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*Prepared by the Legal Summaries Editor of the Journal of the National Association of Administrative Law Judges at Pepperdine University School of Law. The Legal Summaries are selected case briefs of recent court decisions on issues involving administrative law.*
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UNITED STATES SUPREME COURT


LAW: The Controlled Substance Act does not authorize the Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide permitted under state law.

FACTS: In 1994, Oregon became the first state to legalize assisted suicide. The Oregon Death with Dignity Act ("ODWDA") exempts from civil or criminal liability state-licensed physicians who, in compliance with the ODWDA's specific safeguards, dispense or prescribe a lethal dose of drugs upon the request of a terminally ill patient. The Controlled Substance Act ("CSA"), a federal statute, allows these particular drugs to be available only by written prescription from a registered physician. In 1971, the United States Attorney General ("Attorney General") promulgated a regulation that requires all prescriptions to be issued for a "legitimate medical purpose" ("Regulation"). In 2001, the Attorney General issued an interpretive rule that declared that using controlled substances to assist suicide is not a "legitimate medical practice" and that dispensing or prescribing them for this purpose is unlawful under the CSA ("Interpretive Rule" or "Rule"). The State of Oregon, a physician, a pharmacist, and some terminally ill patients living in Oregon challenged the Rule. The district court permanently enjoined enforcement of the Rule, and the Ninth Circuit invalidated the Rule. The federal government appealed.

ANALYSIS: An administrative rule interpreting the issuing agency's own ambiguous regulation may receive substantial deference under Auer. Here, the Attorney General's Interpretive Rule is not entitled to Auer deference as an interpretation of the Regulation because the Regulation merely restated the terms of the CSA. An agency does not acquire special authority to interpret its own words when it does not use its own expertise and experience to formulate the regulation.

An interpretation of an ambiguous statute may be afforded substantial deference under Chevron if it appears that the administrative official promulgated the rule pursuant to authority delegated by Congress. Here, the Rule was not entitled to Chevron
deference. Congress delegated to the Attorney General only the authority to promulgate rules relating to registration and control of the dispensing of controlled substances, but not to declare an entire class of activity a criminal violation of the CSA. The Rule purports to declare that using controlled substances for physician-assisted suicide is a crime, which goes beyond the Attorney General’s statutory power to register or deregister physicians.

The Interpretive Rule is entitled to Skidmore deference, under which it is given respect only to the extent that it has the power to persuade. The Attorney General’s opinion, however, is unpersuasive under Skidmore. The CSA and case law support the conclusion that Congress did not intend the CSA to regulate the practice of medicine generally beyond barring doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking. More specifically, the CSA does not authorize the Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, as authorized by ODWDA. If Congress had intended to give this authorization to the Attorney General, it would have done so by explicit statutory language.

**HOLDING:** The Ninth Circuit’s judgment is affirmed.

**IMPACT:** Doctors practicing medicine in states that permit physician-assisted suicides may write prescriptions to “assist” without a federal criminal charge under the CSA. The Attorney General may only issue a rule criminalizing these prescriptions if Congress expands the authority granted to the Attorney General in the CSA.


**LAW:** The United States may offset Social Security benefits to collect a student loan debt that has been outstanding for over ten years.

**FACTS:** James Lockhart failed to repay federally insured student loans incurred between 1984 and 1989. The Debt Collections Act of 1982 ("DCA") provides that an agency can collect an outstanding debt by administrative offset. In 2002, the federal government began
withholding a portion of his social security payments to offset his debt, some of which was more than ten years delinquent. Lockhart sued alleging that the DCA’s ten year statute-of-limitations barred the offset. Lockhart argued that when Congress eliminated time limitations as to various student loans in 1991 by enacting the Higher Education Technical Amendments (“Amendments”), it did not intend to repeal the DCA’s statute of limitations as to offsets against social security benefits since debt collection by social security offset was not authorized until 1996 with the enactment of the Debt Collection Improvement Act (“DCIA”). The district court dismissed the complaint, and the Ninth Circuit affirmed.

ANALYSIS: The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning. Although the DCIA retained the DCA’s general ten-year bar on offset authority, the Amendments retain their effect as a limited exception to the DCA time bar in the student loan context. The Court declined to read any meaning into a failed 2004 congressional effort to amend the DCA to explicitly authorize offset of debts over ten years old because of the danger in interpreting a prior statute based on failed legislative proposals.

