Uncertainty Looms for Contractors After Withdrawal of Sprinkler Opinion*

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Practice Area: Construction Law and Litigation

Ask any project manager or general contractor on a major construction project in Wisconsin how much time is spent navigating the bureaucratic maze to obtain necessary permits, complying with permit conditions, and rectifying any alleged failure to meet permit conditions, and the answers may be both surprising and disappointing. The myriad of requirements imposed by state agencies add to the regulatory burden, including environmental regulations by the Department of Natural Resources (DNR) and the Department of Agriculture, Trade and Consumer Protection (DATCP), workforce requirements by the Department of Workforce Development (DWD), and professional licensure expectations imposed by the Department of Safety and Professional Services (DSPS).

To be clear, agencies are rightly tasked with establishing building codes, permit conditions, and construction standards for purposes of maintaining public safety. But for far too long, Wisconsin's regulatory regime lacked clarity and specificity. And if there is one thing the regulated community demands, it is certainty.

In addition to the various reforms that were implemented over the last ten years, was an opinion by then-Attorney General Brad Schimel. The opinion made clear a state agency could not promulgate a standard that imposed a greater restriction than that allowed by statute. However, this past fall, the Wisconsin Department of Justice under Attorney General Josh Kaul (DOJ) issued a new opinion that could represent the first substantive attempt to change the last decade's administrative reforms. What follows is a brief overview of the legislative and legal reforms that reoriented the administrative state and an analysis as to how the recent DOJ opinion could unwind it all.

The Administrative Law Revolution

2011 Act 21. In 2011, much attention was given to Act 10, Gov. Walker's signature reform to public-sector collective bargaining. But much of what we now consider the standard rule-making process in Wisconsin was first set out in 2011 Act 21. At its core, Act 21 provides that no agency may implement or enforce any standard, requirement, or threshold (including as a term or condition of any license it issues) unless such action is explicitly required or permitted by statute or rule. Gone are the days of implied or perceived authority. Additionally, for each proposed rule, the act required agencies to submit a "statement of scope" to the governor for review and prepare an economic-impact analysis relating to specific businesses, business sectors, public-utility ratepayers, local governmental units, and the state's economy as a whole.

2017 Acts 39, 57, and 108. Act 39 addressed concerns over the lengthy periods of time that agencies were given to promulgate rules. An agency must now submit a proposed rule to the legislature before a scope statement expires, resulting in a 30-month deadline. This requirement adds certainty to the process for the regulated community.

Act 57 is the state version of the federal REINS Act. Wisconsin agencies must now determine whether a proposed rule will impose $10 million or more in implementation and compliance costs over a two-year period. If there is such a finding, an agency may not promulgate the rule absent authorizing legislation or germane modification to the proposed rule to reduce the costs below the $10 million threshold. In addition, the Department of Administration must review an agency's scope statement prior to presentation to the governor to ensure an agency has explicit authority to promulgate a given rule (note the connection to Act 21).

Act 108 created an expedited process for the repeal of certain "unauthorized rules." (If the law that authorized a rule's promulgation has since been repealed or amended, the rule is considered "unauthorized" — again, note the connection to Act 21.) Any such rules, in addition to rules that are obsolete, duplicative, superseded, or economically burdensome, must be included in a biennial report to the legislature's Joint Committee for the Review of Administrative Rules. The report must also describe any actions taken by an agency, if any, to address each of the problematic rules listed.

Tetra Tech. In June 2018, the Wisconsin Supreme Court issued *Tetra Tech v. Wisconsin Department of Revenue*. In an opinion authored by then-Justice Daniel Kelly, the court decided to end its "practice of deferring to administrative agencies' conclusions of law." In dispatching with its previous three-tiered deference structure — in which agencies' conclusions could be given "great weight," "due weight," or "no weight," depending on various factors — the court explained that "allowing 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," adding: "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 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."

2018 Act 369. Act 369 essentially adopted the *Tetra Tech* analysis, prohibiting courts from affording deference to an agency's interpretation of law and agencies from seeking deference based on their interpretation of any law in any proceeding.

