JUDICIAL DEFERENCE TO AGENCY LEGAL INTERPRETATION—WHERE WE ARE AND POTENTIAL CHANGES ON THE HORIZON

Dennis A. Whitaker

Hawke McKeon & Sniscak LLP

PENNSYLVANIA

"Administrative tribunals are likely here to stay."

Pennsylvania Bar Association Special Committee on Administrative Law 1941

PENNSYLVANIA

In the last quarter of a century, independent regulatory administrative agencies, boards and commissions have mushroomed in ever increasing numbers at all levels of government-federal, state and local. Many of them have been given by Congress or a Legislature broad general powers to consider and dispose of matters of great public of private importance, although their precise duties and functions and in particular their limitations are often loosely or ill defined, and the law with respect thereto is not well settled.

Regardless of the admirable purpose for which these agencies are usually established, it is a matter of frequent complaint and common knowledge that the agencies at times act arbitrarily, or capriciously, and unintentionally ignore or violate rights which are ordained or guaranteed by the Federal or State Constitution, or established by law. For these reasons it is imperative that a checkrein be kept upon them.

Keystone Raceway Corp. v. State Harness Racing Commission, 173 A.2d 97, 99 (Pa. 1961), per Mr. Justice Bell.

Pennsylvania

The AALs

Administrative Agency Law of 1945

Act of June 4, 1945, P.L. 1388.

Administrative Agency Law

Act of April 28, 1978, P.L. 202, as amended, 2 Pa. C.S. §§101-754.

PENNSYLVANIA

Pa. Con. Article 5, Section 9

There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

PENNSYLVANIA

- Section 1921(c)(8) of the Statutory Construction Act, 1 Pa. C.S. § 1921(c)(8), allows courts to consider administrative interpretations where the statute is ambiguous. Section 704 of the AAL, 2 Pa. C.S. § 704, also provides for deference to administrative agency adjudications under the familiar rubric that Commonwealth Court must affirm the agency unless necessary findings of fact are not supported by substantial evidence, or the decision violates applicable law or the constitution. *See, e.g., Popowsky v. Pennsylvania Public Utility Commission*, 706 A.2d 1197 (Pa. 1997) (Commonwealth Court "exceeded its scope of review" when it failed to give PUC deference in interpreting provisions of the Public Utility Code).

PENNSYLVANIA

DEGREES OF DEFERENCE?

- **Great deference:** *Tool Sales & Service*; *Popowsky*; *Nationwide Insurance Co. v. Schneider*, 960 A.2d 442 (Pa. 2008) (such deference is only appropriate where agency expertise implicated).
- **Deference or some deference:** *Street Road Bar & Grille, Inc. v. Liquor Control Bd.*, 876 A.2d 346, 354 n.8 (Pa. 2005) (agency interpretation entitled to deference or some deference only where consistent with legislative intent or not unwise.)
- **Substantial deference:** *Schuylkill Twp. v. Pennsylvania Builders Ass'n,* 7 A.3d 249, 253 (Pa. 2010).
- **Considerable weight and deference:** *Rubino v. Pennsylvania Gaming Control Bd.*, 1 A.3d 976 (Pa. Cmwlth. 2010) (agency's interpretation of own regulations).

PENNSYLVANIA

Equivalence of Pa. law to *Chevron:* *Seeton v. Pa. Game Comm.*, 937 A.2d 1028, 1037 n.12 (Pa. 2007) (*Chevron* rubric not adopted in Pa but holding is indistinguishable).

FEDERAL

- **The administrative agency regime never has been universally popular, particularly among conservatives. As discussed by Professor Michael Gerhardt in *The Forgotten Presidents*, President Coolidge used his power to make agency appointments to maintain control over federal regulatory agencies. Indeed, he appointed agency heads who were opposed or skeptical of the core mission of the agencies they were appointed to administer. William F. Buckley, in the first issue of National Review, bemoaned "a gigantic, parasitic bureaucracy".**

FEDERAL

Owen Josephus Roberts

Roberts was a swing vote between those, led by Justices Louis Brandeis, Benjamin Cardozo, and Harlan Fiske Stone, as well as Chief Justice Charles Evans Hughes, who would allow a broader interpretation of the Commerce Clause to allow Congress to pass New Deal legislation that would provide for a more active federal role in the national economy, and the Four Horsemen (Justices James Clark McReynolds, Pierce Butler, George Sutherland, and Willis Van Devanter) who favored a narrower interpretation of the Commerce Clause and believed that the Fourteenth Amendment Due Process Clause protected a strong "liberty of contract." In 1936's *United States v. Butler*, 297 U.S. 1 (1936), Roberts sided with the Four Horsemen and wrote an opinion striking down the Agricultural Adjustment Act as beyond Congress's taxing and spending powers.

