STATE OF MICHIGAN
OFFICE OF THE GOVERNOR

In the Matter of the Request for the Removal of Kwame M. Kilpatrick from the Office of Mayor of the City of Detroit

No. EO-2008-004-LO
Hon. Jennifer M. Granholm

OPINION AND ORDER (1) DENYING RESPONDENT'S MOTION TO DISMISS PETITION OR STAY PROCEEDINGS AND (2) GRANTING PETITIONER'S MOTION FOR HEARING ON THE MERITS

I. Introduction

On May 20, 2008, the Detroit City Council, Petitioner, submitted written charges to the Governor asking for the removal of Respondent, Kwame M. Kilpatrick, from the office of Mayor of the City of Detroit pursuant to Article 7, Section 33 of the Michigan Constitution of 1963 and Section 327 of the Michigan Election Law.[1] As required by that statute, the charges were verified by the affidavit of Kenneth V. Cockrel, Jr., President of the Council, and personally served on Respondent.

On July 1 and July 31, 2008, the Governor established a briefing schedule for the resolution of preliminary legal issues. Specifically, the Governor instructed the parties to raise any relevant legal issues in writing by August 6, 2008. Responses were due on August 20, 2008, and replies to the responses were due on August 25, 2008.

On August 6, 2008, Respondent filed a motion and supporting brief requesting the dismissal of Petitioner's charges or a stay in the proceedings, asserting that:

(1) MCL 168.327 does not require removal because there is insufficient evidence of official misconduct by Respondent;

(2) the affidavit of the Council President is insufficient as a matter of law to support the petition for removal;

(3) the petition was made by a simple majority of the Council in violation of its own rules;

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[1] Michigan Election Law, 1954 PA 116, § 327, as amended by 1982 PA 505 ("MCL 168.327").

(4) the removal proceedings are based on facts identical to those alleged in Respondent's pending criminal prosecution and therefore require Respondent to submit evidence undermining his defense and infringing upon his right against self-incrimination;

(5) the Detroit Charter does not provide for removal of an elected official for the reasons asserted by Petitioner;

(6) the rules subjecting an elected official to removal were not promulgated by ordinance in advance of the conduct and, thus, "ex post facto" application of those rules violates due process;

(7) Petitioner's investigation of the facts upon which the removal request is based was flawed and therefore may not be used as evidence against Respondent;

(8) the Stored Communications Act, 18 USC 2701 *et seq.*, prohibits the disclosure of the contents of text messages, without which the prosecutor has insufficient proof to establish guilt beyond a reasonable doubt; and

(9) the perjury statute, MCL 750.423, is void for vagueness because it gives no notice that an immaterial or irrelevant misstatement of fact constitutes a violation of the perjury statute.

On August 6, 2008, Petitioner filed a motion and supporting brief requesting a hearing on the merits of the removal request, asserting that: (1) the petition is properly before the Governor; (2) a stay of the proceedings is inappropriate; and (3) the charges submitted are sufficient to warrant a hearing on the merits. Because the outcome of Respondent's motion will determine that of Petitioner's motion, the motions will be reviewed and disposed of in that order.

II. Removal Authority

The removal of local public officers in this state is governed by Const 1963, art 7, § 33, which provides that "[a]ny elected officer of a political subdivision may be removed from office in the manner and for the causes provided by law."[2]

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[2] The removal of local elected officials from office has been constitutionally authorized since before Michigan became a state. When recommending language that would become Const 1963, art 7 § 33, the Committee on the Executive Branch explained:

> The 1835 constitution gave the legislature power to provide by law for the removal of justices of the peace and other county and township officers. The 1850 constitution made the same provision "for the removal of any officer elected by a county, township or school district."
>
> The 1908 provision kept the 1850 specification of elected officers, but broadened the language to include those of cities and villages.

The statute implementing Const 1963 art 7, § 33 and governing the removal process for elected city officials is MCL 168.327, which provides:

> The governor shall remove all city officers chosen by the electors of a city or any ward or voting district of a city, when the governor is satisfied from sufficient evidence submitted to the governor that the officer has been guilty of official misconduct, wilful neglect of duty, extortion, or habitual drunkenness, or has been convicted of being drunk, or whenever it appears by a certified copy of the judgment of a court of record of this state that a city officer, after the officer's election or appointment, has been convicted of a felony. The governor shall not take action upon any charges made to the governor against a city officer until the charges have been exhibited to the governor in writing, verified by the affidavit of the party making them, that he or she believes the charges to be true. But a city officer shall not be removed for misconduct or neglect until charges of misconduct or neglect have been exhibited to the governor as provided in this section and a copy of

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> In addition to provisions for removal of local officers by local authority through laws and charters, statutes pursuant to this section have given the governor general power to remove the following elected local government officers for cause with notice of specific charges and hearing: county officers, MSA 6.1207, including auditors, MSA 6.1238, and road commissioners, MSA 6.1268; city officers, MSA 6.1327; justices of the peace and township officers, MSA 6.1369; and village officers, MSA 6.1383.
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> Removal of elective local officers "in such manner and for such cause as shall be prescribed by law," as presently provided in section 8, appears to be reasonably flexible. The legislature by statute has vested power in the governor to remove such officers for cause. [1 Official Record, Constitutional Convention 1961, p 838.]

