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Pepperdine University School of Law

Legal Summaries

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UNITED STATES COURT OF APPEALBORGESS MEDICAL CENTER V. BURWELL
843 F.3d 497 (D.C. Cir. 2016)*Synopsis:*

In *Borgess Medical Center v. Burwell*, two hospitals, Borgess Medical Center (Borgess) and Bronson Methodist Hospital (Bronson, collectively the Hospitals) challenged the Health and Human Services' (HHS) decision to deny reimbursements for offsite training programs. The appellants contended that the Secretary of the HHS (Secretary) was incorrect in determining that they did not meet the requirements under the reimbursement regulations. The Court of Appeals for the District of Columbia Circuit agreed with the Secretary and held that the Hospitals did not comply with the regulations' requirements in order to receive the reimbursements for their training programs.

Facts and Analysis:

The Hospitals are inpatient hospitals in Michigan that created a consortium to fund and manage health education programs through which they can train interns and residents.¹ In order to fund KCMS in its operation of the residency programs, the Hospitals "entered into various Affiliation Agreements with KCMS in which the Hospitals agreed to incur 'joint and equal responsibility for providing [KCMS] with sufficient financing to carry out its programs'"² In addition to this funding through the consortium, KCMS received "millions of dollars of revenue" from patient care, Michigan State University, and contracts and grants.³ The Hospitals applied to receive

¹ *Borgess Medical Ctr. v. Burwell*, 843 F.3d 497, 500 (D.C. Cir. 2016). The Hospitals joined "Michigan State University in the late 1980s to restructure this consortium into its current form as the Michigan State University Kalamazoo Center for Medical Studies ([KCMS])." *Id.* KCMS managed multiple residency programs for the Hospitals. *Id.*

² *Id.*

³ *Id.*

reimbursement on their Medicare cost reports from fiscal terms 2000 to 2004, for the costs of offsite clinic resident training programs.⁴

The Medicare Act is a system that gives the elderly and disabled health insurance benefits and Part A of the Act addresses the insurance benefits of hospitals.⁵ The Centers for Medicare and Medicaid Services (CMS) is authorized to administer the Act—to “reimburse inpatient hospitals for costs associated with ‘graduate medical education.’”⁶ The reimbursement amount is “based on the number of ‘full-time-equivalent’ (FTE) medical residents in the hospital’s residency program each year” and the hospital can include the hours its residents spend in offsite settings in the FTE count.⁷ To count these hours towards the FTE count, the hospital “must incur ‘all, or substantially all, of the costs of the training program in that setting.’”⁸ CMS promulgated this regulation as a “tool” to aid in the determination of reimbursements.⁹

The court used the arbitrary and capricious standard to review the Secretary’s action which gives the agency’s decision substantial deference when the “agency’s interpretation of its own regulation” is at issue.¹⁰ The court will give deference to the “Secretary’s interpretation . . . unless an alternative reading is compelled by the regulation’s plain language or by other indications of the Secretary’s intent at the time of the regulation’s promulgation.”¹¹

⁴ *Id.*

⁵ *Id.* at 499.

⁶ *Id.*

⁷ *Borgess Medical Ctr. v. Burwell*, 843 F.3d 497, 499 (D.C. Cir. 2016).

⁸ *Id.* CMS promulgated regulations to enforce the requirements under the Medicare Act that allow hospitals to include nonhospital setting time towards their FTE calculations. *Id.* One of the regulations that CMS established was that

the written agreement between the hospital and the nonhospital site must indicate that the hospital will incur the cost of the resident’s salary and fringe benefits while the resident is training in the nonhospital site and . . . [provide] reasonable compensation to the nonhospital site The agreement must indicate the compensation the hospital is providing to the nonhospital site”

Id.

⁹ *Id.*

¹⁰ *Id.* at 501.

¹¹ *Id.*

First, the court reviewed the regulation's "'written agreement requirement.'"¹² The Hospitals state that this requirement was improperly used to deny their reimbursement request because the reviewer of their reimbursement claim did not "specifically identify it as a reason for reopening their cost report."¹³ The court disagreed with the Hospitals because the claim's reviewer cited not only 42 C.F.R. § 413.86(f)(4)(iii) (2000) but also all of the statute's subparts which included the written agreement requirement along with the "'all or substantially all' requirement."¹⁴ Since the reviewer cited to these provisions in the statute, the Hospitals were "put on notice" that any of these provisions will be the underlying basis for denial of the reimbursement.¹⁵

Then the court look to the Hospitals' argument that the written agreement requirement can be satisfied by the "1973 Agreement . . . , the Hospitals' and KCMS's Affiliation Agreements, and KCMS's financial statements."¹⁶ The court determined that the 1973 Agreement cannot satisfy the regulation requirement because it was not an agreement between the Hospitals and the nonhospital but an agreement to create KCMS and also did not "specify that either hospital will incur the cost of the resident's salary, fringe benefits, or other required expenses . . . for any of the residency programs."¹⁷ The court concluded that this agreement was not sufficient to satisfy the written agreement requirement.¹⁸ The Affiliation Agreements cannot satisfy the requirement because of the lack of specificity.¹⁹ The agreements state that the "Hospitals will share 'joint and equal responsibility for providing [KCMS] with sufficient financing . . .'" and failed to address specifically which programs are to be funded or how the funds will be used by the Hospitals.²⁰ KCMS received large amount of financial support from different sources which makes it

¹² *Borgess Medical Ctr. v. Burwell*, 843 F.3d 497, 501 (D.C. Cir. 2016).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 501–02.