FEDERAL

"Switch in Time that Saved Nine"

Roberts switched his position on the constitutionality of the New Deal in late 1936, and the Supreme Court handed down *West Coast Hotel v. Parrish,* 300 U.S. 379 (1937) , upholding the constitutionality of minimum wage laws. Subsequently, the Court would vote to uphold all New Deal programs.

FEDERAL

- **Federal Administrative Procedure Act**. Congress established the basic framework by which rulemaking occurs by enacting the Administrative Procedure Act (APA) in 1946. It remains the basic legislative standard even though its processes have been affected by more recent statutes.

FEDERAL

Skidmore. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Deference based on the persuasiveness of the agency's position. An agency interpretation may merit some deference whatever the form that it is expressed, given the specialized experience and broader investigations and information available to the agency and the value of uniformity in its administrative and judicial understandings of what national law requires. The fair measure of deference to an agency administering its own statutes has been understood to vary with the circumstances and the courts have looked to the degree of the agency's care, its consistency, formality and relative to the persuasiveness of the agency's position. The *Skidmore* Court did not articulate a specific test expecting that subsequent cases would be resolved based on their specific facts. Subsequently, in *Chevron,* established a test to determine whether deference does or does not apply.

FEDERAL

Auer/Seminole Rock Doctrine: Deference is given to the agency's interpretation when the (1) agency's interpretation is consistent with the regulation and (2) the regulation is consistent with the statute under which it is promulgated. *Auer v. Robbins,* 519 U.S. 452 (1997) (Labor Secretary's interpretation of Department regulations is controlling unless plainly erroneous or inconsistent with the regulation); *Bowles v. Seminole Rock Co.,* 325 U.S. 410 (1945) (if meaning of [an administrative regulation] is in doubt, a court must necessarily look to the administrative construction of the regulation-- administrative interpretation becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation).

FEDERAL

Chevron: *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, a court must determine if the statute has a plain meaning. If it does and the agency's interpretation differs from that meaning, the court must reverse and substitute the correct interpretation. If the statute has no plain meaning, courts defer to reasonable agency interpretation of its enabling statute. An agency's initial interpretation of a statute that it is charged with administering is not "carved in stone," and agencies must be given ample latitude to adapt their rules and policies to the demands of changing circumstances. *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

FEDERAL

The *Mead* Doctrine: In *United States v. Mead Corporation*, 533 U.S. 218 (2001), the Court held that courts can apply two levels of deference to an agency's interpretation of a statute it is charged with enforcing: *Chevron* deference which requires an agency's interpretation must be followed and *Skidmore* deference where the agency's interpretation must be given some deference depending on its power to persuade the court of the correctness of its interpretation. Under *Mead, Chevron* deference was limited to situations where courts conclude that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of such authority. This delegation may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of comparable congressional intent.

FEDERAL

Justice Scalia's dissented in *Mead* stating in pertinent part:

Today's opinion makes an avulsive change in judicial review of federal administrative action. Whereas previously a reasonable agency application of an ambiguous statutory provision had to be sustained so long as it represented the agency's authoritative interpretation, henceforth such an application can be set aside unless "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law," as by giving an agency "power to engage in adjudication or notice-and-comment rulemaking, or . . . some other [procedure] indicati[ng] comparable congressional intent," and "the agency interpretation claiming deference was promulgated in the exercise of that authority." *Ante*, at 226-227. What was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary. And whereas previously, when agency authority to resolve ambiguity did not exist the court was free to give the statute what it considered the best interpretation, henceforth the court must supposedly give the agency view some indeterminate amount of so-called *Skidmore* deference. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). We will be sorting out the consequences of the *Mead* doctrine, which has today replaced the *Chevron* doctrine, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), for years to come. I would adhere to our established jurisprudence, defer to the reasonable interpretation the Customs Service has given to the statute it is charged with enforcing, and reverse the judgment of the Court of Appeals.

CURRENT CHALLENGES TO ESTABLISHED DOCTRINES PENNSYLVANIA

- *Crown Castle NG East, LLC v. Pennsylvania Public Utility Commission*, 188 A.3d 617 (Pa. Cmwlth. 2018), *allocatur granted* Jan. 3, 2019, appeal docket 2 MAP 2019

- Following an investigatory notice and comment paper hearing, PUC in 2017 reversed its long-held view that neutral-host Distributed Antenna System (DAS) companies are public utilities.