Reported cases indicate that the constitutional authority to remove local elected officials was exercised a number of times prior to the adoption of the Michigan Constitution of 1963. See, e.g., *Attorney General v Bairley*, 209 Mich 120; 176 NW 403 (1920) (upholding removal of Monroe County Sheriff); *Germaine v Governor*, 176 Mich 585; 142 NW 738 (1913) (upholding removal of Traverse City Mayor); *People ex rel Clay v Stuart*, 74 Mich 411; 41 NW 1091 (1889) (upholding removal of Kent County Prosecutor); *McLauglin v Wayne Co Prosecuting Attorney*, 90 Mich 311, 51 NW 283 (1892) (refusing to issue court order to compel officials to proceed with removal of Detroit alderman); *People ex rel Metevier v Therrien*, 80 Mich 187; 45 NW 78 (1890) (invalidating removal of Mackinac County Sheriff for failure to provide notice and lack of specific charges). After the 1963 Constitution took effect, in *Buback v Governor*, 380 Mich 209; 156 NW2d 549 (1968), the Supreme Court upheld a Court of Appeals decision rejecting the Wayne County Sheriff's efforts to enjoin a removal proceeding against him by Governor George W. Romney while criminal charges arising from the same circumstances were pending against the Sheriff. The court rejected the Sheriff's claim that the removal proceeding would violate his privilege against self-incrimination and deprive him of procedural due process. *Id.*, p 213. And, in 1982, Governor William G. Milliken found the elected West Bloomfield Township Treasurer "guilty of official misconduct which constitutes a sufficient basis for his removal from office." Executive Order No. 1982-17.

> the charges served on the officer and an opportunity given the officer of being heard in his or her defense. The service of the charges upon the officer complained against shall be made by personal service to the officer of a copy of the charges, together with all affidavits or exhibits which may be attached to the original petition, if the officer can be found; and if not, by leaving a copy at the last known place of residence of the officer, with a person of suitable age, if a person of suitable age can be found; and if not, by posting the copy of the charges in a conspicuous place at the officer's last known place of residence. An officer who has been removed from office pursuant to this section shall not be eligible for election or appointment to any office for a period of 3 years from the date of the removal. A person who has been convicted of a violation of section 12a(1) of Act No. 370 of the Public Acts of 1941, being section 38.412a of the Michigan Compiled Laws, shall not be eligible for election or appointment to an elective or appointive city office for a period of 20 years after conviction.

This statute requires the Governor to remove an elective city officer when the Governor is convinced, based on sufficient evidence, that the accused officer is guilty of "official misconduct," "wilful neglect of duty," or other specified offenses.

III. Discussion of Motions

A. Respondent's motion to dismiss or stay the proceedings.

1. Does the petition set forth sufficient evidence of official misconduct to warrant a hearing?

Respondent asserts in his motion for dismissal that the Governor's standard of review when determining whether to hold a hearing is based on the sufficiency of the evidence in the removal request. This assertion is incorrect. The "sufficient evidence" standard described in the statute expressly applies to the Governor's final decision whether to remove an elected city official, which is made only after Respondent has been heard and all submitted evidence evaluated. At this initial stage, however, the standard is whether the allegations and materials submitted, if true, would establish an offense warranting a hearing on the merits.[3]

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[3] A removal request under MCL 168.327 must allege specific charges and the date and place of their occurrence. OAG, 1932-1934, p 408 (December 11, 1933), citing *People ex rel Metevier v Therrien*, 80 Mich 187; 45 NW 78 (1890). In that opinion, Attorney General Patrick O'Brien advised Governor William A. Comstock on an unverified petition relating to conditions in beer gardens in Detroit and seeking removal of the city's acting mayor, the Wayne County Prosecutor, and certain Detroit police officers. The Attorney General advised that the petition did not comply with the requirements of the law as it was not verified by the affidavit of the petition signers and because most of the charges were of a general nature. *Id.*, p 409. The Governor's constitutional and statutory authority to remove the Mayor of the City of Detroit was also explicitly recognized in *Attorney Gen ex rel Moreland v Detroit Common Council*, 112 Mich 145, 170-171, 173; 70 NW 450 (1897).

In this matter, Petitioner claims that Respondent used his public office for private gain. Specifically, Petitioner claims that Respondent utilized his office and public resources, including the services of Detroit's law department, to enter into settlement agreements in the matters of *Brown v Detroit Mayor*, Wayne Circuit Court (Docket No. 03-317557-NZ) and *Harris v Detroit Mayor*, Wayne Circuit Court (Docket No. 03-337670-NZ), and that he did so for personal gain, including to avoid personal embarrassment and possible criminal prosecution.

Petitioner also claims that Respondent concealed from or failed to disclose to the Council information material to the Council's review and approval of the settlement agreements. Petitioner alleges that Respondent's concealment efforts were carried out through an elaborate scheme that included, among other actions: (1) Respondent's execution, as a condition of the settlements, of one or more confidentiality agreements; (2) Respondent's rejection of the settlements including the confidentiality provisions after the city received a Freedom of Information Act[4] request for all documents related to the settlements; (3) Respondent's subsequent approval of a revised settlement agreement that excluded any reference to the confidentiality provisions; and (4) Respondent's execution of a separate confidentiality agreement that was kept secret. Petitioner further asserts that, by failing to inform the Council of the confidentiality agreement negotiated as part of these settlements, Respondent failed to disclose material terms or conditions of the settlements and therefore failed to obtain the Council's informed consent in authorizing the settlements, the combined total of which amounted to $ 8.4 million in public funds.

