

Tetra Tech Agency Deference Standard Here To Stay

May 13 2019

Practice Area: Government Law

On January 18, 2019, the Wisconsin Supreme Court issued a decision in *Myers v. Wisconsin Department of Natural Resources* ("DNR"), a closely watched case involving administrative deference. The decision affirmed the holding in *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, a 2018 decision that upended the decades long standard used by Wisconsin courts to interpret executive agency interpretations of law.

The analysis below necessarily begins with a review of the Court's holding in *Tetra Tech* and explains how the Court in *Myers* seems to have fully adopted the *Tetra Tech* deference standard when it rejected the DNR's justifications for amending a permit.

Tetra Tech

In 2010 the Wisconsin Department of Revenue ("Department") conducted a field audit of both Tetra Tech and LFR Remediation and ultimately assessed a use tax and sales tax on the respective processes that were part of a large environmental remediation project. Tetra Tech and LFR petitioned the Department for redetermination of the assessed taxes and the Department denied the petitions. The Tax Appeals Commission upheld the Department's decision. The Commission's decision was subsequently upheld by the Brown County Circuit Court as well as the Court of Appeals.

In June 2018 the Wisconsin Supreme Court, in an opinion authored by Justice Dan Kelly, ended its "practice of deferring to administrative agencies' conclusions of law." Despite the holding, the Court nevertheless upheld the decision of the Court of Appeals. The Court did so because pursuant to Wis. Stat. § 227.57(10), "due weight" deference, as opposed to "great weight deference," was the appropriate deference to be provided the Department's "experience, technical competence, and specialized knowledge."

Historically, courts have been charged with applying a three-tier deference structure—including great weight deference, due weight deference, and no deference—when reviewing administrative agency decisions. Great weight deference was appropriate when a court concluded 1) the agency was charged by the legislature with the duty of administering the statute, 2) the interpretation of the agency was one of long-standing, 3) the agency employed its expertise or specialized knowledge in forming the interpretation, and 4) the agency's interpretation provided uniformity and consistency in the application of the statute. The great weight deference standard *required* a court adopt an administrative agency's interpretation so long as it was reasonable. In fact, deference was required even when a court had a *more reasonable* interpretation of the law.

The second level of deference, due weight, was appropriate when the statute was one that an agency was charged with administering, and the agency had some experience in an area, but had not developed the expertise which necessarily placed it in a better position to make judgments regarding the interpretation of the statute than a court. If a court found an alternative interpretation more reasonable, it did not then need to adopt the agency's interpretation. This level of deference has been referred to as a "tie goes to the agency" rule in which deference was required unless a court's interpretation was more reasonable.

The third level of deference was simply no deference at all. In these circumstances, a reviewing court merely benefited from an agency's determination and could reverse an agency's interpretation even when an alternative statutory interpretation was equally reasonable to the interpretation of an agency.

The Supreme Court's decision in *Tetra Tech* dispatched the previous three-tiered deference structure of great weight, due weight, and no weight. In doing so the Court explained, "[a]llowing an administrative agency to authoritatively interpret the law raises the possibility that our deference doctrine has allowed some part of the state's judicial power to take up residence in the executive branch of government." The Court explained that it must "be assiduous in patrolling the borders between the branches. This is not just a practical matter of efficient and effective government. We maintain this separation because it provides structural protection against depredations on our liberties."

The Court admitted from a practical standpoint that executive branch officials may have to interpret and apply laws, and those interpretations may be acquiesced to. However, the Court made clear these sorts of acts comprise interpretations and applications within the *executive* branch, as opposed to what the Court was concerned with, which was the authoritative interpretation and application of the law as applied to a particular case within the *judicial* branch.

The Court summarized its findings on the exclusive nature of judicial power emphatically – "we conclude that only the judiciary may authoritatively interpret and apply the law in cases before our courts. The executive may not intrude on this duty, and the judiciary may not cede it. If our deference doctrine allows either, we must reject it."

The end result is rather straightforward. The Court decided "to end [its] practice of deferring to administrative agencies' conclusions of law." However, it made clear "pursuant to Wis. Stat. § 227.57(10), we will give 'due weight' to the experience, technical competence, and specialized knowledge of an administrative agency as we consider its arguments."

Myers

Myers v. DNR centers on a fourteen-year saga involving a pier on the shores of Lake Superior. In 2001, the Myers obtained a DNR permit to build a pier at their waterfront property on Lake Superior. However, after receiving complaints in 2012 and 2013 from neighbors of the Myers, the DNR conducted an investigation of the pier and demanded the Myers substantially modify their pier. The Myers declined to make the proposed changes. The DNR responded by issuing a "Notice of Pending Amendment," holding a public informational hearing, and subsequently issuing a formal permit amendment.

The Myers responded to DNR's permit amendment demand by seeking Chapter 227 review in circuit court. The circuit court denied the Myers' petition. The court of appeals affirmed the circuit court's conclusion that the DNR possessed the authority to issue the permit amendment.

The Supreme Court, in a 6-1 decision authored by Justice Dallet, began its analysis by explaining the standard of review, particularly as it relates to agency interpretations of law. It cited *Tetra Tech* for the proposition that "[w]e have ended our practice of deferring to administrative agencies' conclusions of law." Instead, the court now gives "'due weight' to the experience, technical competence, and specialized knowledge of an administrative agency in evaluating the persuasiveness of the agency's argument."

In applying the *Tetra Tech* due weight deference standard, the court explicitly rejected the DNR's three main arguments in support of its authority to amend the permit issued over a decade earlier. The court rejected DNR's argument that by including a condition in the permit, it reserved to itself the authority to amend or rescind the permit if the pier became a material obstruction to navigation or became detrimental to the public interest. The court held an "administrative agency has only those powers expressly conferred or necessarily implied by the statutory provisions under which it operates."

With respect to the second DNR justification, the court found there was no support in the plain language of the relevant statute for the DNR's claim that a pier permit carries with it an ongoing requirement to satisfy the statutory criteria. Finally, the court similarly rejected DNR's reliance on "good cause" authority to modify or rescind the permit. Instead, the court agreed with the Myers' interpretation that the permit issued under Chapter 30 was akin to a building permit. Therefore, the DNR's authority to modify a permit was limited until the earlier of the expiration date of the permit or the date when pier placement was completed.

How Will These Decisions Impact Interactions with Wisconsin Agencies?

Both *Tetra Tech* and *Myers* leave little doubt Wisconsin administrative agencies must establish, clearly and convincingly, that a respective agency's status as an "expert" in fact deserves such a designation in order for the courts to give its decision any deference. Essentially, the court rejected "rote recitations" as adequate justifications from agencies to establish an expert designation, and by way of such designation, the provision of automatic deference.

The same four factors that previously existed to determine whether an agency is an "expert" remain useful for a court's analysis. However, gone are the days of *automatic* or *mandatory* deference. Instead, the Supreme Court's decisions in *Myers* and *Tetra Tech* affirm that the judiciary is ultimately responsible for interpreting the law. While courts will continue to consider an administrative agency's "expert" interpretation of the law, if such an interpretation is found to be inconsistent with a court's interpretation, it will be rejected.

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