ALM | LAW.COM

The Legal Intelligencer

Beg to 'Defer': Agency Deference in Recent Pennsylvania Court Cases and Its Future

By Devin T. Ryan
July 21, 2023

Agency deference is common parlance to many practitioners, especially those challenging or defending agency actions in appellate courts. Since the U.S. Supreme Court's decision in *Chevron* (deference to agencies' interpretation of ambiguous statutes) and continuing through its decision in *Auer* (deference to agencies' interpretation of ambiguous regulations), agency deference has helped administrative agencies defend their actions in court. See *Chevron v. NRDC,* 467 U.S. 837 (1984) (*Chevron*); *Auer v. Robbins,* 519 U.S. 452 (1997) (*Auer*). However, at both the state and federal level, questions have been raised about whether limits should be placed on such deference and whether the principle should be abolished entirely. Specifically, in Pennsylvania, the Commonwealth and Supreme Courts' recent rulings may indicate a growing view that agency deference, at least in certain circumstances, should be restrained. Furthermore, the U.S. Supreme Court recently granted certiorari in *Loper Bright Enterprises v. Raimondo*, which involves a request to overturn or, at the very least, clarify the U.S. Supreme Court's long-standing *Chevron* deference standard. See 2023 U.S. LEXIS 1847, __ S.Ct. __ (U.S. 2023).

This article will investigate the Pennsylvania Commonwealth Court and Supreme Court's recent rulings on agency deference, specifically *Marcellus Shale Coalition v. DEP,* 292 A.3d 921 (Pa. 2023) (*MSC III*), *DEP v. Clearfield County,* 283 A.3d 1275 (Pa. Cmwlth. 2022) (*Clearfield County*), and *Towamencin Township v. Pennsylvania Labor Relations Board*, 2022 Pa. Commw. Unpub. LEXIS 428 (Pa. Cmwlth. 2022) (*Towamencin Township*) and then address the impact, if any, the U.S. Supreme Court's forthcoming decision in Loper could have on the agency deference standard that is applied by Pennsylvania courts.

Courtesy photo

Devin Ryan, Post & Schell.

Recent Pennsylvania Court Cases on Agency Deference

Pennsylvania courts have been active in addressing issues concerning agency deference. Most recently, the Pennsylvania Supreme Court issued its significant decision in *MSC III,* which reversed the Commonwealth Court's decision below and rejected the Marcellus Shale Coalition's challenge to certain of the Pennsylvania Department of Environmental Protection's (DEP) unconventional gas well permitting regulations. Throughout the Justices' opinions, a common thread was their views on *Chevron* deference and how and to what extent that legal principle should be applied.

For example, in Part II of Chief Justice Debra Todd's lead opinion in *MSC III* (which Justices Christine Donohue and Kevin Dougherty joined),Todd declared how "this court has never declared that we follow federal agency law principles in lockstep." Indeed, "agency issues appear in a dizzying array of contexts and 'a pervading question in this field, of course, is how much deference is due in any given context.'" Furthermore, "various justices, including the author of this opinion, have expressed the view that our courts should, if not must, depart from federal law in some circumstances." However, pointing to the Pennsylvania Supreme Court's decision in *Crown Castle NG E. v. Pennsylvania PUC,* 234 A.3d 665 (Pa. 2020) (*Crown Castle*), Todd explained that *Chevron* "is indistinguishable from our own approach to agency interpretation of commonwealth statutes."

Those views on *Chevron* were not entirely supported by Justice David Wecht in his concurring and dissenting opinion. Wecht noted how "[n numerous previous decisions," he "has expressed his long-held view that judicial interpretation of statutes should not be controlled by 'deference' to the readings suggested (much less demanded) by administrative agencies." Yet, Wecht considered "the question presented here" to be "of a different shade," as "we are not so much concerned with the agencies' interpretation" of the statute" or "any purported need to defer thereto, but rather with the substantive validity of properly promulgated 'legislative' rules." Justice Wecht then went on to analyze whether the regulations at issue met the three-prong *Tire Jockey* standard for reviewing regulations adopted by an agency pursuant to its legislative rulemaking power. See *Tire Jockey Services v. DEP,* 915 A.2d 1165 (Pa. 2007).

In her dissenting opinion, Justice Sallie Mundy argued that the lead opinion "has the question backwards." "The court must not ask if anything in an enabling statute restricts an agency from promulgating certain regulations, but rather if anything in the enabling statute permits an agency to promulgate the challenged regulations." Here, Mundy disagreed with the lead opinion because, among other reasons, she concluded that the relevant statute did not grant specific authority to the agencies to promulgate the regulations at issue. Yet, Mundy recognized (and arguably did not dispute) the applicability of *Chevron* when evaluating agency actions. Instead, she quoted *Chevron* for the proposition that "it cannot be said ... that the General Assembly has 'directly spoken to the precise question at issue,'" i.e., whether the agencies had statutory authority to promulgate these regulations.

Compare these declarations with the Commonwealth Court of Pennsylvania's recent rulings on agency deference. In *Clearfield County,* the county challenged DEP's approval of a municipal waste landfill permit application filed by PA Waste, LLC (PA Waste). The Environmental Hearing Board (EHB) found that DEP's approval "insufficiently described the origin of waste to be disposed of at the Landfill" and that "a detailed description of the origin of waste would justify a need for the landfill." The DEP and PA Waste appealed that decision to the Commonwealth Court.