HOLDING: The Ninth Circuit’s judgment is affirmed.

IMPACT: Social security benefits may be offset to pay off outstanding federally insured student loans no matter how old the debt.

UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

Local 15, Int’l Bhd. of Elec. Workers v. NLRB, 429 F.3d 651 (7th Cir. 2005).

LAW: Without a valid distinction between those locked out and those allowed to work, an employer has no legitimate and substantial business justification for a partial lockout during collective bargaining negotiations. Without a legitimate and substantial business justification, an employer’s unfair labor practice violates the National Labor Relations Act.
FACTS: On June 28, 2001, Local 15, International Brotherhood of Electrical workers, AFL-CIO (the "Union") began a strike against Midwest Generation EME, LLC ("Midwest") over stalled negotiations for a new collective bargaining agreement. Midwest continued its business during the strike, relying on supervisors, contractors, and eight employees who refused to strike. After failed negotiations, on August 31, 2001, the Union voted to end their strike and offered to return to work unconditionally. On September 6, 2001, Midwest informed the Union that it was instituting a lockout against striking employees not including the 61 employees who were initially part of the strike but later offered to return to work ("crossovers"). The lockout continued until the parties reached a collective bargaining agreement on October 22, 2001.

In response to an unfair labor practice charge filed by the Union, the National Labor Relations Board ("NLRB") issued a complaint against Midwest on March 7, 2002 for unfair labor practices in violation of the National Labor Relations Act (the "Act"). The complaint alleged that Midwest committed an unfair labor practice by refusing to reinstate employees who were on strike at the time of an unconditional offer to return to work, while allowing other workers who had already returned or planned to return to work access to their jobs. The parties waived an ALJ hearing and stipulated to the record that the only issue for resolution was whether Midwest violated the Act by locking out or refusing to reinstate those employees who were on strike at the time of the Union’s unconditional offer to return to work, while reinstating and/or not locking out the crossovers. The NLRB found no violation of the Act.

ANALYSIS: The Act prohibits employers from interfering with employees’ rights to engage in activities for the purpose of collective bargaining. If the employer has no legitimate and substantial business justification for the interference, then the employer violates the Act.

Midwest’s operational needs are not a sufficient business justification for instituting the partial lockout. The record indicates that Midwest’s operations were successfully maintained throughout the strike without the use of crossovers or employees who chose not to participate in the strike at all. The last 6 crossovers did not even start work until after the Union’s August 31 unconditional offer to
return to work, which shows that they were unnecessary for continued operations.

Bringing economic pressure on Union members to abandon the Union’s bargaining demands is also an insufficient business justification for instituting the partial lockout. Midwest presented no direct correlation between an employee’s non-participation in the strike and a lack of support for the Union’s demands. In addition to abandoning the Union’s bargaining position, there can be several reasons why an employee might choose to cross a picket line, such as financial motivations, personal relationships with employers, and indifference. Further, when Midwest announced the selective lockout, all of the employees on strike had already offered to return to work unconditionally.

Without a valid distinction between those locked out and those allowed to work, Midwest had no legitimate and substantial business justification for the partial lockout.

**HOLDING:** The NLRB’s decision is reversed and remanded to determine whether Midwest’s unfair labor practices coerced the Union and its members into ratifying the contract offer, thereby voiding the collective bargaining agreement.

**IMPACT:** The NLRB’s findings must be rational and consistent with the National Labor Relations Act, and must be supported by argument and evidence. A reviewing court is not obliged to defer to the NLRB’s decision when that decision is inconsistent with a statutory mandate or congressional policy underlying a statute.

**UNITED STATES COURT OF APPEALS, NINTH CIRCUIT**

**Native Ecosystems Council v. United States Forest Serv.,** 418 F.3d 953 (9th Cir. 2005).

**LAW:** Resource plans, permits, contracts, and other instruments for the use and occupancy of National Forest System lands must be consistent with land management plans.