¹⁶ *Id.* at 502.

¹⁷ *Id.*

¹⁸ *Borgess Medical Ctr. v. Burwell*, 843 F.3d 497, 502 (D.C. Cir. 2016).

¹⁹ *Id.*

²⁰ *Id.*

“impossible to know which source is funding the residency programs.”²¹ Therefore, these collection of documents are insufficient evidence to meet the regulation’s written agreement requirement.²²

Holding:

The court held that the Hospitals did not satisfy the written agreement requirement under 42 C.F.R. § 413.86(f)(4)(ii)(2000) and affirmed the lower court’s decision. The court did not address the other issue of whether “the Hospitals’ cost-sharing arrangement complied with the ‘all or substantially all’ requirement” because the noncompliance of the written agreement requirement was enough to agree with the CMS’s decision of denying the Hospitals the reimbursements.²³

Impact:

By using the arbitrary and capricious standard in reviewing the Secretary’s decision in the interpretation of the agency’s own regulation, the court maintained its precedent of giving deference to the Secretary only if the decision was “arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law.”²⁴ The decision made by CMS was based on enforcing the Medicare Act, through its regulation requiring a written agreement by the Hospitals. This was not seen as arbitrary or capricious and the appropriate statute was cited by CMS to correctly deny the Hospitals’ claim for reimbursement. The regulation unambiguously stated the requirements necessary to receive the reimbursements which the Hospitals failed to satisfy. The court was clear to explain that the agency’s action was not an abuse of its power nor going against the law—the Medicare Act—but was enforcing its regulations according to Congress’s intent in the Act.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 503.

²⁴ *Borgess Medical Ctr. v. Burwell*, 843 F.3d 497, 501 (D.C. Cir. 2016).

CONTINENTAL RESOURCES, INC. v. JEWELL
846 F.3d 1232 (D.C. Cir. 2017)

Synopsis:

The U.S. Court of Appeals, District of Columbia Circuit determined the issue of whether Continental Resources, Inc. (Continental) filed its action for judicial review more than 180 days after the receipt of notice of the Department of Interior's (Department) final decision.²⁵ The court concluded that Continental did file its complaint timely—within the 180-day time period requirement.

Facts and Analysis:

Continental leased land from the federal government to extract gas and in return paid royalties to the U.S. Department of the Interior.²⁶ In 2010, an agency within the Department “began an administrative proceeding against Continental” and issued an order to demand more royalties—an additional amount of \$1.7 million.²⁷ Continental appealed to the agency's director, in response to the administrative proceeding against it.²⁸ The Secretary, or a designee of the agency, has thirty-three months from the date of the agency's order to reach a final decision in a matter.²⁹ The appellant and the agency mutually agreed to extend this period of thirty-three months and placed “Continental's appeal ‘on hold [for six months in 2010], pending completion of settlement discussions.’”³⁰ The Director of the Department decided against Continental in April 2013, and

²⁵ Cont'l Res., Inc. v. Jewell, 846 F.3d 1232, 1232–33 (D.C. Cir. 2017).

²⁶ *Id.* at 1233.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* According to the statute—§ 1724(h)(2)(B)—the Secretary will be deemed to have made a final decision “against the lessee when the amount in controversy is \$10,000 or more” if the Secretary failed to reach a final decision within the 33 months. *Id.* However, this 33 month period from the date of the order until the final decision can be extended by a written, mutually agreed upon time between the Secretary and the appellant. *Id.*

³⁰ *Id.*

Continental filed an appeal to the Department's "Board of Land Appeals" (Board).³¹

The Board considered whether the "deemed final" provision was already triggered, which would result in an end to all administrative proceedings with "a final decision of the Secretary."³² According to 30 U.S.C. § 1724(J), Continental had "180 days from 'receipt of notice' of the final agency action to file its complaint" and the Department argued that Continental's complaint was not timely "because more than 180 days had passed from the date of the Secretary's 'deemed final decision.'"³³ The Department referred to the opinion dated June 2013 as the final decision.³⁴

The issue before the court was to determine when the 180-day period commenced—either on June 2013 or on July 2013—where the complaint will be "time-barred" or timely, respectively.³⁵ In order to determine which date was correct, the court applied Section 1724(j), which states "a judicial proceeding challenging the final agency action" is "timely so long as such judicial proceeding is commenced within 180 days from receipt of notice . . . of final agency action."³⁶ The court reasoned that the notice could not have been given earlier than the Board's ruling on July 2013 because at that point, neither parties knew "what date the Board would designate as the date of the Secretary's final decision."³⁷ The court further explained that an appellant cannot be given notice of a final agency action when the date of the action was not yet determined.³⁸ The Board's ruling in July 2013 and Continental's receipt of this ruling, then triggered the 180 day period under Section § 1724(j). The lower court erred in stating that even though Continental did not receive the notice of the final agency action until July 2013, Continental "received notice by operation of law that the Secretary had not issued a decision within

³¹ Cont'l Res., Inc. v. Jewell, 846 F.3d 1232, 1233 (D.C. Cir. 2017).

³² *Id.*

³³ *Id.* at 1234.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Cont'l Res., Inc. v. Jewell, 846 F.3d 1232, 1234 (D.C. Cir. 2017).