CURRENT CHALLENGES TO ESTABLISHED DOCTRINES PENNSYLVANIA

- On appeal of the PUC's decision by DAS provider Crown Castle, the en banc Commonwealth Court reversed, holding that: (1) the PUC's about-face "is not entitled to much deference" because it reversed the PUC's long-held prior interpretation; (2) the PUC's new interpretation is "not supported by the statutory language"; and (3) the PUC's new interpretation (a) conflicts with the Commonwealth Court's holding in *Rural Telephone Company Coalition v. Pennsylvania Public Utility Commission*, 941 A.2d 751 (Pa. Cmwlth. 2008) that wholesale service similar to DAS is public utility service, and (b) is, contrary to the PUC's claim, unsupported by the FCC's order in *In Re: Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. 12865, 12867 (F.C.C. 2014) (2014 Wireless Infrastructure Order).

CURRENT CHALLENGES TO ESTABLISHED DOCTRINES PENNSYLVANIA

- The issues the Supreme Court will decide, as stated by PUC in its request for discretionary review, are:
- Did the Commonwealth Court err in holding, based on its misinterpretation and misapplication of a federal court case, that the PUC was not entitled to deference as to its expert interpretation of its enabling statute?
- On a question of first impression involving the jurisdictional status of operators of Distributed Antenna Systems, did the Commonwealth Court commit an error of law by determining that the PUC's interpretation of the definition of "public utility" and the statutory exclusion for wireless service was inconsistent with the statutory language and rules of statutory construction?
- (3) Did the Commonwealth Court commit an error of law by determining that the Commission's finding that Distributed Antenna Systems are not jurisdictional public utilities was inconsistent with the Commonwealth Court's precedent and federal law?

CURRENT CHALLENGES TO ESTABLISHED DOCTRINES PENNSYLVANIA

- Commonwealth Court acknowledged that the PUC's interpretation generally is "entitled to substantial deference because of the highly technical nature" of the PUC statute and the PUC's role in interpreting it, 188 A. 3d at 631, but reasoned based on previous court precedent that the PUC's interpretation in this instance "is not entitled to much deference" because it deviates from the PUC's previous interpretation of the same statutory language. Moreover, Commonwealth Court essentially found that the PUC's new interpretation was clearly wrong.

CURRENT CHALLENGES TO ESTABLISHED DOCTRINES FEDERAL

- *Kisor v. Wilkie*, No. 18-15. Argument held on March 27, 2018. At issue is whether the Court should overrule *Auer* and *Seminole Rock* which direct courts to defer to an agency's reasonable interpretation of its own ambiguous regulation.
- James Kisor served in the Marines in Vietnam and later filed for benefits for PTSD. The Department of Veterans Affairs (VA) agreed that Kisor suffers from PTSD but refused to give Kisor benefits dating back to 1983 as he sought, based on its interpretation of the term "relevant" in its regulations. Kisor appealed to the Federal Circuit, which deferred to the VA's interpretation.

CURRENT CHALLENGES TO ESTABLISHED DOCTRINES FEDERAL

- Kisor filed a petition for certiorari in which he posited that *Auer* deference was intended to have only a relatively minor impact, providing a default rule when agencies' regulations happen to be ambiguous, but the actual impact instead has been much greater: Because agencies know that courts will defer to ambiguous regulations, they have an incentive to draft vague regulations (perhaps deliberately so) that they later can interpret as they choose. Kisor also argued that *Auer* deference implicates significant constitutional concerns: deference to an agency's interpretation of its own regulation violates due process because it does not give those affected by the regulation fair notice of what is and is not allowed; such deference also raises separation of powers concerns because when a federal court defers to an agency's interpretation of its own regulation the court is not performing its function to interpret the law, and thus cannot serve as a checkrein on the other branches. The Court granted cert on whether *Auer* and *Seminole* Rock should be overruled.

CURRENT CHALLENGES TO ESTABLISHED DOCTRINES QUESTIONS TO PONDER-FEDERAL

- Commentators on the *Kisor* argument are divided about whether the Court will overrule or simply limit *Auer* and *Seminole Rock*.
- There is a sense by some that *Kisor* is part of a broader attack on the administrative state and that the decision could have far reaching ripple effects on issues as diverse as the environment and immigration.
- If *Auer/Seminole Rock* go, is *Chevron* next?
- Could *Kisor* presage the demise of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)?

CURRENT CHALLENGES TO ESTABLISHED DOCTRINES TAKEAWAYS-PENNSYLVANIA

- Deference to an agency's interpretation is only an issue if the regulation is ambiguous-tools of construction are not applicable otherwise
- Deference is presaged on the agency's expertise
- Interpreting statutes and regulations are questions of law to which courts apply a de novo standard of review and a plenary scope of review-regardless of how the deference is characterized, substantial or otherwise, the courts have the last word.

Disclaimer

This presentation is offered for informational purposes only and is not, and may not be relied upon, as legal advice provided to any person or entity pursuant to an attorney-client relationship. If any person or entity wants legal advice regarding the subject(s) of this presentation, such person or entity should retain and consult with a lawyer of choice.

This presentation is not made on behalf of, and may not represent, positions by any HMS client.