**FACTS:** The Helena National Forest includes an area of the Elkhorn Mountains and is managed by the Helena National Forest Plan ("HNF Plan"). The HNF Plan contains standards relating to the
security of big game species such as elk. The Elkhorn Mountains are home to the only designated Wildlife Management Unit in our National Forest System, the Elkhorn Wildlife Unit, which was created by the United States Forest Service ("Forest Service"). The Elkhorn Wildlife Unit has its own standards with which any site-specific project must comply. Specifically, the Forest Service is only to consider "land management activities" in the Elkhorn Wildlife Unit when "they are compatible with management direction for wildlife."

In 2000, the Forest Service proposed the Elkhorn Project, a wildlife improvement project involving a timber sale within the Helena National Forest and the Elkhorn Wildlife Unit. The Native Ecosystems Council and the Ecology Center (collectively, "NEC") filed an administrative appeal, which was denied. NEC then filed suit in district court arguing that the Forest Service's approval of the Elkhorn Project was arbitrary and capricious, and, therefore, in violation of various federal statutes. The district court granted the Forest Service's motion for summary judgment.

**ANALYSIS:** A grant of summary judgment is reviewed *de novo*. Under the APA, a reviewing court may set aside agency action only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." To have not acted in an arbitrary and capricious manner, the agency must present a rational basis for its conclusions.

The HFN Plan requires that each elk herd in the Helena National Forest have at least thirty-five percent "hiding cover." This hiding cover percentage must be calculated over the entire elk herd unit or drainage, or only over the summer range portion of that elk herd unit. Rather than calculating a hiding cover for the elk herd's entire unit or drainage, the Forest Service calculated the hiding cover over only the sections of the elk herd within the Helena National Forest boundaries. The agency's interpretation is inconsistent with the HNF Plan because the HNF Plan does not allow the Forest Service to exclude private and other non-HNF public lands within the elk herd's range from its hiding cover calculation perimeters. Also, the Forest Service presented a calculation over the elk herd's summer range that was inconsistent with previous hiding cover analyses, but failed to present any rational explanation for the differences. Although the Forest Service calculations need not be perfect, it is
unclear from the record whether or not the Forest Service complied with the hiding cover standard. Because the record does not include a rational basis for the Forest Service’s conclusion that the project will not violate the HNF Plan’s hiding cover standard, the agency’s approval of the project was arbitrary and capricious and a violation of the National Forest Management Act.

By using a hiding cover calculation that was inconsistent with that required by the HNF Plan, the Forest Service did not take a “hard look” at the project’s true effect. The Forest Service also failed to inform the public of the project’s environmental impact. Thus, the Forest Service also violated the National Environmental Policy Act.

**HOLDING:** The district court’s judgment is reversed and remanded.

**IMPACT:** Environmental groups concerned with administrative agency adherence to land management plans are afforded great protection. Agencies must present, in the record, well-reasoned analyses for its decisions.

**UNITED STATES COURT OF APPEALS, TENTH CIRCUIT**

**United States v. Hubenka,** 438 F.3d 1026 (10th Cir. 2006).

**LAW:** “Navigable waters,” as used in the Clean Water Act, includes tributaries of navigable waters.

**FACTS:** The Wind River originates in Wyoming’s Wind River Range and flows southeast, eventually flowing east into the Missouri River. John Hubenka (“Hubenka”) was concerned with protecting his nearby ranch and wanted to ensure that the river’s north bank would not erode. In 1995, he worked with the United States Army Corps of Engineers (the “Corps”) to construct a stabilization project that successfully protected the north bank from erosion.

At some point in the late 1990’s or early in 2000, the river’s primary course shifted from the “north channel” to a new “south channel” for reasons that are unclear. In March 2000, Hubenka had three new dikes constructed to prevent water from the south channel from returning to the north channel. None of the dikes were authorized by a permit from the Corps.
Hubenka was charged with three violations of the Clean Water Act ("CWA"), which governs "navigable waters." The government alleged that each of the dikes constituted a knowing discharge of pollutants into the Wind River. A jury convicted Hubenka on all three counts. Hubenka appealed arguing that the Corps exceeded its jurisdiction under the CWA by regulating discharges into the Wind River, a non-navigable water, and exceeded its statutory authority in issuing a regulation under which the CWA applied not just to navigable waters but also to tributaries of navigable waters.