³⁸ *Id.*

the [thirty-three] month period.”³⁹ This was incorrect because the 180-day period—Section § 1724(j)—can only be triggered by receipt of notice requirement and not by the thirty-three month period—Section § 1724(h) provision.⁴⁰

Holding:

The court held that Continental could not have possibly known the “date of final agency action until July 2013,” which meant that receipt of notice could not have occurred before July 2013 or on June 2013, as the Department argued. Since Continental could not have known the date of the final agency action until July 2013, their receipt of notice could not have occurred before July 2013.⁴¹ As a result, Continental could have filed only after July 2013, which made their filing on January 2014 within the 180 day period because the January 2014 date was 171 days after the Board’s decision in July 2013.⁴² Therefore, Continental’s complaint was filed within the 180-day period and was determined as timely.

Impact:

The court unambiguously confirmed the importance of analyzing the law and the agencies’ correct adherence to the statute—especially in this case because the statute’s language and intent was very clear. The court emphasized the concept of strict compliance with the statute, which gives agencies regulating authority. The court will not allow abuse of discretion by the agency if the agency does not abide by the rules set forth by Congress.

³⁹ *Id.*

⁴⁰ *Id.* at 1235.

⁴¹ *Id.*

⁴² *Id.* at 1234.

NRC CORPORATION V. NATIONAL LABOR RELATIONS BOARD
840 F.3d 838 (D.C. Cir. 2016)

Synopsis:

The court in *NCR Corp. v. National Labor Relations Board*⁴³ denied the NCR Corporation's (NCR) petition for review of the National Labor Relations Board's (NLRB) order and decision. NCR petitioned for a review of the NLRB's decision and order because they contended that NLRB's action violated the National Labor Relations Act (Act). The court rejected the petitioner's arguments and granted the NLRB's cross-application for enforcement.

Facts and Analysis:

In 2014, the International Brotherhood of Electrical Workers Local 2222 (Union) petitioned for Board certification, and the Union and NCR signed an agreement to conduct a mail ballot election.⁴⁴ A notice was mailed to the forty-one employees whom "NCR had determined were eligible to vote in the election," and the notice indicated that the ballots must be mailed for the office to receive them by close of business on August 4, 2014.⁴⁵ The ballots were mailed to the eligible voters on July 21, 2014 and were to be counted on August 5, 2014.⁴⁶ The office received twenty-eight ballots by close of business on August 4, 2014, and the counting of the ballots was delayed one hour on August 5, 2014, to consider "any additional ballots arriving with that day's mail."⁴⁷ However two business days later, seven additional ballots were delivered to the office; five were postmarked on July 31, 2014, one was postmarked on August 1,

⁴³ 840 F.3d 838, 839 (D.C. Cir. 2016).

⁴⁴ *Id.* at 839–40. The election will be "conducted by mail" where "Voters must return their mail ballots so that they will be received in the National Labor Relations Board . . . by close of business on August 4, 2014 . . . [and the ballots] will be counted at the Region 01 office . . . at 10:00 AM on August 5, 2014." *Id.* at 840.

⁴⁵ *Id.* at 840.

⁴⁶ *Id.*

⁴⁷ *Id.*

2014, and another one was postmarked on August 4, 2014.⁴⁸ The NCR requested that the Region 01 office's Director count the seven ballots that were received after the deadline.⁴⁹ The Director rejected NCR's request, and NCR then filed "objections to the conduct of the election."⁵⁰

The Director stated that the Board should "overrule NCR's objections because 'the conduct of the election was in accord with established election mechanics; no employee was misled as to the balloting requirements; and . . . a deviation from the established procedure would place an unusually high burden on the election process in general'"⁵¹ The Board followed the Director's recommendation and determined that the Union was the "collective bargaining representative for the bargaining unit at NCR."⁵² The Union filed "an unfair labor practice charge, and a complaint and notice of hearing alleged that NCR violated section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union."⁵³ NCR argued that the NLRB abused their discretion by failing to decide "whether the seven voters who mailed their ballots in accordance with the Notice of Election were possibly disenfranchised, and . . . arbitrarily sacrificed voter enfranchisement to administrative expediency."⁵⁴

The court stated that the Board's interpretation of the Act cannot be struck down unless it is unreasonable and inconsistent with precedent.⁵⁵ The court will find that the Board's decision based on findings of fact to be conclusive as long as it is supported by "substantial evidence."⁵⁶ Using this standard, the court found that the Board "did not abuse its discretion in rejecting NCR's objections to the conduct of the election."⁵⁷ The language in the notice—"so that

⁴⁸ NCR Corp. v. Nat'l Lab. Rel. Bd., 840 F.3d 838, 840 (D.C. Cir. 2016).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ NCR Corp. v. Nat'l Lab. Rel. Bd., 840 F.3d 838, 841 (D.C. Cir. 2016).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 842.

they will be received”—was not misleading because this language was used in other NLRB notices “for many years and makes clear that the ballots must be received in the . . . office by the date set in order to be counted.”⁵⁸ Following this allegedly confusing phrase, the notice clearly stated that the ballots will be counted on August 5, which got rid of any possible confusion that voters may have in the process.⁵⁹ The Board also has shown through precedent that it has “consistently refused to count ballots that arrived after the count.”⁶⁰ NCR’s contentions can be seen as a misunderstanding of the Agreement and notice and their disagreement with the Board’s policy for ballots received after the deadline.⁶¹ NCR did not offer any evidence of “confusion and its view is facially unpersuasive.”⁶² NCR tried, unsuccessfully, to apply an unpublished decision by the Board, but it was considered as “neither precedential nor consistent with the Board’s established rule on late-arriving mail ballots.”⁶³ The court was not persuaded by NCR’s contentions because it failed to meet the substantial burden of indicating that the election was improper.⁶⁴ There were no irregularities in the election that resulted from the Board’s conduct because the Board counted all the ballots received by the deadline; “the Board’s disenfranchisement precedent is inapplicable” without the showing of irregularities in the election.⁶⁵

