

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 ADDRESSING LEGAL ISSUES RAISED BY
RESPONDENT IN PRE-HEARING CORRESPONDENCE**

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 via motions and briefs by August 6, 2008. Responses were due on August 20, 2008, and replies to the responses were due on August 25, 2008. Motions by the parties were addressed in an opinion and order dated August 25, 2008 and issued on August 26, 2008.

After August 6, 2008, a number of legal issues were raised by counsel for Respondent in correspondence with my legal counsel, Kelly G. Keenan. The issues raised were not addressed by Respondent's counsel in the motions and briefs submitted on Respondent's behalf. Some of the issues, such as the Governor's lack of authority to issue subpoenas, were resolved in the prehearing order issued on August 11, 2008. In a letter dated August 15, 2008, counsel for Petitioner asked that correspondence from Respondent raising legal issues outside of motions or briefs be treated as a form of motion practice and that the Governor deny the motions contained in the correspondence. While Mr. Keenan previously addressed a number of these outstanding legal issues on my behalf in correspondence with counsel, this order is intended to dispose of remaining legal issues in advance of the hearing on September 3, 2008. The legal issues raised by Respondent's counsel include the following:

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

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- (1) In a letter dated August 8, 2008, counsel for Respondent asks: "In that the Council as a body is the Petitioner, I assume that you will waive their legislative immunity for the purpose of this proceeding?"
- (2) In a letter dated August 8, 2008, counsel for Respondent asks to be advised "as to the availability of immunity for witnesses and the Respondent, who will or may testify at the Governor's hearing."
- (3) In a letter dated August 13, 2008, counsel for Respondent suggests that the Governor "is authorized to issue a pardon, which would be the equivalent of state immunity on the charges filed by the Prosecutor. Thus she could inquire of the Prosecutor as to the immunity issue, or alternatively, she could issue a pardon."

The legal issues will be reviewed and disposed of in that order.

1. Waiver of Legislative Immunity

This removal proceeding is authorized by MCL 168.327, which requires that after charges of misconduct or neglect are exhibited against a city officer the officer be afforded an opportunity to be heard in his or her defense. Nothing in this statute, or other provisions of Michigan law, authorizes the Governor to waive any claim of legislative immunity, irrespective of whether such a claim is raised or applicable in this matter.

2. Grants of Immunity

1968 PA 289 governs grants of immunity, but neither this statute nor other provisions of Michigan law authorizes the Governor to grant or request immunity for Respondent or witnesses in a removal proceeding.

Section 1 of 1968 PA 289, MCL 780.701, authorizes a prosecuting attorney in a criminal proceeding pending before a court to apply to a magistrate or judge for an order granting immunity to a person who might give testimony concerning a criminal violation charged in complaint or warrant before a court. This provision has no application in this matter. The Governor is not a prosecuting attorney, magistrate, or a judge. Nor is this matter a criminal proceeding involving a criminal complaint and warrant pending before a court. This matter involves a request to remove an elected official from office under the Michigan Election Law.

Non-judicial officials have limited authority to request a court-ordered grant of immunity in an investigation or legal proceeding under Section 2a of 1968 PA 298, MCL 780.702a. Under this provision, a public official or agency may apply to a court for a grant of immunity only if the official or agency is:

- (a) empowered by a state statute to issue a subpoena or otherwise compel the testimony of a witness or the production of evidence in an investigation or proceeding authorized by that statute; or

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- (b) authorized to seek from a court a subpoena, compelled testimony or production of evidence from a court.

Nothing in MCL 168.327 or other provisions of Michigan law authorizes the Governor to issue a subpoena, compel testimony, compel production of evidence, or seek a subpoena, compelled testimony, or production of evidence from a court in this matter.² Accordingly, the Governor has no authority to grant or request immunity in this matter.