Petitioner has submitted approximately 29 documents as exhibits in support of the petition and charges. Petitioner also has verified the charges with the signed, dated, and notarized affidavit of Kenneth V. Cockrel, Jr. Petitioner asserts that these exhibits show that Respondent's alleged conduct violates Detroit Charter, §§ 2-106 and 6-403, and constitutes "official misconduct" under MCL 168.327.

a. Detroit Charter, § 2-106.

Detroit Charter, § 2-106, governs the standards of conduct to be adhered to by city officers and employees, including the Mayor, provides part:

> ***The use of public office for private gain is prohibited. The city council shall implement this prohibition by ordinance, consistent with state law.*** The ordinance shall contain appropriate penalties for violations of its provisions. The ordinance shall provide for the reasonable disclosure of substantial financial interests held by any elective officer, appointee, or employee who regularly exercises significant authority over the solicitation, negotiation, approval,

[4] 1976 PA 442, as amended, MCL 15.231 *et seq*.

> amendment, performance or renewal of city contracts, and in real property which is the subject of a governmental decision by the city or any agency of the city. ***The ordinance shall prohibit actions by elective officers***, appointees, or employees ***which create the appearance of impropriety***. [Emphasis added.]

This Charter provision prohibiting the use of public office in the City of Detroit for private gain has been implemented by ordinance. When adopting that implementing ordinance in 2000, the Council included a statement of purpose now codified at Detroit Ordinance, § 2-6-1:

> Public service is a public trust. A position of public trust should never be used for private gain as defined in section 2-6-3 of this Code. In order to promote public confidence in public servants, to preserve the integrity of city government, and to establish clear disclosure requirements and standards of conduct for all public servants of the City of Detroit, the City of Detroit enacts this article which shall be liberally construed so as to avoid even the appearance of impropriety by its public servants so that the public interest is protected.

The official commentary on this ordinance is codified as part of the Detroit City Code and provides detailed guidance regarding the intent of this provision. Additionally, Detroit Ordinance, §§ 2-6-1 to 2-6-130, must be "liberally construed" to fully protect the public interest. The official commentary provides, in relevant part:

> The integrity of city government and public trust and confidence in public officers and employees require that public servants be independent, impartial and responsible to the People; that government decisions and policy be made within the proper channels of the governmental system; and that public office not be used for personal gain. The purpose of this article is to establish guidelines for ethical standards of conduct for all City government officials and employees by defining those acts or actions that are incompatible with the best interests of the City and by mandating disclosure by public servants of private financial or other interests in matters affecting the City. [Detroit Ordinance, § 2-6-1, Commentary.]

The ordinance defining "private gain" also includes specific commentary on that term and its use:

> In the interest of maintaining honesty, integrity and impartiality in government, the goal of this provision is to ensure that public servants conduct government business in a manner that enhances public confidence and respect for city government, and places paramount importance on the public interest, rather than a public servant's own

> personal interest or the private interest of a third-party. [Detroit Ordinance, § 2-6-101, Commentary.]

b. Detroit Charter, § 6-403.

Detroit Charter, § 6-403, provides:

> The corporation counsel shall defend all actions or proceedings against the city.
>
> The corporation counsel shall prosecute all actions or proceedings to which the city is a party or in which the city is a party or in which the city has a legal interest, ***when directed to do so by the mayor***.
>
> Upon request, the corporation counsel may represent any officer or employee of the city in any action or proceeding involving official duties.
>
> ***No civil litigation of the city may be settled without the consent of the city council***. [Emphasis added.]

Unlike Detroit Charter, § 2-106, Detroit Charter, § 6-403 is self-executing, and does not require enactment of an implementing ordinance. The corporation counsel referenced in Detroit Charter, § 6-403 is part of the city's executive branch.[5] Under Detroit Charter, § 5-101, "[t]he mayor is the chief executive of the city and, as provided by this Charter, has control of and is accountable for the executive branch of city government." Therefore, ultimate responsibility for the law department and the corporation counsel are vested by the people of the City of Detroit in the Mayor.

c. Official misconduct under MCL 168.327.

Michigan courts have been interpreting the term "official misconduct" in the context of removal proceedings for nearly a century. In *People ex rel Johnson v Coffey*, 237 Mich 591; 213 NW 460 (1927), the court upheld Governor Alex Groesbeck's removal of Thomas Johnson from the elected office of Superintendent of Public Instruction based upon charges that he unlawfully received $1,500.00. The court concluded that the unlawful receipt constituted malfeasance regardless of his good faith belief and intentions and legal advice from his attorney that his conduct was lawful. In so concluding, the court warned that "courts frown on the taking of moneys from the public treasury unlawfully . . . and deal more severely with such official misconduct than with many other acts of official misbehavior." *Id.*, p 602. In *Carroll v Grand Rapids Comm*, 265 Mich 51, 58; 251 NW 381 (1933), the court further observed that the justification for removing one from office for cause "must be something which in a material way affects the rights of the public." And, in

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[5] "Except as otherwise provided by law or this Charter, executive and administrative authority for the implementation of programs, services and activities of city government is vested exclusively in the executive branch." Detroit Charter, § 5-102.