The court pointed out that NCR “never objected either to the changes or to the return or ballot count dates prior to filing its petition for review with [the] court.”⁶⁶ The policy of a final ballot count at the time the ballots are counted “is long established and well supported by the policy considerations” in previous decisions.⁶⁷ The court further explained that NCR could have requested a different

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *NCR Corp. v. Nat’l Lab. Rel. Bd.*, 840 F.3d 838, 842 (D.C. Cir. 2016).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 843.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *NCR Corp. v. Nat’l Lab. Rel. Bd.*, 840 F.3d 838, 844 (D.C. Cir. 2016).

date for the Board to count the ballots, but this did not occur.⁶⁸ According to NCR's interpretation of the policy for final ballot count, the ballots should be counted "regardless of when they were actually received, even if weeks or months after the scheduled date of the count had passed," which would be time-consuming and lead to extensive litigation.⁶⁹

Holding:

Therefore, the court determined that the Board's interpretation was consistent with its precedent because it was "based on the balancing of conflicting interests in affording employees the broadest participation in election proceedings while still protecting against 'delay and uncertainty.'"⁷⁰ The court denied NCR's petition for review of the Board's interpretation and decision in ballot counting and granted the Board's cross-application to enforce its Order on NCR.⁷¹

Impact:

The court emphasized the importance of following Congress's intent through the Act that entrusted the Board with wide discretion in creating procedures necessary to give fair and free choice of bargaining representatives by employees.⁷² The court recognized that it is crucial to not step in and overstep the authority given to the agency—especially without any substantial evidence presented that clearly indicate abuse of power. The court focused on the importance of looking at the Board's precedent, which did not indicate any abuse of its discretion and was consistent with the decision at issue in this case. The court saw the potential for extensive litigation and unreasonable use of resources in the judicial system if NCR's interpretation was adopted, which does not stay true to Congress's intent through the Act.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 841.

SEARS, ROEBUCK & CO. v. UNITED STATES POSTAL SERVICE
844 F.3d 260 (D.C. Cir. 2016)

Synopsis:

In *Sears Roebuck and Co. v. United States Postal Service*, the United States Court of Appeals, District of Columbia Circuit struck down the appellants' (Sears) challenges to the Pricing and Classification Service Center's (PCSC) decision, which upheld the United States Postal Service's (USPS) interpretation of the Domestic Mail Manual (Manual). Sears sued the USPS to overturn the PCSC's decision that appellants did not meet the requirements to qualify for the discounted automation rate on the 8.2 million folded self-mailers that appellants mailed out. The court determined that it will not undermine USPS's reasonable interpretation of Manual requirements.

Facts and Analysis:

The appellants, Sears, mailed around 8.2 million mails that "can be folded and sent without envelopes, for which they paid postage at a discounted automation rate."⁷³ In order to receive this discounted rate for the postage, Sears "certified that their mailings met the applicable sealing requirements for oblong self-mailers."⁷⁴ USPS investigated and found that Sears did not meet the requirements to receive the discounted rate because the mails sent out "exceeded seven inches in length, had been sealed only on the left edges, and not on the top and bottom edges."⁷⁵ USPS assessed revenue deficiencies of \$1.25 million against the appellants, and PCSC upheld this assessment.⁷⁶ Sears claimed that the seals they placed on the left edge "were close enough to the top and bottom to effectively seal those edges in compliance with the Manual requirements" and

⁷³ *Sears, Roebuck & Co. v. U.S. Postal Serv.*, 844 F.3d 260, 261 (D.C. Cir. 2016).

⁷⁴ *Id.* The requirements in the Manual stated that if the mail is "[seven] inches long or more, the piece must be sealed on the top and the bottom." *Id.*

⁷⁵ *Id.* at 261–62.

⁷⁶ *Id.* at 262.

specifically argued that the Manual⁷⁷ did not clearly describe “where along the top and bottom edges the seals must be placed.”⁷⁸ The appellants’ contended that both the USPS’s interpretation and PCSC’s conclusion to uphold USPS’s interpretation are unreasonable and therefore should be set aside by the court.⁷⁹

The court addressed this case by looking at the agency’s interpretation of the Manual’s requirement for sealing self-mailers.⁸⁰ The court cited *Securities and Exchange Commission v. Chenery Corp.*,⁸¹ where the “‘process of review requires that the grounds upon which the . . . agency acted be clearly disclosed and adequately sustained,’ so that the reviewing court can be assured that the agency ‘has exercised the discretion with which Congress has empowered it.’”⁸² The court disagreed with the appellants and stated that the PCSC clearly applied the sealing requirement that “‘left edge (trailing edge) and other open edges must be secured with at least one tab or a glue line,’ and that ‘the piece must be sealed on the top and the bottom.’”⁸³ The PCSC’s decision was “to ‘make clear that the core problem with [appellants’] self-mailers was that there was *no* seal on the top or the bottom at all, not that it was off-center” as the appellants were arguing by misconstruing the record.⁸⁴ In addition to the court’s explanation above, the court also addressed that the PCSC’s decision was not a post hoc rationalization of the agency’s interpretation of the Manual requirements.⁸⁵

⁷⁷ The Manual stated the following in the requirement that is at issue in this case: “The left edge (trailing edge) and other open edges must be secured with at least one tab or a glue line. . . . If the piece is 7 inches long or more, the piece must be sealed on the top and the bottom.” *Id.* In addition to this Manual, the USPS published a “Quick Service Guide . . . that included illustrations showing examples of the correct use of tabs, seals, and glue strips or spots on folded self-mailers.” *Id.* at 262–63.