On appeal, the Commonwealth Court was confronted with the DEP's interpretations of two Environmental Quality Board (EQB) regulations that govern permit applications for municipal waste landfills. The first regulation at issue was the "Origin Regulation" (25 Pa. Code Section 273.112), which requires the permit application to describe the "general operational concept for the proposed facility, including the origin, composition and weight or volume of solid waste that is proposed to be disposed of at the facility." The second was the "Need Regulation" (25 Pa. Code Sect 271.127(c)), which states that the applicant must show the proposed landfill's public benefits "clearly outweigh the known and potential environmental harms."

In a 3-0 decision, the court agreed with the DEP and PA Waste that the EHB "erred as a matter of law by misconstruing the plain language of the Need Regulation, which states that a discussion of need is optional." However, the court rejected the DEP's and PA Waste's interpretation of the Origin Regulation as only requiring the permit application to identify generally the waste's origin. Relying on a dictionary definition of the term "origin," given that the term was undefined in the EQB's regulations, the court determined that PA Waste's permit application failed to "describe where the waste begins, from it derives, or its source." Here, the court reasoned that the permit application "did not describe the source of the waste" because PA Waste's narrative in the application stated that "the origin ... of the ... waste quantities to be disposed of at the landfill are not known" and that in "general, waste will be delivered from surrounding jurisdictions, as well as from sources outside of Pennsylvania." These arguably inconsistent and "oblique" descriptions were insufficient in the court's view.

A few days after the court's decision in *Clearfield County*, the Commonwealth Court addressed a *Chevron* deference issue in its unpublished *Towamencin Township* decision. In a 2-1 decision, the court upheld the Pennsylvania Labor Relations Board's (PLRB) interpretation of Section 825.300(d) of the U.S. Department of Labor's (DOL) regulations promulgated pursuant to the Family and Medical Leave Act of 1993 (FMLA). The majority found that Section 825.300(d) is unambiguous and "clearly specifies that, once a covered employer becomes aware that an eligible employee is taking FMLA-qualifying leave, the employer shall designate it as FMLA leave and count it against the employee's FMLA entitlement when the leave commences." However, even if the regulation were ambiguous, "DOL's regulations do not limit an employer's duty merely to employee FMLA eligibility notification but, rather, as DOL has interpreted, once a covered employer becomes aware that an eligible employee is taking FMLA-qualifying leave, the employer is mandated to designate and count such leave as FMLA leave when it commences."

Therefore, "to the extent DOL's regulations are considered ambiguous, DOL's FMLA forms and [DOL's Wage and Hour Division] Opinion Letters are entitled to deference." In the dissenting opinion, Judge Christine Fizzano Cannon agreed that the regulation was unambiguous but "disagreed with the majority's reading of this provision," concluding that "nothing in the language of the regulation mandates that once an employer designates leave as FMLA-eligible, it must count the leave as such against the employee's wishes." (emphasis in original). However, on the deference issue, Fizzano Cannon agreed with the hearing examiner's finding below that "DOL's interpretation is not entitled to overrule contrary judicial decisions."

US Supreme Court's Forthcoming Decision in 'Loper'

Against the backdrop of these recent Pennsylvania court rulings on agency deference is the U.S. Supreme Court's forthcoming decision in Loper, where the court will address whether it "should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." As recounted by the D.C. Circuit Court of Appeals below, the case involves a challenge by "a group of commercial herring fishing companies" to a National Marine Fisheries Service "rule that required industry to fund at-sea monitoring programs." See *Loper Bright Enterprises v. Raimondo,* 45 F.4th 359 (D.C. Cir. 2022). The companies have argued that the Magnuson-Stevens Fishery Conservation and Management Act of 1976 "does not specify that industry may be required to bear such costs and that the process by which the Service approved the Omnibus Amendment and promulgated the final rule was improper."

Potential Impact of 'Chevron's Reversal or Limitation on Pennsylvania Courts

If the U.S. Supreme Court reverses or limits *Chevron* in its *Loper* decision, the effect on Pennsylvania courts is unclear. Certainly, as noted above, the justices of the Supreme Court of Pennsylvania have diverging views on agency deference, as last displayed in the *MSC III* decision.

However, the Pennsylvania Supreme Court did indicate in *MSC III* that it has room to depart from federal rulings on agency issues. As the lead opinion stated, "our courts should, if not must, depart from federal law in some circumstances." The lead opinion proceeded to cite several concurring opinions authored by Donohue, Wecht, and the late Chief Justice Max Baer, all of whom expressed questions about how much deference, if any, should be afforded to agencies' interpretations of ambiguous statutes. Meanwhile, in some respects, the Pennsylvania Commonwealth Court has taken a more expansive view of agency deference when dealing with an agency's statutory interpretation (see *Towamencin Township*) and more restrictive view when confronted with an agency's regulatory interpretation (see *Clearfield County*).

Therefore, the U.S. Supreme Court's decision in *Loper* likely could further influence how Pennsylvania courts address the extent of agency deference. However, Pennsylvania courts will be governed by their own case law on the subject, which, as noted by the Pennsylvania Supreme Court in *MSC III,* could choose to depart from federal law in some circumstances.

Devin T. Ryan *is a principal in Post & Schell's energy and utilities practice group and focuses his practice on energy and public utility law, representing electric, natural gas, water and wastewater utility clients. He can be reached at dryan@postschell.com.*