High School v MHSAA,* 437 Mich 75, 80; 467 NW2d 21 (1991), and *Oakland County v Michigan,* 456 Mich 144, 149; 566 NW2d 616 (1997).
17. *Attorney General v PSC,* 231 Mich App 76,78; 585 NW2d 310 (1998). *Accord, Attorney General v PSC,* 235 Mich App 308, 313; 597 NW2d 264 (1999), and *Residential Ratepayer Consortium v PSC,* 239 Mich App 1, 3; 607 NW2d 391 (1999).
18. *Giaras v MPSC,* 301 Mich 262, 269; 3 NW2d 268 (1942), and *In re 1987–88 Medical Doctor Provider Class Plan,* 203 Mich App 707, 729; 514 NW2d 471 (1994).
19. *Department of Civil Rights ex rel Johnson v Silver Dollar Cafe,* 441 Mich 110, 120; 490 NW2d 337 (1992).
20. *Michigan Employment Relations Comm'n,* supra, at 124.
21. See cases cited in footnote 16 above.
22. *Magreta v Ambassador Steel Co (On Rehearing),* 380 Mich 513, 519; 158 NW2d 473 (1968), and *Breuhan v Plymouth-Canton Community Schools,* 425 Mich 278, 282–283 ; 389 NW2d 85 (1986).
23. *Manufacturers Bank v Department of Natural Resources,* 420 Mich 128, 148; 362 NW2d 572 (1984), and *Davis v River Rouge Bd of Educ,* 406 Mich 486, 490; 280 NW2d 453 (1979).
24. *Miller Bros v PSC,* 180 Mich App 227, 232; 446 NW2d 640 (1989), and *In re Complaint of MCTA,* 241 Mich App 344, 360; 615 NW2d 255 (2000).
25. *Ludington Svc Corp v Acting Comm'r of Ins,* 444 Mich 481, 503–505; 511 NW2d 661 (1994).
26. *Consumers Power Co v PSC,* 460 Mich 148, 157; 596 NW2d 126 (1999).
27. *In re MCI Telecommunications Complaint,* 460 Mich 396, 413; 596 NW2d 164 (1999).
28. *Accord, In re Del Rio,* 400 Mich 665, 726; 256 NW2d 727 (1977).
29. *Paye v Grosse Pointe,* 279 Mich 254, 259–260; 271 NW 826 (1937) (citation omitted).
30. *Kelly v Secretary of State,* 293 Mich 530, 533; 292 NW 479 (1940).
31. *Howard Pore Inc v State Comm'r of Revenue,* 322 Mich 49, 66; 33 NW2d 657 (1948).
32. *General Motors Corp v Erves,* 395 Mich 604, 621; 236 NW2d 432 (1975).
33. *United States v Mead Corp,* ___ US ___; 121 S Ct 2164, ___; ___ L Ed 3d ___ (2001) (footnotes and citations omitted).
34. *Attorney General v PSC,* 456 Mich 882 (1997).
35. *Attorney General v PSC,* 237 Mich App 24; 602 NW2d 207 (1999).
36. *Attorney General v PSC No. 1,* 462 Mich 878 (2000).