⁷⁸ *Id.* at 262.

⁷⁹ *Sears, Roebuck & Co. v. U.S. Postal Serv.*, 844 F.3d 260, 262 (D.C. Cir. 2016).

⁸⁰ *Id.* at 266.

⁸¹ 318 U.S. 80 (1943).

⁸² 844 F.3d at 266.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Sears, Roebuck & Co. v. U.S. Postal Serv.*, 844 F.3d 260, 266 (D.C. Cir. 2016).

The appellants contended that the Postal Inspector's Investigative Memoranda, which suggested that the sealing requirement included the center placement of the glue, had to be followed by the USPS.⁸⁶ However, the court clarified that the Postal Inspector "does not serve an adjudicative function" and that "the local Postal Office . . . [assesses] the initial revenue deficiency."⁸⁷ After the USPS finalizes an assessment, any disputes on the assessment "must be appealed to the PCSC, which in turn 'issues the final agency decision.'"⁸⁸ The Postal Inspector in this situation is very limited and "does not establish regulatory standards" nor does the Postal Inspector "issue decisions that constitute final agency action."⁸⁹ This Investigative Memoranda has no bearing at all to undermine and set aside the PCSC's decision because it "merely stated that the Postal Inspector 'initiated an investigation of a potential revenue deficiency' and did not constitute any final agency action."⁹⁰ The court held that the PCSC's decision was the final agency action because it was supported by consistent position of the USPS and also supported by the Manual's requirement—therefore not defying *Chenery*.⁹¹

Lastly, the court determined whether or not the USPS's interpretation of the Manual's sealing requirements was reasonable.⁹² The court explained that the court will defer to the "agency's interpretation of the Manual if it 'sensibly conforms to the purpose and wording of the regulations.'"⁹³ Sears introduced an alternative interpretation of the requirements to "undercut the PCSC's decisions," that the court rejected.⁹⁴ The PCSC's decision that a mailer "longer than seven inches must have one tab . . . on the left edge, one on the top, and one on the bottom . . . conform[ed]"

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 266–67.

⁸⁹ *Id.* at 267.

⁹⁰ *Id.*

⁹¹ *Sears, Roebuck & Co. v. U.S. Postal Serv.*, 844 F.3d 260, 267 (D.C. Cir. 2016).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

precisely to the Manual's plain language."⁹⁵ The court concluded that the PCSC's decision that the appellants' mailers did not meet this requirement was "a perfectly reasonable construction of the Manual . . . [and the PCSC] gave Appellants clear notice of the sealing requirements [through the USPS's Quick Guide]."⁹⁶ The court agreed with the agency and stated that the requirements were reasonable, and the appellants had "clear notice of what was necessary in order to qualify for the discounted automation rate."⁹⁷

Holding:

The court rejected appellants' disagreement to the PCSC's decision of the denial of the discounted automation rate and affirmed the enforcement of the revenue deficiencies against the appellants.⁹⁸ However, the court reversed and vacated the lower court's decision to award surcharges against the appellants.⁹⁹ The court found "no inconsistency in the [USPS's] interpretation of the Manual" and that the interpretation was "entirely reasonable."¹⁰⁰

Impact:

The court made sure to clearly state that the agency was not at fault but was consistent and reasonable in its interpretation of the sealing requirements in the Manual. The PCSC's decision was based on the clear language of the Manual along with the Quick Guide, to provide a error-free basis for their conclusion of denying the discounted automation rate to the appellants. The court stated that the PCSC's decision was not a post hoc rationalization of the agency's decision. When there is clear language of the agency's regulation that is further explained by documents like the Quick Guide, the court will undeniably give deference to the agency's interpretation.

⁹⁵ *Id.* at 268.

⁹⁶ *Id.*

⁹⁷ *Sears, Roebuck & Co. v. U.S. Postal Serv.*, 844 F.3d 260, 268 (D.C. Cir. 2016).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 262.

The court set yet another precedent to draw attention to the important difference between investigatory and adjudicatory functions in administrative agencies. Even though the Secretary of an agency or an investigatory body like the Postal Inspector may investigate and even issue citations,¹⁰¹ these investigatory bodies cannot establish regulatory standards—only the adjudicatory body like PCSC can issue the final agency decision. The court agreed with the lower court that the agency will be given deference to its interpretation of the regulation when the agency clearly disclosed and exercised the discretion that the Congress empowered it. Since there was clear disclosure by the agency through the Manual and Quick Guide, and the agency acted reasonably and consistently with the clear language of the regulation, PCSC made the correct final assessments and do not stand to be undercut by the appellants.

**UNITED STATES POSTAL SERVICES V. POSTAL REGULATORY
COMMISSION**
841 F.3d 509 (D.C. Cir. 2016)

Synopsis:

In *United States Postal Service v. Postal Regulatory Commission*, the court of appeals dismissed the United States Postal Service's (USPS) petition for reconsideration of the Postal Regulatory Commission's (Commission) decision for lack of jurisdiction.¹⁰² The Commission established a test to help regulate the rate increase of the USPS's market-dominant products, and USPS petitioned for a reconsideration of this new test, which was denied by the Commission.¹⁰³ The court of appeals also rejected the USPS's petition because the Commission's denial of reconsideration is unreviewable.¹⁰⁴

¹⁰¹ *Id.* at 267.

