

ORIGINAL

No. 19-5935

IN THE SUPREME COURT OF THE UNITED STATES

RACHEL C. BROWN  
And All Others Similarly Situated  
Petitioner,

v.

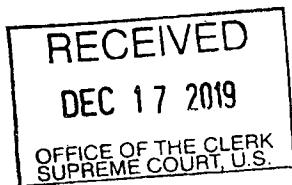
MICHIGAN CIVIL SERVICE COMMISSION  
Respondent.

On Petition for Writ of Certiorari to the United States Supreme Court

**PETITION FOR REHEARING**

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Rachel C. Brown  
*In Pro Per*  
533 W. Hodge Avenue  
Lansing, MI 48910  
(517) 899-3424



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## **PETITION FOR REHEARING**

Pursuant to Rule 44.2, Petitioner respectfully petitions this Court for rehearing.

### **ARGUMENT**

- I. Article 4, Section 48 of the Michigan Constitution is invalid; this provision denies classified state employees their private rights to equal protection of the laws secured by Article 1, Section 2 of the MI Constitution and the 14th Amendment of The Constitution of the United States.**

The constitution and laws of the state of Michigan are subject to compliance with the rights secured by the Constitution of the United States. Procedures of the MI Civil Service Commission (MCSC) fail to comport with this mandate. The legislative and judicial branches have failed to provide proper fail safes to the abuses of power exercised by the MCSC, and have in fact empowered the same. This situation has resulted in countless instances of the deprivation of equal protections of the laws to citizens employed by the State of Michigan.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Constitution, Amendment XIV(1).

- A. The MCSC, once the Department of Civil Service, has been granted constitutional powers beyond the reach of the state legislature.**

MCSC's constitutionally created powers are vested in the state personnel director and include “[making] rules and regulations covering all personnel transactions, and [regulating] all conditions of employment in the classified service”. MI Const., Art. 11, Sec 5. The terms “personnel transactions” and “conditions of employment” are ambiguous and not defined by the state, MCSC, or Black’s Law Dictionary. However, these terms in practice have extended to include MCSC’s administration of the long-term disability (LTD) income protection insurance plan available to state employees in the classified civil service.

**B. Recent changes have removed any perception of oversight for LTD appeals.**

There was some indication of independent involvement in LTD appeals by the autonomous Office of the State Employer. However, Executive Order 2016-22 transferred all duties related to the administration and appeals of LTD to the MCSC<sup>1</sup>. Currently, MCSC does contract, advise, and audit a third-party administrator (TPA), York, for initial determinations and appeals of LTD<sup>2</sup>. All subsequent appeals through final decision are handled exclusively by MCSC under Civil Service Regulation 5.18 as shown in *Kroon-Harris*<sup>3</sup>.

**C. The MCSC, as administrator of the LTD income protection insurance plan for state employees, is not legally obligated to provide the protections mandated by the state's insurance code.**

Entities providing insurance in MI are subject to provisions of the MI Insurance Code. MCSC through multiple pleadings in the state courts asserts that LTD is not a contract of insurance. This is in direct conflict of the plain language of its own rules and regulations as well as any reasoned interpretation<sup>4</sup>. Both the MI Court of Claims and Supreme Court have acknowledged this assertion and in fact characterized LTD as an insurance contract<sup>5</sup>.

**D. The MCSC has been exempted from the MI Administrative Procedures Act (APA).**

MCSC is exempted from following the provisions of the APA through the definition of the term agency. MCL 24.203(2). This exemption results in MCSC's completely independent publication of rules which have the effect of law. The exemption also allows continued

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<sup>1</sup> Appendix A.

<sup>2</sup> Appendix D.

<sup>3</sup> *Kroon-Harris v. State of Michigan*, Case No. 129689, MI Supreme Court, Jan 12, 2007, pg. 1.

<sup>4</sup> Civil Service Rule 5-11.

<sup>5</sup> *Kroon-Harris v. State of Michigan*, Case No. 129689, MI Supreme Court, Jan 12, 2007, pg. 2.

deprivation of due process and the provision of an administrative hearing in LTD benefits appeals.

**E. Despite deprivation of a hearing and accepted adjudicative procedures, the MI Court of Appeals does not allow an appeal of right for decisions of the circuit court in state employee LTD appeals.**

The MCSC does not conduct fact-finding or produce conclusions of law employing standard and accepted practices in its LTD review and determination procedures; the procedures used also deprive LTD appellants an administrative hearing at all stages. This is empowered by the exclusion from the APA. Appeals to the circuit court following the final decision of the MCSC is the first instance of formal adjudication. Generally, final decisions of the circuit court are appealable as of right to the MI Court of Appeals (COA). MCR 7.203. However, in LTD appeals, the COA dismisses an appeal filed by right. The decision states,

“lack of jurisdiction because the August 31, 2017 order of the circuit court on appeal from another tribunal is not appealable as a matter of right.” Appendix C.

The statute does exempt matters decided by the circuit court on appeal from another court or tribunal. MCSC does not meet the definition of court or tribunal in LTD appeals.

The final decision of MCSC directs to the APA, MCL 24.301-24.306 directing appellants to further review from the circuit court. Appendix B. This is an intentionally misleading direction which influences both appellants and the courts. Chapter 6, MCL 24.301 *et seq.*, is the portion of the MI APA that covers judicial review of administrative decisions and starts as follows:

When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law.

MCSC refers to the APA which it not only claims exemption from through its court pleadings, but also from LTD appeal decisions in which the term “contested case”<sup>6</sup> does not apply due to its deprivation of hearing to LTD appellants. Other cases that are directed by the APA to the courts for review involve a hearing, which includes accepted practice resulting in findings of fact and conclusions of law, following the appellants’ participation/representation on the record.