In a letter dated August 13, 2008, counsel for Respondent cites *Gardner v Broderick*, 392 US 273; 88 S Ct 1913, 20 L Ed 2d 1082 (1968) and *Lefkowitz v Cunningham*, 431 US 801; 97 S Ct 2132; 53 L Ed 2d 1 (1977) to argue "that the Governor, as the head of a governmental unit may not hold an administrative hearing while criminal charges are pending at which she inquires into the factual basis for those criminal charges, unless immunity has been conferred upon the Respondent." Neither case is applicable to this matter. In *Gardner*, a New York police officer subject was asked to waive his privilege against self-incrimination during a grand jury investigation into alleged bribery and corruption of police officers in connection with unlawful gambling operations. The officer was told he would be fired if he did not sign the waiver. After refusing to sign the waiver, the police officer was provided an administrative hearing and discharged from his position solely on the basis of his refusal to sign the waiver. Similarly, in *Lefkowitz*, a political party officer in New York was subpoenaed to testify before a special grand jury authorized to investigate his conduct in the political party offices he held. He refused to waive his right against self-incrimination and was divested of the political party offices by operation of state law. In both cases, the individuals were subject to adverse consequences solely because they refused to waive their constitutional privilege against self-incrimination.

In this matter, nothing compels Respondent to waive his right against self-incrimination. Respondent, unlike the individuals in *Gardner* and *Lefkowitz*, has not been asked to waive his privilege against self-incrimination and may refuse to testify or decline to answer specific questions if his testimony would incriminate

² To the extent that Respondent argues that the removal proceeding should be halted because he is unable to secure the attendance of witnesses on his behalf, this exact issue was addressed and resolved nearly 100 years ago by the Michigan Supreme Court in *Attorney Gen v Bairley*, 209 Mich 120; 176 NW 403 (1920).

In *Bairley*, Attorney General Alex J. Groesbeck initiated a quo warranto action (a common law writ used to inquire into the authority by which a public office is held) to determine the title of Joseph J. Bairley to the office of Monroe County Sheriff. Bairley had earlier been found guilty of malfeasance in office and ordered removed from office by Governor Albert E. Sleeper. Bairley refused to vacate the office. The Supreme Court ultimately upheld Governor Sleeper's removal of Bairley and entered a judgment of ouster. In so doing, the court concluded, among other things, that Bairley had no right to secure additional witnesses: "The principal argument in behalf of [Bairley] is based upon the assertion that . . . there is secured to [Bairley] the right to the process of subpoena, which is not provided for if the investigation is made personally by the Governor If there is any merit in this contention, it is a matter that should receive legislative rather than judicial attention."

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him in his pending criminal prosecution. As indicated in the opinion and order dated August 25, 2008, should Respondent refuse to testify, the Governor will not use that refusal against him.

3. Pardon

While the People of the State of Michigan have entrusted the Governor with authority to issue pardons for criminal offenses under Const 1963, art 5, § 14, the plain language of this constitutional provision authorizes a pardon only after a conviction in court. See also, *People v Marsh*, 125 Mich 410; 84 NW 472 (1900).

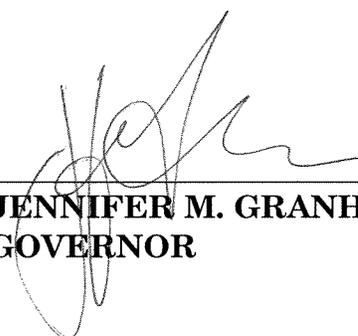
Accordingly, because Respondent has been charged in other forums with several crimes but has not been convicted, the Governor has no authority to issue a pardon in this matter. Moreover, the charges or circumstances here do not merit the use of the pardon power

Conclusion

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

1. To the extent that correspondence from Respondent's counsel dated August 8, 2008 constitutes a request for waiver of legislative immunity, Respondent's request for waiver of legislative immunity is denied.
2. To the extent that correspondence from Respondent's counsel dated August 8, 2008 and August 13, 2008 constitutes a request for a grant of immunity, Respondent's request for a grant of immunity is denied.
3. To the extent that correspondence from Respondent's counsel dated August 13, 2008 constitutes a request for a pardon, Respondent's request for a pardon is denied.
4. The hearing in this matter will proceed as previously specified consistent with the opinion and order dated August 25, 2008.

IT IS SO ORDERED.



JENNIFER M. GRANHOLM
GOVERNOR

Dated: September 2, 2008