Wilson v Highland Park Council, 284 Mich 96, 98; 278 NW 778 (1938), the court reiterated:

> It is well settled the misconduct, misfeasance, or malfeasance, under our law to warrant plaintiff's removal from office, must have direct relation to and be connected with the performance of official duties and amount either to maladministration or to willful and intentional neglect and failure to discharge the duties of the office at all. . . . The misconduct charged and established must be something which plaintiff did, or did not do, in his official capacity.

In *Krajewski v Royal Oak,* 126 Mich App 695, 697; 337 NW2d 635 (1983), the court interpreted "official misconduct" in the context of a state law limiting the ability of governmental entities to remove veterans serving as public officials. The court determined that the phrase has a peculiar and appropriate meaning in the law under MCL 8.3a and looked to its definition in Black's Law Dictionary (4th ed.), p 1236, which provides:

> "Official misconduct" includes any "unlawful behavior by a *public officer* in relation to the duties of his office, willful in its character, including any willful or corrupt failure, refusal, or neglect of an officer to perform any duty enjoined on him by law." [Emphasis added by court.]

More recently, in *People v Coutu (On Remand)*, 235 Mich App 695; 599 NW 2d 556 (1999), the court described "official misconduct" as follows:

> The term, "misconduct in office" or "official misconduct" is broad enough to include any willful malfeasance, misfeasance, or nonfeasance in office. The term may, indeed in its common acceptation does, imply any act, either of omission or commission, on the part of an officer, by which the legal duties imposed by law have not been properly and faithfully discharged. Likewise, misconduct in office is corrupt misbehavior by an officer in the exercise of the duties of his office or while acting under color of his office, and criminal intent is an essential element of the crime. [*Id.*, p 706, quoting 67 CJS, Officers, § 256, pp 789-790.]

The court further noted that the "corrupt intent" element of the offense of official misconduct can be shown "where there is intentional or purposeful misbehavior pertaining to the requirements and duties of office by an officer." *Id.*, p 706. Finally, the court noted that official misconduct does not necessarily involve money "but as a common-law offense is much more inclusive" and "is supported if there is an injury to the public or the individual." *Id.*, p 707.

In *People v Perkins*, 468 Mich 448; 662 NW 2d 727 (2003), the court held that the following elements constitute official misconduct: (1) the accused is a public

officer; (2) the accused engaged in corrupt behavior, either by committing an unlawful act (malfeasance) or a lawful act in a wrongful manner (misfeasance); (3) the wrongdoing resulted from or directly affected the performance of the officer's official duties; and (4) the officer acted with corrupt intent, i.e., with a sense of depravity, perversion, or taint. *Id.*, pp 445-446.[6]

Significantly, the requisite "taint" identified by the court in *Perkins* for purposes of official misconduct is established when a public officer engages in activities in his official capacity for personal gain and conceals information about those activities. In *People v Redmond*, unpublished opinion of the Michigan Court of Appeals issued November 14, 2006 (Docket No. 261458), lv den 480 Mich 883 (2007), the court upheld the prosecution of the former superintendent of the Oakland Intermediate School District ("OISD") for official misconduct. The prosecution had alleged six separate factual theories under which it asserted that the defendant was guilty of official misconduct.[7] The court sustained the defendant's official misconduct conviction on all grounds. In doing so, the court concluded that the defendant committed acts of malfeasance or misfeasance under the color of his position, and that "this conduct was bad or offensive" and therefore "tainted" and corrupt. *Id.*

Against the backdrop of the foregoing authority, the Governor concludes that the removal request adequately sets forth specific charges that, if true, violate Detroit Charter, §§ 2-106 and 6-403, and constitute official misconduct under MCL 168.327. Therefore, a hearing on the merits is warranted and Respondent's assertion to the contrary is without merit.

2. Is the affidavit of Kenneth V. Cockrel, Jr. insufficient as a matter of law to support the petition?

MCL 168.327 prohibits the Governor from taking "action upon any charges made to the governor against a city officer until the charges have been exhibited to the governor in writing, verified by the affidavit of the party making them, that he or she believes the charges to be true." The Petitioner's charges in this matter were exhibited in writing and signed by Kenneth V. Cockrel, Jr. individually and in his

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[6] The court further determined that if the accused public officer failed to perform an act that the duties of the office required, and wrongdoing resulted from or directly affected the performance of the officer's official duties, the officer has engaged in willful neglect of duty, or nonfeasance. *Perkins, supra*, p 456.

[7] As in this matter, the charges against Redmond included both allegations of personal gain and concealment of information. Specifically, the charges were that Redmond: (1) unethically received additional monies for a vacation payout; (2) entered into severance agreements with OISD employees without the approval of the OISD board; (3) made factual misrepresentations in an affidavit in response to an inquiry by the Michigan Department of Education; (4) engaged in official misconduct by entering into a contract on behalf of the OISD with the MINDS Institute while chairman of the Institute's board; (5) failed to reveal his position as chairman of that board to the OISD board; and (6) authorized an additional payment to the Institute without a contract modification.

capacity as President of the Council. President Cockrel verified the petition with an affidavit, which states in pertinent part:

> I have reviewed the document entitled "In Re: Charges of the Detroit City Council Against Honorable Kwame M. Kilpatrick Seeking his Removal for Acts of Official Misconduct."
>
> Based upon my direct experience, personal knowledge and information and belief, I represent that the statements contained therein are true.