¹⁰² U.S. Postal Serv. v. Postal Regulatory Comm'n, 841 F.3d 509, 510 (D.C. Cir. 2016).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

Facts and Analysis:

The Commission—authorized by the Postal Accountability and Enhancement Act of 2006 (Act)—regulates the market-dominant products’ rates of the USPS.¹⁰⁵ The Commission has the authority to approve “raising rates above [the capped price increase] market ‘on an expedited basis due to either extraordinary or exceptional circumstances.’”¹⁰⁶ Even though the Act allows the Commission to create “a modern system for regulating the rates and classes of the USPS’s market-dominant products,” Congress established a price cap for these products—“generally limiting each price increase to an amount equal to the annual change in the Consumer Price Index for All Urban Consumers (CPI-U).”¹⁰⁷ The Commission established a test called the “new normal” test (Test) to help make determinations of “when the ‘extraordinary or exceptional circumstances’ no longer support[] a rate increase.”¹⁰⁸ The procedures were created where the “‘rates may be adjusted on an expedited basis due to either extraordinary or exceptional circumstances’ without regard to the CPI-U limitation.”¹⁰⁹

In 2013, the USPS sent in another request¹¹⁰ for a rate increase, above the CPI-U’s 4.3% limit, for an “indefinite period of time.”¹¹¹

¹⁰⁵ *Id.* at 509–10.

¹⁰⁶ *Id.* at 510.

¹⁰⁷ *Id.*

¹⁰⁸ *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 841 F.3d 509, 510 (D.C. Cir. 2016).

¹⁰⁹ *Id.* For the rates to be adjusted without considering the CPI-U limitation, the Commission must find “that such adjustment is reasonable and equitable and necessary to enable the [USPS] . . . to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.” *Id.*

¹¹⁰ The USPS submitted a request for a rate increase above the CPI-U limit in 2010 to “make up for substantial losses resulting from” decrease in mail volume. *Id.* at 510–11. Even though the Commission determined that the recession that cause this decrease in mail volume was an extraordinary or exceptional circumstance, “it nonetheless denied the [USPS’s] request for an above-CPI-U rate increase because it found that the [USPS] had failed to quantify properly its losses ‘due to’ the recession with particularity.” *Id.* at 511.

¹¹¹ *Id.*

The Commission did not agree with the USPS's contention that the mail volume losses were caused by the recession and allowed the 4.3% rate increase to stay in effect until the USPS recovered \$2.8 billion.¹¹² The Commission disagreed with the USPS because the Commission stated that the losses "could not be considered 'due to' the economic downturn once a 'new normal' in operational levels was achieved."¹¹³ The court of appeals had previously given deference to the Commission on its use of the Test because the Test was well supported with reason and evidence.¹¹⁴ The court of appeals agreed with the Commission because the Commission "permissibly reasoned that just because some of the effects of exigent circumstances may continue for the foreseeable future, that does not mean that those circumstances remain 'extraordinary' or 'exceptional' for just as long."¹¹⁵ The Commission declined to reconsider the Test, and the USPS petitioned the court to review the Test again.¹¹⁶

The court looked to precedent on a similar situation where the Court determined that "an agency's decision to deny reconsideration of an earlier order is unreviewable, except insofar as the request for reconsideration is based upon new evidence or changed circumstances."¹¹⁷ Even if the USPS can show new evidence or changed circumstances, it will be difficult to overturn the agency's decision without a clear abuse of discretion by the agency.¹¹⁸ The USPS argues that the Commission changed the meaning and role of the Test in Order No. 2623, but the court disagrees because Order No. 2623 simply states that the Commission will not reconsider the new normal analysis in Order No. 1926.¹¹⁹ Order No. 2623 does not contain any "departure from Order No. 1926; rather, it explains its

¹¹² *Id.* at 511.

¹¹³ *Id.*

¹¹⁴ U.S. Postal Serv. v. Postal Regulatory Comm'n, 841 F.3d 509, 511–12 (D.C. Cir. 2016).

¹¹⁵ *Id.* at 512.

¹¹⁶ *Id.*

¹¹⁷ *Id.* See Interstate Com. Comm'n v. Bhd. of Locomotive Engineers, 482 U.S. 270, 290 (1987).

¹¹⁸ 841 F.3d at 513.

¹¹⁹ *Id.*

reasoning in denying consideration.”¹²⁰ The court rejected the USPS’s argument because “simply discussing the merits of an early agency decision does not open a reconsideration denial to review,” and the explanation to affirm a prior determination does not reopen the case and render “a new, judicially-reviewable decision.”¹²¹

Holding:

The court found that the USPS did not provide new evidence to request a reconsideration of the agency’s previous determination and therefore, forfeited their chance to the request.¹²² The court rejected the USPS’s petition for review and dismissed this petition for lack of jurisdiction.¹²³

Impact:

The court analyzed the two orders and found that Order No. 2623 does not stray away from the previous order and unambiguously details its decision to not reconsider the denial to review. The court set another precedent with this case, determining that when there is clear language by the agency on its interpretations and determinations, it will give deference to the agency unless there is a strong showing of a clear abuse of discretion by the agency. The USPS does not provide any new evidence to correctly request a reconsideration under the new evidence exception in addition to providing any evidence towards “the clearest” abuse of discretion by the agency—which is a more stringent requirement to meet in order to overturn the court’s preference to give deference to the agency.