ANALYSIS: Under the two-step Chevron rule in cases involving an agency's interpretation of a statute, a reviewing court gives effect to the express intent of Congress; if the statute is silent or ambiguous, however, the court defers to the agency's interpretation so long as it is permissible. The Supreme Court has observed that Congress's broad definition of "navigable waters" to mean "waters of the United States" evidences an intent to exercise its powers to regulate some waters that would not be deemed "navigable" under the classical understanding of that term. The term "navigable waters" is ambiguous since the CWA does not reveal the extent to which non-navigable waters may be regulated. Nonetheless, a "significant nexus" between the subject water and a navigable water is sufficient to establish jurisdiction under the CWA. Congress enacted the statute to restore and maintain the chemical, physical, and biological integrity of the nation's waters. Given this congressional concern, the potential for pollutants to migrate from a tributary to navigable waters downstream constitutes a "significant nexus" between those waters. Accordingly, the Corps' interpretation of "waters of the United States" to include tributaries of navigable waters is a permissible construction. Thus, deference is given to the Corp's interpretation of the statute.

The court also held that Hubenka's use of river bottom materials to construct dikes involved a discharge of pollutants within the CWA, the government was not required to prove a deleterious effect on waters downstream, and evidence of Hubenka's prior encounters with the Corps was admissible to prove a knowing violation of the CWA.

HOLDING: The district court's judgment is affirmed.
IMPACT: This decision affords greater environmental protection by recognizing a broader definition of “navigable waters.” This is especially important for environmentalists who are concerned that the Supreme Court may soon dramatically cutback the reach of the Clean Water Act as there are two cases before the Court this term, Rapanos v. United States and Carabell v. U.S. Army Corps of Engineers, for which each petition was filed by parties appealing the extent of the federal government’s reach under the Clean Water Act.

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

ABA v. FTC, 430 F.3d 457 (D.C. Cir. 2005).

LAW: Attorneys engaged in the practice of law are not “financial institutions” within the meaning of Federal Financial Modernization Act provisions requiring protection of consumer financial information.

FACTS: The Gramm-Leach-Bliley Financial Modernization Act (the “Act”) contains privacy protection provisions that apply to “financial institutions,” which the Act defines as “any institution the business of which is engaging in financial activities as described in section 1843(k) of Title 12.” § 1843(k) identifies institutions engaged in non-banking activities that are financial in nature. Pursuant to statutorily-granted authority, the Federal Trade Commission (“FTC” or “Commission”) issued regulations that defined a “financial institution” as “[a]n institution that is significantly engaged in financial activities.”

Various bar associations sent a letter to the FTC asking whether the Commission considered the Act to govern attorneys engaged in the practice of law, and, if so, requesting exemption from the Act. The FTC rejected the request for exemption, and purported to hold the position that the Act regulated attorneys engaged in the practice of law.

The bar associations filed actions for declaratory judgment. The district court held that the Commission’s attempt to regulate attorneys under the Act was inconsistent with the Act and arbitrary and capricious in violation of the Administrative Procedure Act (“APA”). The FTC appealed.
ANALYSIS: Deference to an administrative agency's interpretation of a statute under *Chevron* is warranted only where there is an ambiguity in the statute and the ambiguity is such as to make it appear that Congress either explicitly or implicitly delegated authority to cure the ambiguity. There is no ambiguity in the statute because Congress has left no gap for the agency to fill. It is a stretch to read the congressional definition of a "financial institution" as including an attorney. Although the FTC's regulatory definition includes the activities of providing real estate settlement services and providing tax planning and tax preparation services in which attorneys sometimes engage, Congress has never granted the FTC authority to regulate the practice of law. If it intended to do so, Congress would have left an ambiguity in the question of whether an attorney is a "financial institution" for purposes of the Act. Thus, the court owes the agency no *Chevron* deference.

Even if the court does owe deference to the agency's interpretation, it is not sufficiently reasonable to survive the deference. The regulation of the practice of law is traditionally a matter left to the states. If Congress intends to alter the usual constitutional balance between state governments and the federal government, it must make its intention to do so unmistakably clear in the language of the statute.

HOLDING: The district court's judgment is affirmed.

IMPACT: The FTC does not have wide discretion to regulate *any entity* engaged in financial activities under the Gramm-Leach-Bliley Financial Modernization Act. To regulate attorneys as "financial institutions," the FTC must have specific authority to do so by from Congress.