Because President Cockrel's affidavit complies with the requirements of MCL 168.327, Respondent's argument to the contrary is without merit.

3. If the decision to file the petition was made by a simple majority of the Detroit City Council in violation of its own rules, is that a basis to dismiss the petition?

Respondent asserts that the procedural rules adopted by the Council govern the filing of Petitioner's removal request and that the request was improperly submitted under those rules. Specifically, Respondent asserts that the Council's decision to file the request should have been approved by two-thirds of the Council instead of by a "simple majority," and is therefore invalid.

Neither the Charter nor the Council's rules contain specific authority governing the removal of a city official. Were such authority to exist, however, it would conflict with MCL 168.327. Section 36 of The Home Rule City Act, 1909 PA 279, MCL 117.36, states that "[n]o provision of any city charter shall conflict with or contravene the provisions of any general law of the state." The people of the City of Detroit have expressly recognized this principle in Detroit Charter, § 1-102, which provides in pertinent part:

> The city has the comprehensive home rule power conferred upon it by the Michigan Constitution, subject only to the limitations on the exercise of that power contained in the Constitution or this Charter or imposed by statute.

Because MCL 168.327 expressly provides that a removal request be "verified by the affidavit of the party making them, that he or she believes the charges to be true," the statute recognizes that such a request may be made by an entity or an individual. But even if the filing of Petitioner's removal request was governed by the Council's parliamentary rules and not by MCL 168.327, it has long been established that a legislative body has complete control and discretion over whether the body observes its own rules of procedure and a violation of such rules does not void legislative action.[8] Municipal legislative bodies like the Council often adopt

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[8] See *Baker v Carr*, 369 US 186, 214-215; 82 S Ct 691; 7 L Ed 2d 663 (1962); *Anderson v Sec of State*, 273 Mich 316, 319; 262 NW 922 (1935); *Hughes v House Speaker*, 152 NH 276, 284; 876 A2d 736 (2005); *Des Moines Register & Tribune Co v Dwyer*, 542 NW2d 491, 496 (Iowa, 1996); *Abood v Alaska*

Roberts' Rules of Order as a parliamentary guide to expedite the transaction of affairs in an orderly manner. Because such rules are procedural, strict observance is not mandatory and failure to observe a parliamentary rule does not invalidate action otherwise conforming with charter requirements.[9]

Petitioner's removal request complies with MCL 168.327, the controlling authority for such requests. Even if Petitioner's request required but lacked the backing of two-thirds of the Council and violated the Council's procedural rules, Respondent's assertion that the petition is invalid is without merit.

4. Will a removal proceeding require Respondent to submit evidence that will undermine his defense and infringe upon his right against self-incrimination in a pending criminal proceeding?

Respondent asserts that his due process rights and his right against self-incrimination require that a hearing on the merits be delayed until resolution of the criminal charges pending against him. The due process clause under the Michigan Declaration of Rights,[10] and its federal counterpart under the Fourteenth Amendment,[11] provides both substantive and procedural protections by enforcing delineated constitutional rights, establishing procedural safeguards, and prohibiting laws that lack a legitimate public purpose or rational relationship between a permissible aim and statutory requirements.[12] But, courts have restricted application of the due process clause to situations affecting a person's life, liberty or property.[13]

League of Women Voters, 743 P2d 333, 338 (Alas, 1987); *Moffitt v Willis*, 459 So 2d 1018, 1022 (Fla, 1984); *State ex rel LaFollete v Stitt*, 114 Wis 2d 358, 365; 338 NW2d 684 (1983); *State ex rel Todd v Essling*, 268 Minn 151, 165-166; 128 NW2d 307 (1964).

[9] See *Pasadena v Paine*, 126 Cal App 2d 93, 95-96; 271 P2d 577 (1954), citing *Rutherford v Nashville*, 168 Tenn 499; 79 SW2d 581 (1935); *Winninger v Waupun*, 183 Wis 32; 197 NW 249 (1934); *South Georgia Power Co v Baumann*, 169 Ga 649, 151 SE 513 (1929); *McGraw v Whitson*, 69 Iowa 348; 28 NW 632 (1886). See also, *Whitney v Hudson Common Council*, 69 Mich 189, 201-202; 37 NW 184 (1888) (holding parliamentary rules should not be applied in a way that invalidates substantial results even when results are founded on irregular methods of procedure).

[10] Const 1963, art 1, § 17, provides in pertinent part: "No person shall . . . be deprived of life, liberty or property, without due process of law."

[11] US Const, amend 14, provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

[12] See *Daniels v Williams*, 474 US 327, 337; 106 S Ct 677; 88 L Ed 2d 662 (1986) (Stevens, J., concurring); *Mudge v Macomb Co*, 458 Mich 87, 180, n 10; 580 NW2d 845 (1998) (Boyle, J., concurring in part and dissenting in part); *People v Sierb*, 456 Mich 519, 523; 581 NW2d 219 (1998) (holding protection under state and federal constitutions coextensive); *Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57, 66, n 9; 445 NW2d 61 (1989).