¹²⁰ U.S. Postal Serv. v. Postal Regulatory Comm’n, 841 F.3d 509, 513 (D.C. Cir. 2016).

¹²¹ *Id.*

¹²² *Id.* at 514.

¹²³ *Id.*

**UNITED STATES POSTAL SERVICE V. POSTAL REGULATORY
COMMISSION**
842 F.3d 1271 (D.C. Cir. 2016)

Synopsis:

In *U.S. Postal Service v. Postal Regulatory Commission*, the Court of Appeals for the District of Columbia Circuit granted the U.S. Postal Service's (Postal Service) petition—to review the Postal Regulatory Commission's (Commission) decision that denied the Postal Service's reclassification request. The Postal Service claimed that not only did the Commission not provide an explanation but also did not conform to its precedent in similar cases. Therefore, the Postal Service stated that the reclassification request denial was arbitrary and capricious. The court granted the petition for review of the Postal Service's contentions.

Facts and Analysis:

The Postal Service charges its products based on how the products are classified—“as either ‘market-dominant’¹²⁴ or ‘competitive’”¹²⁵—under the Postal Accountability and Enhancement Act.¹²⁶ The Postal Service requested the reclassification of commercial Standard Mail Parcels, which was granted by the Commission and therefore labeled as competitive.¹²⁷ The Commission approved this reclassification request because the Postal Service provided an estimate of its share in the market for “under one-pound parcel[s],” which when compared to competitors’ market

¹²⁴ U.S. Postal Serv. v. Postal Regulatory Comm’n, 842 F.3d 1271, 1272 (D.C. Cir. 2016). The rates for market-dominant products are controlled by the Commission’s rate regulation which can include “a price cap that cannot rise more than the rate of inflation in any year.” *Id.*

¹²⁵ *Id.* Products are labeled as competitive unless the Postal Service can exercise “sufficient market power that it can effectively set the price of [the] product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products.” *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

shares, showed that the ground shipping market was competitive.¹²⁸ Soon after this approval, the Commission approved another reclassification request; a reclassification request for the commercial First-Class Mail Parcels to be labeled as a competitive product.¹²⁹ The Postal Service stated that “it had captured most of the two-to-three day air segment, but estimated that its competitors’ . . . services made up about 33% of the total market, and commercial ground carriers made up about 20%.”¹³⁰ The Commission made the determination to approve the Postal Service’s request based on Postal Service’s “own market share estimates of 44% (by volume) and 34% (by revenue),” finding that this evidenced substantial competition in the marketplace to reclassify the product.¹³¹ Another request was made the following year to reclassify the single-piece Parcel Post product, and based on the Postal Service’s estimates,¹³² the Commission concluded that this parcel delivery market was competitive, granting the request.¹³³

After these multiple reclassification requests, the Postal Service sought another request, but this time for retail First-Class Mail Parcel products.¹³⁴ The Postal Service wanted this product to be labeled as competitive and provided its own estimates of its market share as “7.2% of the entire parcels market, 7.9% of the 0–70 pound . . . ground market, and 38.7% of the under-one pound . . . ground market, and again identified . . . UPS and FedEx” as its competitors.¹³⁵ The Commission did not grant this request and reasoned that the Postal Service did not provide “adequate evidence,

¹²⁸ *Id.* Even though there was “opposition from the Parcel Shippers Association,” along with the Postal Service’s “inability to provide an estimate of the likely impact that a significant price increase would have on its market share,” the Postal Service’s reclassification request was approved by the Commission. *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 842 F.3d 1271, 1272–73 (D.C. Cir. 2016).

¹³² “The Postal Service had estimated that this product captured only 17.6% of the ground package retail market, and 1.1% of the entire ground package market, despite its lower price than comparable UPS and FedEx products.” *Id.* at 1273.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

beyond mere assertions, sufficient to determine what market Single-Piece, First-Class Mail Parcels operate[d] within.”¹³⁶

In the court’s view, the mere fact that the Commission changed the amount of evidence and proof that the Postal Service needed to provide was not “‘in and of itself, objectionable,’ provided [the Commission] has acknowledged the change and offered a reasoned explanation for it.”¹³⁷ However, in the request determination at issue here, the Commission did not provide an explanation nor did it acknowledge this change in the order—even though there was “no obvious reason to change course”¹³⁸ The Commission did not present any “evidentiary or substantive” change in its course and denied the Postal Service’s contention of “imposing a new evidentiary burden.”¹³⁹ The Commission did not present reasoned decision-making by relying on precedent when “the prior parcel reclassification orders did not involve ‘materially different situations.’”¹⁴⁰

Holding:

The court concluded that the Commission had the duty and obligation to clearly contrast or reject the previous orders.¹⁴¹ The court did not accept the “post hoc rationale”¹⁴² that was used to explain the Commission’s decision in this reclassification request.¹⁴³ A statement that the newly created standard by the Commission was a reasonable one and all previous cases’ explanations do not apply

¹³⁶ *Id.*

¹³⁷ U.S. Postal Serv. v. Postal Regulatory Comm’n, 842 F.3d 1271, 1273 (D.C. Cir. 2016).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1274.