LAW: The adjudicatory arm of the National Association of Security Dealers ("NASD") is not a "person aggrieved" within the meaning of § 25(a) of the Securities Exchange Act of 1934 when the Securities and Exchange Commission reverses a decision it has made.

FACTS: NASD is a self-regulatory organization with express statutory authority to adjudicate actions against members accused of
violating federal securities laws. In this case, an NASD member was accused of engaging in a manipulative scheme in violation of § 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"). The NASD hearing panel concluded that the member had not manipulated the market. On appeal, the National Adjudicatory Council ("NAC") reversed the hearing panel, and the member was disciplined accordingly. The member appealed to the SEC, which concluded that the evidence in the record did not establish the alleged manipulation, and it set aside NASD's sanctions. NASD petitioned for judicial review under § 25(a) of the Exchange Act as a "person aggrieved by a final order of the [SEC]."

ANALYSIS: During the nearly seventy years that self-regulatory organizations have been recognized under the Exchange Act, Congress has never granted NASD a statutory right to seek judicial review of a SEC decision reversing disciplinary action taken by NASD. No court has ever suggested that such review is possible, and the court found no case in which NASD has ever petitioned for such review. The court found no reason to allow it to do so now.

HOLDING: NASD's petition for review is dismissed.

IMPACT: Judicial review under § 25(a) of the Securities Exchange Act of 1934 is unavailable to NASD in its adjudicative capacity. The right to review of an SEC decision is restricted to persons whom the agency regulates and affects adversely, and not to a lower tribunal.

UNITED STATES DISTRICT COURT, NEW YORK


LAW: The Iraqi Sanctions Regulations prohibit "human shield" activities in Iraq and the solicitation of funds for use in paying for illicit travel to Iraq.

FACTS: In February 2003, Judith Karpova traveled to Iraq and served as a "human shield" in the event of a U.S. invasion of Iraq. As a human shield, Karpova's mission was to protect the Iraqi infrastructure by going to sites and either publicizing the threat to them or physically remaining on the sites and protecting them with
her life. When she returned to the United States, the Department of Treasury's Office of Foreign Assets Control ("OFAC") imposed a $6,700 civil penalty against Karpova for exporting services to Iraq and engaging in unauthorized travel-related transactions in Iraq in violation of the Iraqi Sanctions Regulations (the "Regulations"). Karpova challenged the penalty, and the defendants moved to dismiss the complaint, or in the alternative, for summary judgment.

ANALYSIS: The OFAC's two interpretations are owed great deference because they relate to foreign relations. First, the OFAC sanctioned Karpova for exporting services to Iraq in violation of the Regulations. Since the Regulations do not define the term "services," the court deferred to the OFAC's interpretation. When considering the dictionary definitions of "service," the OFAC's interpretation that Karpova's human shield activities in Iraq are "services" is reasonable. Second, the OFAC sanctioned Karpova for engaging in unauthorized travel-related transactions in Iraq in violation of the Regulations. Although Karpova was hosted by an Iraqi non-governmental agency once she arrived in Iraq, there was ample evidence that before she arrived in Iraq she solicited funds to pay for her trip. It is not unreasonable for the OFAC to interpret the provisions prohibiting transactions to include prohibiting solicitation of funds for use in paying for illicit travel to Iraq. Karpova cannot assert the journalistic activity exemption because she went to Iraq in capacities other than as a writer – in particular, as a human shield. Even if she were to qualify, the exemption expressly excludes "travel transactions related to any other activity in Iraq," and some of Karpova's activities were clearly not journalistic in nature. Thus, the sanctions against Karpova were not imposed arbitrarily and capriciously.

Also, the Regulations do not exceed presidential authority because they are supported by International Emergency Economic Powers Act, the United Nations Participation Act, the Iraqi Sanctions Act, and two Executive Orders.

Further, the APA has never been construed to grant to any court the power to review the wisdom of policy decisions of the President because matters relating to foreign relations are exclusively entrusted to the political branches of government.

The court also found that Karpova was not deprived of due process despite the lack of a testimonial hearing because there is no
requirement that oral testimony be heard in every administrative proceeding. Furthermore, the Regulations did not deprive Karpova of her Fifth Amendment right to travel or her First Amendment right to freedom of speech.