[13] See, e.g., *Bundo v Walled Lake*, 395 Mich 679, 692; 238 NW2d 154 (1976), quoting *Board of Regents v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972) (holding licensee has property interest in renewal of liquor license).

In Michigan, it is well settled that an elected official has no property right in the office held:

> ***A public office cannot be called 'property,'*** within the meaning of these constitutional provisions. If it could be, it would follow that every public officer, no matter how insignificant the office, would have a vested right to hold his office until the expiration of the term. ***Public offices are created for the purposes of government. They are delegations of portions of the sovereign power for the welfare of the public.*** They are not the subjects of contract, but they are agencies for the state, revocable at pleasure by the authority creating them, unless such authority be limited by the power which conferred it. [*Jeffries v Wayne Co Election Comm*, 294 Mich 255, 258; 295 NW 546 (1940), quoting *Attorney Gen ex rel Governor v Jochim*, 99 Mich 358, 367; 58 NW 611 (1894). (Emphasis added.)[14]]

A public officer in Michigan also holds no contractual rights to his or her position. "Nothing seems better settled than that an appointment or election to a public office does not establish contract relations between the person appointed or elected and the public." *Jochim*, *supra*, p 368.

Under the rule established in *Jochim*[15], a public office cannot be called "property" and the official holds no contractual rights in the office. "Offices are created for the public good, at the will of the legislative power, with such powers, privileges, and emoluments attached as are believed to be necessary or important to make them accomplish the purposes designed." *Id.* The court further noted that while "many cases can be found that speak of the disgrace of removals and the right to hold an office under election," the vesting of constitutional removal authority in the Governor "recognizes the power of the people over public offices, and sustains the authority of the governor . . . to remove for cause." *Id.*, pp 369-370.

While a city officer subject to removal under MCL 168.327 holds no property or contractual rights protected by the due process clause, *Buback v Governor*, 380 Mich 209, 217-218; 156 NW2d 549 (1968) ("*Buback I*"), suggests that the officer may still be entitled to fair and just treatment in a removal hearing or investigation

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[14] See also, *Robbins v Wayne Co Bd of Auditors*, 357 Mich 663, 667; 99 NW2d 591 (1959); *Molinaro v Driver*, 364 Mich 341, 350; 111 NW2d 50 (1962).

[15] The United States Supreme Court cited *Jochim* in *Taylor v Beckham*, 178 US 548, 577, n 4; 20 S Ct 890; 44 L Ed 1187 (1900), when the high court announced that "public offices are mere agencies or trusts, and not property as such . . . . In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right." See also, *Kulak v Birmingham*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued July 19, 2005 (Docket No. 04-1510) (determining city planning board member lacked property interest in public office subject to due process protections). Additionally, the Michigan Supreme Court has affirmed its holding in *Jochim* in subsequent decisions. See, *Robbins*, *supra*, p 667; *Jeffries*, *supra*, p 258.

under Const 1963, art 1, § 17.[16] However, the constitutional rights identified in this fair and just treatment clause are distinct from due process rights. The framers of this provision recognized the distinction:

> It may be asked, does not the due process clause protect the individual against unfair and unjust treatment? Yes, but not in executive or legislative investigations. The fact is that the due process safeguards of a criminal trial have not been interpreted to apply to legislative or executive investigations. While many investigations have unfairly and unjustly assumed the character of a criminal trial and abused the prestige of government, the rights of individuals, and our concept of separation of powers in so doing, the normal rights of an accused have not been judicially accorded to a witness in an investigation. [1 Official Record, Constitutional Convention 1961, p 546.]

The provision was not intended to "impose categorically the guarantees of procedural due process upon such investigations." 2 Official Record, Constitutional Convention 1961, p 3364.[17]

Nothing in the record of the 1961 Constitutional Convention suggests that the fair and just treatment clause was intended as a grant of substantive rights. One convention delegate commented:

> "We simply thought a person called by subpoena or certainly one who appears voluntarily should be treated with courtesy and fairness, that his personal reputation should not be impugned if he is there merely to make statements to the committee—certainly so long as he voluntarily cooperates with the committee. [1 Official Record, Constitutional Convention 1961, p 549.]

Another delegate described the clause as a "rule of ordinary decent human conduct." *Id.*, p 550.

In removal cases, courts have been reluctant to acknowledge more than minimal protections to individual officeholders and instead have emphasized the responsibilities of the Governor. The Governor is the sole tribunal in removal

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[16] Const 1963, art 1, § 17, provides in part that "[t]he right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed."

[17] See also a statement by Delegate J. Harold Stevens, the First Vice Chairman of the Committee on Declaration of Rights, Suffrage and Elections at the 1961 Constitutional Convention:

> [W]e hoped that the constitution, as we changed it, would be a guide not only to the courts but to the legislature and administrative bodies to be fair and just. It is not expected that due process of law in the sense which it would apply in a court would necessarily apply in an administrative hearing or in a legislative hearing. It never has and it isn't intended that it should. [1 Official Record, Constitutional Convention 1961, p 547.]

proceedings, with no right of appeal or review afforded the accused. "Where the removal power has been assigned to the Governor or to a state agency, this court has refused to interfere with the exercise of that power." *Buback I*, *supra*, p 217. Under MCL 168.327 the Governor can impose no greater or lesser penalty than removal and can impose no criminal punishment. If the Governor acts within the law, the Governor's decision is final. *People ex rel Clardy v Balch,* 268 Mich 196, 207, 201-201; 255 NW 762 (1934).