Given general applicability of cases that derive rights to judicial review by the APA, that being those which have already undergone an administrative hearing, it is understandable why the COA would limit an appeal as of right. The MCSC does not follow the provisions of the APA for promulgation of rules (Chapter 3), contested cases (Chapter 4), or judicial review (Chapter 6). The MCSC in this way misleads the courts into the assumption that its procedures meet the rigors of formal adjudication by a court or tribunal. An appeal of right should have been available in this case, yet was denied along with the discretionary review of the subsequent application for leave to appeal.

**F. Despite the absence of protections and the constitutional mandate to provide for appropriate legislation to ensure equal protections of the laws, the MI legislature is barred from enacting laws to protect the rights of state employees in the classified civil service, where non-classified and private sector employee rights are protected.**

The MI Constitution grants powers and authorities to the MCSC<sup>7</sup> and also restricts the legislature from enacting appropriate protections for classified state employees<sup>8</sup>. Long-term disability (LTD) insurance benefits are funded and administered by the executive branch – specifically, the MCSC administers these benefits and is the sole point for the resolution of disputes about these benefits by law. There is an inherent conflict of interest where an entity both

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<sup>6</sup> MCL 24.203(3).

<sup>7</sup> MI Const., Art. XI, Sec. 5.

<sup>8</sup> MI Const., Art. IV, Sec. 48.

funds an insurance plan and makes decisions on paying claims. No other law is permitted to regulate the procedures used by the MCSC. The courts are the only vehicle by which abuses of power by the MCSC can be corrected to protect the rights of state employees.

**II. Michigan courts have issued opinions and orders on state employee LTD benefit disputes/appeals which conflict within Michigan's One Court of Justice *and* with decisions of the U.S. Supreme Court. This Court's decision is imperative to remedy unconstitutional legislative limitations empowering continued unconstitutional conduct of the MCSC.**

Various MI circuit courts have ruled in favor of and against MCSC and have raised due process concerns or ruled, as here, that adequate due process was provided. There is inconsistency in the rulings depending on the case, the court, or the judge. What is consistent is that all cases deal with relatively equivalent procedures of the MCSC that lack any checks and balances where there are no laws in MI to provide for such.

The higher courts also mention conflicting concerns but hesitate to rule on constitutional claims and dispose of cases through other means. In this case, due process was specifically ruled on by the circuit court, right to appeal to the COA was denied, then the COA and Supreme Court denied discretionary review where the constitutional question could have been resolved.

One appellant took her LTD matter to the Court of Claims rather than the circuit court on the basis of breach of contract whose order was then reviewed by the COA. There was agreement that there is no statute authorizing appeal to the circuit court and that the APA does not apply to the MCSC. The dispute here was whether or not LTD is contractual between the state of MI and employees. The COA stated:

We conclude that *Parkwood* and the plain language of MCL 600.6419(1)(a) support plaintiff's position on appeal, despite defendant's attempts to characterize plaintiff's claim as something other than contractual.<sup>9</sup>

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<sup>9</sup> *Kroon-Harris v. State of Michigan*, Case No. 261146, MI Court of Appeals, July 14, 2005, pg. 5.

The COA remanded back to the Court of Claims. The MI Supreme Court later reinstated the Court of Claims dismissal for lack of jurisdiction despite dissenting opinions pertinent to the contract question<sup>10</sup>. The outcome referred all disputes about LTD back to the exclusive procedure of the MCSC through its own Regulation 5.18, which does not have the effect of law.

This Court in *Mathews* made clear a property interest in these types of benefits protected by the Fifth Amendment exists, and that some type of hearing is required. In *Mathews*, the SSA provided a hearing after benefits were prospectively terminated and this was sufficient to provide for due process. MCSC has never allowed for an administrative hearing in LTD disputes, despite the existence of the Civil Service Hearings Office (CSHO) and its provision of hearings in grievances where no protected property right exists.

## **CONCLUSION**

The MCSC continues to elude a precedential opinion on due process and contractual questions raised by the procedures used in LTD appeals. There continues to be a black hole in the legislation through which this entity can continue as it wishes despite the unconstitutionality of its procedures. Most disturbing is that LTD appellants are easy targets as their health status impairs their ability to participate effectively, and without income replacement insurance benefits with which to meet their needs and employ effective counsel, meaningful participation in appeals and subsequent litigation is grossly limited. It is imperative that due process and equal protection of the laws is enforced upon the MCSC by the judiciary.

Clear errors, breaches of procedure, faulty fact-finding, and instances of improper adjudicative process are manifest in the Certified Civil Service Record. De novo review of the instant case will show that the MCSC deprives state employees of procedural due process in LTD appeals. The structure of Michigan's government and related case law shows, not only that

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<sup>10</sup> *Kroon-Harris v. State of Michigan*, Case No. 129689, MI Supreme Court, Jan 12, 2007, pg. 2.

the higher courts are hesitant to decide on the constitutional claims brought before it multiple times in LTD matters involving the MCSC, but also that Petitioner and all others similarly situated are deprived of their constitutional rights to equal protections of the laws secured by Article 1, Section 2 of the Michigan Constitution and the Fourteenth Amendment of the United States Constitution. The opinion of This Court is imperative to correct these injustices and preserve the jurisprudence of the state and country.

Based upon the foregoing, Petitioner prays that this Court will vacate the denial of November 18, 2019 and grant the Petition for Writ of Certiorari.

Respectfully submitted,



RACHEL C. BROWN

Dated: December 13, 2019

No. 19-5935

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And All Others Similarly Situated  
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**PETITION FOR REHEARING**

**CERTIFICATE OF COUNSEL/PETITIONER**

As pro se petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.



RACHEL C. BROWN

Dated: December 13, 2019

**Additional material  
from this filing is  
available in the  
Clerk's Office.**