It also addressed "sue and settle" tactics, whereby a party — often an activist group — will sue a sympathetic agency, and the agency in turn will settle the lawsuit by changing its regulations. This avoids the usual rule-making process because the agency can claim the lawsuit forced it to make the adjustments. Under the Act, by contrast, if an action is for injunctive relief or a proposed consent decree is included, the Joint Finance Committee has the opportunity to "passively review" the agreement: The committee can simply do nothing for 14 days and let the settlement proceed; or, it can schedule a meeting to review the agreement, after which point the attorney general can proceed only with the approval of the committee.

Act 369 further required that all agency guidance documents must be posted online for the public to view, and that a public hearing must be held to receive public comment. While certain agencies under Gov. Walker had already adopted this requirement for guidance, it was important to demand it administration-wide. Finally, it allowed the Joint Committee for the Review of Administrative Rules to suspend a rule multiple times. Previously, if JCRAR acted to suspend a rule by introducing bills to repeal it in each house of the legislature, it could not do so again if the effort failed. *SEIU v. Vos*. Much of Act 369 (as well as Act 370 relating to the legislature's review of settlement agreements) was addressed this summer by the Wisconsin Supreme Court in *SEIU v. Vos*, 2020 WI 67. The court unanimously upheld the provision that allows a legislative committee to suspend rules issued by executive branch agencies multiple times; however, it did provide a warning – "an endless suspension of rules" without enacting a legislative bill "could not stand." With respect to the codification of *Tetra Tech*, Justice Brian Hagedorn, writing for the unanimous majority, opined "[g]iven our own decision that courts should not defer to the legal conclusions of an agency, a statute instructing agencies not to ask for such deference is facially constitutional."

The court splintered when it came to Act 369's regulation of guidance documents. Writing for the four-member majority on this issue, Justice Kelly concluded the Act's prohibition "from communicating with the public through the issuance of guidance documents without first going through a preclearance process and including legislatively-mandated content" was problematic because "they insert the legislature as a gatekeeper between the analytical predicate to the execution of the laws and the actual execution itself." Justice Hagedorn dissented, arguing "[g]uidance documents regulate executive branch communications with the public – a permissible and longstanding area of legislative regulation."

The *Sprinkler* Opinions
In addition to the above reforms, Attorney General Schimel issued a formal opinion in 2017 regarding the application of Act 21 to two questions posed by DSPS. This fall, the current attorney general issued a competing opinion which withdrew the Schimel opinion. It is necessary for the regulated community to understand the impact of both.

The Schimel "*Sprinkler Opinion*." Under Wisconsin statute, DSPS had to require an automatic fire sprinkler system in "every multifamily dwelling that contains … [m]ore than 20 dwelling units." DSPS had responded to this mandate by promulgating what became known as the Sprinkler Rule, which provided that an automatic sprinkler system must be installed in every multifamily dwelling that "contain[s] more than four dwelling units." The conflict between the statute and administrative code was clear.

Noting the implied authority that Wisconsin courts had recognized prior to Act 21, including the ability to promulgate rules "fairly implied from the statutes under which it operates," the opinion established that "Act 21 completely and fundamentally altered [the] balance, moving discretion away from agencies and to the Legislature." Act 21 specifically added three requirements under Wis. Stat. § 227.11(2)(a).

First, agencies do not possess any inherent or implied authority to promulgate rules or enforce standards, requirements or thresholds and that agencies only possess authority "that is explicitly conferred on the agency by the legislature." Second, statements of "legislative intent, purpose, findings, or policy" found in statutory or nonstatutory provisions do not confer or augment agency rulemaking authority. Similarly, agency rulemaking authority does not arise from statutory provisions "describing the agency's general power or duties." Finally, statutory provisions containing "a specific standard, requirement, or threshold" do not "confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive."

After determining that the DSPS rule and the state statute both contained a requirement covering the same conduct, the opinion found the requirement in the DSPS Sprinkler Rule more "limit[ing] on the use or enjoyment of property or a facility" than the Wisconsin Statute. The opinion provided a key example – "while a builder of a five-unit multifamily dwelling would not be required to install a sprinkler system under the Wisconsin Statutes' sprinkler-system requirement … that same builder would be required to install a sprinkler system under the Sprinkler Rule's sprinkler-system requirement." The opinion also concluded that while DSPS did possess the general power to "adopt reasonable and proper rules and regulations relative to the exercise of its powers and authorities," the language was really "describing the agency's general power and duties" and therefore did not confer rule-making authority."