Moreover, the protections afforded an accused officer do not include the right to suspend a removal proceeding while criminal charges are pending, even when those charges are based on the same facts and circumstances. This is so because the two proceedings are inherently different in their nature and purpose such that the onset of one proceeding before, during, or after the other neither deprives the individual of due process nor violates the constitutional prohibitions against self-incrimination and double jeopardy. In *Thangavelu v Dep't of Licensing & Regulation,* 149 Mich App 546, 555-556; 386 NW 2d 584 (1986), the court explained this difference in the analogous context of a license revocation proceeding:

> In addition to the difference in the degrees of proof required, although the issues involved in the administrative hearing and the criminal proceeding may overlap, the purpose of a revocation proceeding substantially differs from a criminal proceeding.
>
> * * *
>
> The practice of medicine, in addition to skill and knowledge, requires honesty and integrity of the highest degree, and inherent in the State's power is the right to revoke the license of those who violate the standards it sets. This revocation proceeding is not a second criminal proceeding placing the physician in double jeopardy. Rather, the purpose is to maintain sound, professional standards of conduct for the purpose of protecting the public and the standing of the medical profession in the eye of the public.

In *People v Artman*, 218 Mich App 236, 245-246; 553 NW 2d 673 (1996), the court similarly ruled that the defendant's disbarment from the law profession after his prosecution for the same conduct did not violate the prohibition against double jeopardy because the civil penalty of disbarment serves a purpose distinct from any punitive purpose. In so concluding, the Michigan Court of Appeals relied in part on a United States Supreme Court decision holding that an *in rem* civil forfeiture did not constitute "punishment" for purposes of the double jeopardy clause because, among other things, the statutes on which they are based serve important non-punitive and remedial goals. *United States v Ursery,* 518 US 267, 290; 116 S Ct

2135; 135 L Ed 2d 549 (1996).[18]

The same analysis applies here. The pendency of Respondent's criminal prosecution on eight felony counts, some of which may involve overlapping facts upon which Petitioner's removal request is based, is not a basis to delay a removal proceeding since the purpose of the proceeding is remedial in nature and serves important, non-punitive goals, namely, the protection of the public interest.[19] *Balch, supra*, p 268.

This conclusion does not, however, mean that Respondent will be unlawfully compelled to give testimony or produce evidence at the removal proceeding that may later be used against him in a criminal proceeding. On this point, the Governor finds persuasive the court's rationale in *Governor v Senate President*, 156 Ariz 297; 751 P2d 957 (1988). In that case, Arizona Governor Evan Mecham objected to an impeachment trial pending before the Arizona Senate while he also was facing a criminal prosecution based upon the same facts. Concluding that Governor Mecham could refuse to testify before the Senate, and that neither the Senate nor a prosecutor could later use his refusal to testify against him, the court allowed the impeachment trial to proceed. The court noted:

> In the final analysis, we must recognize, however, that the rights of a person accused of crime are not co-extensive with the privilege of remaining in public office. [*Id.*, p 303.]

In this matter, Respondent may similarly refuse to testify or decline to answer specific questions if his testimony would incriminate him in his pending criminal prosecution. "Although the choice facing him is difficult, that does not make it unconstitutional." *Hart v Ferris State College*, 557 F Supp 1379, 1385 (WD Mich, 1983), quoting *Gabrilowitz v Newman*, 582 F2d 100, 104 (CA 1, 1978). Should Respondent refuse to testify, the Governor will not use that refusal against

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[18] Similarly, in *Buback I, supra*, Governor Romney was asked to remove Wayne County Sheriff Peter L. Buback from office. The Sheriff had been charged with seven misdemeanor counts of willful neglect of duty. *Buback v Wayne Co Circuit Judge*, 380 Mich 235, 236; 156 NW2d 528 (1968) ("*Buback II*"). The Sheriff sought to block the removal proceeding pending completion of the prosecution, claiming that the removal proceeding would violate his privilege against self-incrimination and deprive him of procedural due process. However, the Supreme Court affirmed the lower court's denial of his motion for injunctive and other relief. *Buback I, supra*, p 558.

[19] Petitioner has cited several federal cases suggesting that while there is no general right to a stay of a civil proceeding while criminal charges are pending, a stay of a civil proceeding may be granted as a matter of discretion if the party seeking the stay alleges and demonstrates with precision "special circumstances" to justify the stay. *US v Certain Real Property*, 986 F2d 990, 996-997 (CA 6, 1993). A pending parallel criminal proceeding alone does not justify the exercise of this discretion. *Id.* See also, *US v Little Al*, 712 F2d 133 (CA 5, 1983). Further, delay of the civil proceeding must not "seriously injure the public interest." *Securities and Exch Comm v Dresser Industries, Inc*, 628 F2d 1368, 1376 (CA DC, 1980), cert den 449 US 993 (1980). Even if such discretion is applicable here, its exercise is not warranted given the non-punitive objective of MCL 168.327, which is to protect important public interests.