**HOLDING:** Karpova’s complaint is dismissed in its entirety.

**IMPACT:** Agency interpretations that relate to foreign relations are afforded especially high deference. Thus, United States citizens or residents who travel to Iraq must be certain that any services performed in Iraq are specifically authorized by the Regulations. Even if the main purpose of their travels is for an expressly authorized activity such as donating food in humanitarian circumstances or donating supplies intended strictly for medical purposes, any service that is not expressly authorized to be exported to Iraq will result in a civil penalty against that person. Journalists who travel to Iraq must also be wary that all of their activities are journalistic in nature to be able to claim the journalistic activity exemption to the Regulations.

**MARYLAND STATE COURT**


**LAW:** Although an administrative agency has the initial responsibility for transmitting its hearing board’s record to a reviewing court when the hearing board’s decision is appealed, the petitioner ultimately bears the responsibility for compliance with the rules governing transmittal of a record.

**FACTS:** The Director of the Animal Services Division declared that Carter Post’s dog was potentially dangerous and ordered Post to keep the dog muzzled and on a non-retractable nylon or leather leash when off Post’s property. Post appealed to the Animal Matters Hearing Board for Montgomery County (“Board”), which affirmed the Director’s decision. Post then appealed to the Circuit Court for Montgomery County, which reversed the Board’s decision for failure of the Board to give notice to the parties and to transmit timely a record of the Board proceeding. Montgomery County appealed
contending that the circuit court abused its discretion in denying its motion for reconsideration without applying the usual standard of review applicable to decisions of administrative agencies.

**ANALYSIS:** A reviewing court should defer to the administrative agency’s fact-finding and drawing of inferences if they are supported by the record. In order to conduct a judicial review under the applicable standard, a court must have the administrative record. Here, the circuit court did not have the record at the time it reversed the Board’s decision, and while it had the record at the time it denied Montgomery Count’s motion for reconsideration, it did not review the record or, at least, did not base its decision on a review of the record.

Although an administrative agency has the initial responsibility for transmitting the record to the circuit court, Post bore the responsibility for compliance with the rules. The penalty for noncompliance is dismissal of the petition, unless the noncompliance was not caused by the petitioner. Here, the Board caused the noncompliance by failing to send notice of the petition for judicial review to the parties before it and failed to transmit the record to the circuit court. So dismissal of Post’s petition would have been inappropriate. Post, however, should have followed up with the agency; if Post had done so, it would have been appropriate for the circuit court to extend the time for the agency to comply with the rules including transmittal of the record.

**HOLDING:** The circuit court’s judgment is reversed and remanded so that the court may perform a judicial review in accordance with the applicable standard.

**IMPACT:** Petitioners to administrative agency decisions cannot simply rely on the agency to transmit the record, but must follow up with the agency to ensure compliance.
NEW JERSEY STATE COURT


LAW: A statutory deadline for a party requesting a hearing to contest administrative agency action is subject to the substantial compliance doctrine.

FACTS: On November 2, 2004, D.R. Horton, Inc. ("D.R. Horton") received notice from the New Jersey Department of Environmental Protection ("DEP") of a penalty assessment for alleged violations of regulations under the Freshwater Wetland Protection Act ("Act"). Under the Act, D.R. Horton had twenty days from the date of receipt of the notice to request a hearing. On November 18, 2004, four days before the deadline, D.R. Horton mailed a request for a hearing to the DEP by way of the United States Postal Service ("USPS"). For reasons not disclosed in the record, the USPS did not deliver the request until six days later, on November 24, 2004. On December 21, 2004, the DEP notified D.R. Horton that its request for a hearing was denied because the request was untimely. D.R. Horton appealed.