The Kaul "*Sprinkler Opinion*." On Oct. 27, 2020, Attorney General Kaul issued a formal opinion which withdrew former Attorney General Schimel's *Sprinkler Opinion*. The new opinion concluded that the plain language of Wis. Stat. § 227.11(2)(a)2. "does not alter explicit grants of rulemaking authority, regardless of whether the rulemaking provision in which the authority is granted could be characterized as broad or 'general.'" In addition, Attorney General Kaul opined that the plain language of Wis. Stat. § 227.11(2)(a)3. does not "alter an agency's ability to promulgate, enforce, or administer a different standard enacted pursuant to a second statutory source of rulemaking authority." (emphasis added).

In addressing the question under sub-2., the Kaul Opinion pointed to other examples of broad rulemaking authority provided to DOT, DOA, and DHS. Specifically, with respect to DSPS and the Sprinkler Rule, the Kaul Opinion referenced DSPS' mandate to "adopt reasonable and proper rules and regulations relative to the exercise of its powers and authorities." The Kaul Opinion began by emphasizing "[w]hile an agency must stay within the boundaries that the Legislature has provided, this does not require that 'the exact words used in an administrative rule appear in the statute.'" In specifically addressing sub-2., the Kaul Opinion zeroed in on the last clause – "beyond the rule-making authority that is explicitly conferred on the agency by the legislature." The Kaul Opinion found the second clause "makes clear that this provision does not alter existing, explicit authority." Ultimately, this means that "if the Legislature explicitly confers rulemaking authority in a statute – such as by stating that an agency 'shall adopt reasonable and proper rules and regulations' … section 227.11(2)(a)2. does not alter that authority." The Kaul Opinion argued the *Sprinkler Opinion*'s "focus on whether a provision can be characterized as a 'general powers or duties' provision was mistaken" and instead it should have "interpreted all of the relevant statutes authorizing rulemaking." (emphasis in original).

Addressing the heart of the *Sprinkler Opinion* and sub-3., the Kaul Opinion emphasized it simply codified a principle of administrative common law – "when the Legislature in one statute directs an agency to promulgate a specific standard, the agency may not rely on that statutory authority to promulgate a different standard." Put another way, the Kaul Opinion found sub-3. does not alter explicit rulemaking found in other statutes. The Kaul Opinion provided the following illustration to cement its point: "where the Legislature establishes a statutory floor to ensure minimum safety standards while separately directing an agency to promulgate rules on a broad range of topics encompassing the minimum standards, the existence of the minimum statutory standards will not alter the agency's explicit statutory authority to promulgate rules in accordance with the broader grant of authority."

Conclusion

Following 10 years of significant reforms to the rulemaking process and much needed legal interpretations such as *Tetra Tech* and the Schimel Sprinkler Opinion, the regulated community once again faces uncertainty. The Kaul Sprinkler Opinion held that sub-3. "provides that when one statute dictates a specific standard, an agency may not rely on that standard to promulgate another, more restrictive standard." (emphasis in original). The Kaul Sprinkler Opinion failed to recognize that this was the exact scenario the regulated community faced when interpreting the number of sprinklers required in multifamily buildings.

Under the Kaul framework, despite the clear statutory language, because DSPS could point to broader, and in many cases, more general rulemaking authority, it would have been allowed to impose the more restrictive standard requiring sprinklers in multifamily dwellings with more than four dwelling units. How a member of the regulated community should have interpreted the three competing interests – sprinklers required for multifamily dwellings that contain more than 20 dwelling units (the statute), multifamily dwellings that contain more than four dwelling units (the DSPS rule), and the broader DSPS rule allowing the adoption of "reasonable and proper rules" (the broad DSPS authority) – is left unanswered by the Kaul Sprinkler Opinion.

Going forward, Wisconsin's regulated community would be wise to verify the statutory authority for any action contemplated by a Wisconsin agency. In the event it appears as though a state agency lacks authority or would supersede authority granted under statute, a regulated entity should communicate such concerns to relevant agency decision makers.

* This *Legal Update* has been slightly edited from its original version, which appears in the January/February 2021 edition of ABC Wisconsin's *Merit Shop Contractor*.