Respondent. For these reasons, Respondent's request that the removal proceeding be dismissed or delayed is without merit.

5. Must the removal request be dismissed because the Detroit Charter does not provide for removal of an elected official for the reasons asserted by Petitioner?

This matter is before the Governor under MCL 168.327, not the Detroit Charter. Respondent's assertion to the contrary is irrelevant and without merit.

6. Were the rules and regulations establishing conduct, the violation of which would subject an elected official to removal, required to be promulgated by ordinance in advance of the conduct?

Respondent asserts that forfeiture provisions under Detroit Charter, § 2-107, do not authorize Petitioner's removal request because the grounds for forfeiture of an elective office under the Charter do not include official misconduct. Again, regardless of when or whether the Council adopted procedures for forfeiture of office under the Charter, this matter is before the Governor under MCL 168.327, not the Charter. Respondent's assertion to the contrary is irrelevant and without merit.

7. May Petitioner's investigation be used as evidence against Respondent if that investigation was flawed?

The information submitted to the Governor on May 20, 2008 constitutes the charges against Respondent under MCL 168.327. The statute requires that the charges be served "upon the officer complained against," "exhibited to the Governor in writing," and "verified [as true] by the affidavit of party making them." The charges submitted to the Governor on May 20, 2008 satisfy these statutory requirements. Furthermore, Respondent is being provided an opportunity to challenge and rebut the investigation and other evidence submitted by Petitioner. Respondent's assertion regarding Petitioner's investigation is therefore without merit.

8. If the Stored Communications Act, 18 USC § 2701, *et seq.*, prohibits the disclosure of the contents of text messages, does the prosecutor have insufficient proof to establish guilt beyond a reasonable doubt?

Respondent asserts that he has a reasonable expectation of privacy in the contents of communications transmitted using his city-issued text messaging device under the Stored Communications Act ("SCA"), 18 USC 2701.[20] Respondent further asserts that because the SCA prohibits the disclosure of those messages, the

[20] This statute was enacted as Title II of the Electronic Communications Privacy Act of 1986, Pub. L. No. 88-508, 100 Stat. 1848.

"prosecutor" has insufficient proof to establish Respondent's guilt "beyond a reasonable doubt." Respondent apparently mistakes this removal proceeding with Respondent's pending criminal prosecution.

Regardless, a federal court has expressly rejected Respondent's privacy argument. Among other things, the court determined that Respondent has no reasonable expectation of privacy since he personally authorized an electronic communications policy for all city employees that advised, in part, "that any electronic communication created, received, transmitted, or stored on the City's electronic communication system is public information, and may be read by anyone." *Flagg v Detroit,* ___ F Supp 2d ___ (ED Mich, 2008), unpublished opinion of United States District Court for the Eastern District of Michigan issued August 22, 2008 (Docket No. 2:05-cv-74253-GERE-RSW).

Moreover, Respondent's assertion relates not to the adequacy of the petition and charges but to the sufficiency of the evidence supporting the charges. Respondent's assertion is therefore irrelevant and without merit.

9. Is the perjury statute, MCL 750.423, void for vagueness because it gives no notice that an immaterial or irrelevant misstatement of fact constitutes a violation of the perjury statute?

Petitioner's removal request is not based on an allegation that Respondent committed perjury in violation of MCL 750.423. Respondent's assertion that the perjury statute is void for vagueness is therefore irrelevant and without merit.

B. <u>Petitioner's motion for a hearing on the merits.</u>

For the above reasons, the Governor finds Petitioner's removal request has been submitted and is before the Governor in compliance with the requirements of MCL 168.327. The charges submitted are sufficient to warrant a hearing on the merits, and a stay of the proceedings is inappropriate.

IV. <u>Conclusion</u>

The Governor, having reviewed the parties' arguments and applicable law, orders:

1. Respondent's motion to dismiss the petition is denied.

2. Respondent's motion for a stay is denied.

3. Petitioner's motion for a hearing on the merits is granted.

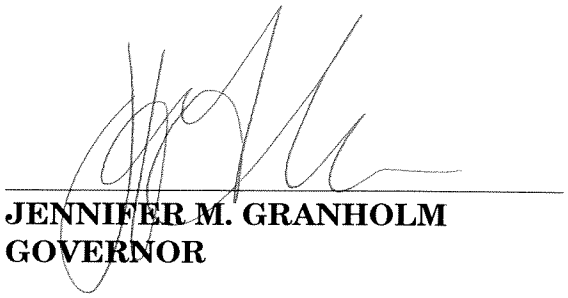
4. The hearing in this matter will proceed as previously specified, beginning at 9:00 a.m. on Wednesday, September 3, 2008.

5. The testimony taken and evidence submitted at the hearing will be limited to resolution of the following specific questions:

a. Did Respondent, in his official capacity as Mayor, authorize settlements in the matters of *Brown v Detroit Mayor*, Wayne Circuit Court (Docket No. 03-317557-NZ) and *Harris v Detroit Mayor*, Wayne Circuit Court (Docket No. 03-337670-NZ) in furtherance of his personal and private interests?

b. Did Respondent, in his official capacity as Mayor, conceal from or fail to disclose to the Council information material to its review and approval of the settlements?

IT IS SO ORDERED.



JENNIFER M. GRANHOLM
GOVERNOR

Dated: August 25, 2008