Court Reports

Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015) (holding that an agency need not go through notice and comment when changing its interpretation of a regulation).

The Fair Labor Standards Act of 1938 ("FLSA") established a minimum wage and overtime compensation for each hour worked in excess of 40 hours during each workweek. The FLSA, however, exempts those employed in a bona fide executive, administrative, or professional capacity, or in the capacity of outside salesman.

In 2004, through the notice and comment rulemaking process, a regulation was promulgated granting power to the Secretary of Labor to define and delimit the categories of exempt administrative employees under the FLSA. The 2004 regulation also gave examples of exempt administrative employees, including employees in the financial services industry.

In 1999 and 2001, the Department of Labor ("DOL") issued an opinion interpreting a section of the FLSA to mean that mortgage-loan officers do not qualify for the administrative exemption. In 2006, the DOL issued a new opinion interpreting a 2004 regulation of the FLSA to mean that mortgage-loan officers fell within the administrative exemption. In 2010, the DOL reversed course and issued an opinion interpreting the 2004 regulation to mean that mortgage-loan officers do not qualify for the administrative exemption.

The Mortgage Bankers Association (MBA) filed suit arguing that the 2010 opinion by the DOL was inconsistent with the 2004 regulation and thus was arbitrary and capricious. MBA also argued that the 2010 opinion by the DOL was invalid in light of *Paralyzed Veterans of America v. D.C. Arena L.P.,* 117 F.3d 579 (D.C. Cir. 1997).

At trial, the district court granted summary judgment to the DOL because MBA failed to show it relied upon the 2006 opinion by the DOL and that the DOL's 2010 opinion was fully supported by the text of the 2004 regulation.

The D.C. Circuit reversed the district court citing to its rule in *Paralyzed Veterans*. The *Paralyzed Veterans* doctrine states, "if an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish under the APA [Administrative Procedure Act] without notice-and-comment." Thus, since there was no notice-and-comment before the DOL released its 2010 opinion revising the 2004

opinion, the D.C. Circuit held that the district court erred and vacated the DOL's 2010 opinion.

The Court first examined the holding in *Paralyzed Veterans*. The Court concluded that *Paralyzed Veterans* was contrary to the clear text of the APA's rule making provisions and improperly imposed an obligation on agencies beyond the maximum procedural requirements specified in the APA. The Court reasoned that §4 of the APA does not require an agency to use notice-and-comment procedures to issue an initial interpretive rule, and therefore, is not required to use those procedures when it amends or repeals that interpretive rule. The Court then found that pursuant to *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978), *Paralyzed Veterans* created a "judge-made procedural right," which is beyond the D.C. Circuit's authority.

After overturning *Paralyzed Veterans*, the Court addressed MBA's argument that an interpretation actually amends a regulation. The Court concluded that the act of "amending" has its own meaning separate and apart from the act of "interpreting." The Court then found that MBA did not explain how an interpretive rule changes a regulation and that its assertion is "impossible to reconcile with the longstanding recognition that interpretive rules do not have the force and effect of law."

The Court next dispensed with MBA's argument that *Paralyzed Veterans* is consistent with the Court's "functional" approach to interpreting the APA. The Court found that the case law cited by MBA, *Christensen v. Harris County*, 529 U.S. 576 (2000) and *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 (1995), did not support its contention. The Court concluded *Christensen* was irrelevant because the case addressed the substance of an interpretation, whereas *Paralyzed Veterans* addressed agency procedure in changing its interpretation. The Court next concluded that *Guernsey* supports its holding here because it correctly laid out the procedural rule that an agency need not go through notice and comment for interpretive rules.

The Court also addressed MBA's assertion that *Paralyzed Veterans* reinforced the APA's goal of procedural fairness by preventing agencies from unilaterally and unexpectedly altering their interpretation of important regulations. The Court, however, noted that the APA already provides checks on agencies by requiring them to "provide more substantial justification when its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." The Court also noted that Congress drafted protections directly into the FLSA by offering safe harbors that often protect parties from liability

when an agency adopts an interpretation that conflicts with its previous position.

Finally, the Court did not address MBA's last argument that the DOL's 2010 opinion was a rule instead of an interpretation. The Court stated that neither the district court nor the D.C. Circuit Court considered the issue, and MBA did not dispute the issue in its opposition brief to certiorari. Thus, MBA waived the argument.

Accordingly, the Court reversed the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Brian Davis

Grosso v. Surface Transp. Bd., 804 F.3d 110 (1st Cir. 2015) (holding that (1) the Board's ruling that the ICCTA preempted local zoning laws regulating wood pellet transloading facility was entitled to *Skidmore*, not *Chevron*, deference; (2) in determining whether vacuuming, screening, bagging, and palletizing of wood pellets constituted "transportation", the proper question for the Board was whether the activities facilitate the movement of passengers or property, not concerns of economic efficiency; and (3) the Board's denial of petitioners' request for discovery was appropriate).

In 2011, Grafton & Upton Railroad Company ("G&U"), a licensed rail carrier, completed construction of a wood pellet transloading facility that received wood pellets from hopper railcars, then vacuumed, screened, bagged, and palletized pellets for transfer onto trucks. Prior to G&U's completion of the facility, it entered into a Terminal Transloading Agreement with Grafton Upton Railcare LLC ("GU Railcare), which provided that GU Railcare would operate the transloading services on behalf of G&U.

Petitioners Diana del Grosso, et al. ("petitioners"), neighbors of the transloading facility, petitioned the Surface Transportation Board ("Board") for a declaratory order that local zoning laws regulating the activities at G&U's transloading facility were not preempted by the Interstate Commerce Commission Termination Act ("ICCTA"). Petitioners argued that such activities did not constitute "transportation" and GU Railcare was not a "rail carrier" under the ICCTA and that local zoning laws were therefore not preempted by the statute. The Board concluded that local zoning laws were preempted by the ICCTA and denied petitioners' request for discovery.

On appeal, the Board and G&U asserted that the Board's finding of preemption is entitled to *Chevron* deference. *Chevron, U.S.A., Inc. v.*