¹⁴¹ *Id.*

¹⁴² *Id.* An example that the court provided in regards to the post hoc rationale the Commission set forth was if the Commission came up with a new standard—like the order at issue, it was “a reasonable interpretation of the statute and the earlier parcel-transfer cases had been superceded [sic] by a Commission order while the instant request was pending.” *Id.*

¹⁴³ *Id.*

anymore was not enough to “fill the void.”¹⁴⁴ The court determined that the Commission’s error “was harmless” and that the Postal service can refile its reclassification request.¹⁴⁵ Even though the evidentiary standard is not clear, on remand, the Commission will need to provide a more “fulsome explanation [to] guide the Postal Service’s submissions in future cases.”¹⁴⁶ The court also stated that it is not necessary to discuss the contention that the Commission’s decision was arbitrary and capricious and remanded the case to review the petition.¹⁴⁷

Impact:

The court did not go in depth by discussing the administrative law concept of arbitrary and capricious within this petition because the Commission did not provide enough explanation of its determination when viewing the agency’s previous decisions in the Postal Service’s requests. The court also further stated that the Commission’s error was harmless because the disapproval of the request was “without prejudice” and because the burden placed on the Postal Service to prove this prejudice was “not ‘a particularly onerous requirement.’”¹⁴⁸ Although the court did not discipline the Commission for its mistake, it was clear that the court agreed with the Postal Service and instructed the Commission to provide a clear explanation for future requests. When the Commission attempted to provide an explanation to the court after enforcing its determination, the court said that the post hoc rationale cannot replace the void of the missing explanation, necessary to enforce its decision. This decision by the court sets yet another precedent to keep agencies in check so that agencies cannot make whatever decisions they want without providing a valid explanation or reasoning in their interpretation of the statutes and regulations.

¹⁴⁴ U.S. Postal Serv. v. Postal Regulatory Comm’n, 842 F.3d 1271, 1274 (D.C. Cir. 2016).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

**UNITED STATES SUGAR CORP. V. ENVIRONMENTAL PROTECTION
AGENCY**
844 F.3d 268 (D.C. Cir. 2016)

Synopsis:

In *U.S. Sugar Corp. v. Environmental Protection Agency*, the Court of Appeals for the District of Columbia Circuit (D.C. Circuit) held that the Environmental Protection Agency's (EPA) rule regarding major boilers will be remanded to the EPA without vacatur. Industry organizations and environmental conservation organizations challenged the regulations under the EPA's Clean Air Act. The D.C. Circuit granted the petitions in part and denied them in part, while the EPA filed to have the rule at issue to be remanded without vacatur.

Facts and Analysis:

The EPA petitioned for a “panel rehearing asking that the major-boiler standards be ‘remanded to [the] EPA without vacatur for the Agency to conduct rulemaking to determine which standards are “affected” and to modify them in accordance with the Court’s opinion.’”¹⁴⁹ The court granted the EPA’s petition to review the Agency’s decision that “exclude[ed] certain sources from its calculation of Maximum Achievable Control Technology (MACT) emissions standards for major-boiler subcategories, and vacated any standards that had been ‘affected’ by the flawed calculation.”¹⁵⁰

The court reasoned that its approval to grant the EPA’s petition—remand without vacatur—was proper because even though remand without vacatur may “invite prejudicial agency delay,” vacatur has “more-harmful consequences” in some other situations.¹⁵¹ The court relied on its precedent of remanding without vacating when the rule’s errors can be cured and when vacating would go against the “enhanced protection of the environmental values covered” in the

¹⁴⁹ *U.S. Sugar Corp. v. Env'tl. Prot. Agency*, 844 F.3d 268, 270 (D.C. Cir. 2016).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

EPA rule.¹⁵² Historically, the court has not vacated a rule if it will lead to “serious adverse implications for public health and the environment.”¹⁵³ If, in this case, the court vacates the EPA’s Major Boilers Rule, its result will allow a halt on the limitations that are preventing the emissions on hazardous air pollutants until the EPA completes the rulemaking process and promulgates new standards to replace the old ones.¹⁵⁴ Vacating the Major Boilers Rule would lead to serious health and environmental concerns because the major boilers would be able to emit hazardous air pollutants in the air affecting the citizens and the environment.

Holding:

The court stated that this case presented a similar situation as previous cases where “remand without vacatur makes the most sense,” and remanded without vacating the MACT standards that were set in the Major Boilers Rule.¹⁵⁵ The court gave further instructions that on remand, the EPA must identify the standards where the “MACT floor would have differed if the EPA had included all best-performing sources in each subcategory in its MACT-floor analysis.”¹⁵⁶ The court held that the EPA must also revise these standards to be consistent with the previous July 2016 opinion in this case.¹⁵⁷ With the danger of the EPA not completing the instructed tasks on remand in a timely manner, the court stated that the petitioners have the option to file a “‘mandamus petition . . . in the event that [the] EPA fails to’ revise its standards on remand”¹⁵⁸ Even though the court did not impose a deadline for the EPA to complete this revision for the standards, the court “expect[s] the EPA to complete this rulemaking promptly.”¹⁵⁹

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ U.S. Sugar Corp. v. Env’tl. Prot. Agency, 844 F.3d 268, 270 (D.C. Cir. 2016).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

Impact:

This decision by the court sets further precedent establishing how the court will not be stringent on disciplining the agencies when agencies have not created correct standards in the rules it promulgates. The court made clear that if the defects in a rule can be cured without completely vacating the rule, then the court will allow the agency to revise the rule in the interest of public health and environmental safety—prioritizing safety above punishing the agency. Even if the agencies are at fault and make mistakes, the court will allow the agencies to take corrective measures and prevent any serious adverse implications to the public.