ANALYSIS: The substantial compliance doctrine allows a challenge to agency action to be maintained where the aggrieved party took reasonable steps to initiate the challenge within the prescribed period but the agency failed to receive timely notice of the challenge due to circumstances beyond the aggrieved party’s control. The DEP relied on cases holding that a statutory time limitation for requesting an adjudicatory hearing is mandatory and jurisdictional. New Jersey courts, however, have recognized that even strict statutory limitations on the initiation of legal action are subject to the substantial compliance doctrine. There is no difference between a limitation period on the initiation of administrative action and on judicial action – both restrict the jurisdiction of the forum to provide the particular relief authorized by the legislature. There is no legislative intent to preclude application of the substantial compliance doctrine to the twenty-day deadline. The purposes of such a requirement are to compel a party aggrieved by agency action to promptly challenge that action and to give finality to agency action
that is not challenged in a timely manner. These purposes are not undermined by the application of the substantial compliance doctrine.

D.R. Horton satisfied the five requirements to establish substantial compliance of the twenty-day deadline. First, the DEP was not prejudiced by the receipt of the hearing request two days past the statutory deadline. Second, D.R. Horton took appropriate steps to comply with the statute by mailing its request four days before the deadline. Third, the mailing constituted general compliance with the purpose of the deadline. Fourth, the mailing provided reasonable notice of D.R. Horton’s claim. Fifth, the fact that D.R. Horton mailed its hearing request four days before the statutory deadline provides a reasonable explanation why there was not strict compliance with the deadline. Regarding the final requirement, the court took judicial notice that the USPS ordinarily delivers mail within the state in less than four days. D.R. Horton could have reasonably expected that mailing the hearing request four days before the statutory deadline would result in its receipt by the deadline. Also, the only method by which D.R. Horton could have submitted its request was by mail since the notice of penalty assessment provided only a post office mailing address and not a street address for in-person delivery.

**HOLDING:** The DEP’s final decision denying the request for a hearing is reversed.

**IMPACT:** This decision recognizes that there may be circumstances beyond an aggrieved party’s control that prevent strict compliance with time limitations to request an adjudicatory hearing. It affords the aggrieved party who takes reasonable steps at compliance with protection from those circumstances beyond his control.

**PENNSYLVANIA STATE COURT**


**LAW:** The Pennsylvania Department of Insurance does not have the authority to require that all auto insurance policies include mandatory, binding arbitration for uninsured motorist and underinsured motorist disputes.
FACTS: Enacted in 1963, Pennsylvania's Uninsured Motorist Clause Act ("UM Act") requires that all auto insurance policies issued in the state include a provision, approved by the Insurance Commissioner, for uninsured motorist coverage, unless that coverage is expressly rejected by the insured. Pursuant to this provision, the Pennsylvania Insurance Department ("Department") promulgated a regulation stating that the coverage plan must include an arbitration clause ("Regulation").

In 1984, the Motor Vehicle Financial Responsibility Law ("MVFRL") was passed, stating that all auto insurance policies must include a provision for uninsured motorist and underinsured motorist insurance in order to be approved by the Insurance Commissioner. In August 1996, Liberty Mutual Insurance Company filed with the Department a revision to its private passenger insurance policy covering uninsured motorists and underinsured motorists. That revision would have eliminated the policy's arbitration provision, resulting in all such claims disputes being resolved in the courts. The Department rejected the proposal stating that the removal violated the Regulation. The Insurance Federation of Pennsylvania ("Federation") filed a petition before the Department seeking an order declaring that the Department did not have the authority to require mandatory arbitration of uninsured motorist and underinsured motorist coverage disputes. The Pennsylvania Insurance Commissioner denied the petition. The Commonwealth Court affirmed, relying on its prior holding in Prudential Property & Casualty Insurance Co. v. Muir, 513 A.2d 1129 (Pa. Commw. Ct. 1986).

ANALYSIS: The Pennsylvania legislature did not grant the Department the express authority in either the UM Act or the MVFRL to require mandatory, binding arbitration for uninsured motorist and underinsured motorist claims.

In Muir, the Commonwealth Court held that the Department had the implied authority to promulgate the regulation in question, and the authority was derived from the statutory duty to enforce the UM Act by approving only those policies that provide proper protection to the victims of uninsured motorists. Public policy, however, does not create an implied legislative mandate allowing the Department "to change the normal course of judicial proceedings
simply because arbitration is less costly and less time-consuming than traditional litigation.”

Authority may be given to an administrative agency to make rules and regulations to cover “mere matters of detail for the implementation of a statute.” In the UM Act and the MVFRL, the legislature delegated to the Department and the Insurance Commissioner the authority to approve or reject all insurance policies. The Regulation covers more than “mere matters of detail” for implementing the UM Act or the MVFRL. Thus, the Department exceeded its statutory authority in requiring mandatory, binding arbitration in uninsured motorist and underinsured motorist disputes.

**HOLDING:** The Commonwealth Court’s decision is reversed and the decision in *Muir* is overruled.

**IMPACT:** State agency action is limited to what is expressly or impliedly authorized by the state legislature. In Pennsylvania, the Department of Insurance cannot promulgate a regulation under a statute that does not give it authority to do so even if the goal of the regulation is to further that statute’s public policy. Rather, authority to do so must be expressly or impliedly added to statutory law by the legislature.

** TENNESSEE STATE COURT **


**LAW:** Procedures in Tennessee’s lethal injection protocol are not “rules” subject to promulgation requirements under the Uniform Administrative Procedure Act.

**FACTS:** In 1987, Abu-Ali Abdur’Rahman was convicted of first degree murder and sentenced to death by a jury in Davidson County, Tennessee. On April 3, 2002, while federal habeas corpus proceedings were ongoing, Abdur’Rahman asked the Commissioner of Correction in Tennessee (“Commissioner”) to issue a declaratory order regarding the constitutionality, legality, and applicability of the Tennessee Department of Correction’s (“DOC”) lethal injection protocol. On May 28, 2002, the Commissioner denied the request.
On July 26, 2002, Abdur’Rahman filed an action challenging the DOC’s lethal injection protocol in the Chancery Court for Davidson County on several constitutional and non-constitutional grounds, including the claim that the procedures in the lethal injection protocol were “rules” adopted by the DOC in violation of the Uniform Administrative Procedure Act (“UAPA”). The Chancellor dismissed the non-constitutional claims, and found that Abdur’Rahman failed to demonstrate that Tennessee’s method of lethal injection was unconstitutional. The court of appeals affirmed.

**ANALYSIS:** The UAPA requires a state agency in Tennessee to follow uniform procedures when making rules. These detailed procedures govern public hearings on the content of proposed rules, the conduct of those hearings, approval of the rules by the Attorney General, filing of the rules with the Secretary of State, and publication in the administrative register. The legal injection protocol is not subject to the requirements of the UAPA for several reasons.

First, the lethal injection protocol is not a rule as defined by the UAPA. It is not an “agency statement of general applicability that implements or prescribes a law or policy or describes the procedures or practice requirements of any agency.” Instead, the protocol fits within two exceptions to the meanings of “rule” – (1) statements concerning only the internal management of state government and not affecting private rights, privileges, or procedures available to the public, and (2) statements concerning inmates of a correctional or detention facility.

Second, the court has previously held that the DOC’s prison disciplinary procedures are not “rules” under the UAPA. The legislature has provided the DOC considerable deference and broad discretionary powers to enable the DOC to manage its responsibilities. Moreover, the court concluded that the promulgation requirements of public notice, public hearing, attorney general approval, and filing with the state are simply not realistic requirements for implementing procedures that concern the intricacies and complexities of a prison environment.

Finally, Abdur’Rahman relied on Tennessee Code Annotated section 40-23-114(c), which states that the DOC “is authorized to promulgate necessary rules and regulations to facilitate the implementation of this statute.” Virtually all other statutes in the
Tennessee Code that authorize the promulgation of rules and regulations expressly refer to the UAPA. The UAPA is inapplicable here because of the absence of an express reference to the UAPA in section 40-23-114(c).

Accordingly, the procedures in the lethal injection protocol are not "rules" adopted by the DOC in violation of the UAPA. The court also found that the lethal injection protocol in Tennessee did not violate the Eighth Amendment, did not violate due process, did not deny access to the courts, did not violate the Nonlivestock Animal Human Death act, did not violate the provisions governing the practice of medicine and provision of healthcare services, and did not violate the Drug Control Act or Pharmacy Practice Act.

**HOLDING:** The court of appeal’s judgment is affirmed.

**IMPACT:** State agency action is afforded great deference when fulfilling its responsibilities within the prison environment. Any procedures, protocol, rules, or regulations that the Tennessee Department of Correction promulgates are not subject to requirements under the Uniform Administrative Procedure Act.