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Drew K. Mahady

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ANOTHER MOMENT IN THE EVOLUTION OF ADMINISTRATIVE AGENCY POWER: THE OPINION IN *SCHULTZ V. SPRINGFIELD FOREST PRODUCTS*

By Drew K. Mahady*

I. INTRODUCTION

Delegations of power to administrative agencies are common. Generally, Congress will establish a policy and order an administrative agency to promulgate the means most likely to obtain the desired end. The empowered agency is often granted the ability to promulgate rules and regulations which have the same force of law as congressionally enacted statutes.¹ The courts have assisted the legislature in legitimizing administrative acts by regularly supporting the actions and methods imposed by administrative agencies.² In fact, there have been only two instances where the Supreme Court has invalidated a Congressional delegation of power to an administrative body.³ The end result of these unique delegations of power is called administrative law.⁴

One of the most recent judicial decisions granting additional powers to the agency system occurred in Oregon.⁵ The Court of Appeals of Oregon held that an agency board has the power to review

*Second year law student, Loyola University Chicago, School of Law.

¹PETER L. STRAUSS ET AL., ADMINISTRATIVE LAW 44 (9th ed. 1995).

²NLRB v. Hearst Publications, Inc., 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944) (stating that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited); Gray v. Powell, 314 U.S. 402, 62 S.Ct. 326, 86 L.Ed. 301 (1941) (ruling that an administrative body conclusion will be left untouched); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (holding that when the language of Congress is unclear, an agency interpretation of a statute must be given great deference).

³Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935).

⁴Administrative law is defined as "law created by administrative agencies by way of rules, regulations, orders, and decisions. BARRONS LAW DICTIONARY 12 (1996).

⁵Schultz v. Springfield Forest Products, 141 Or.App. 727, 951 P.2d 169 (1997).

the validity of a director's rule to ensure compliance with the applicable statute or constitution.⁶ This decision comes at the heels of several court decisions that expanded an administrative law judge's power to include the ability to address the constitutionality of an agency rule or policy.⁷

This note begins with a short discussion of the development of the agency system and the evolution of agency powers. This note then turns its attention to the facts and procedural history of the *Schultz* case. We will then focus on the Court of Appeals' decision to expand an agency power and its reasons supporting such an expansion. Next, this note analyses the scant reasoning provided by the Court of Appeals with a focus on the recent Oregon Supreme Court's decision to allow administrative law judges to address constitutional challenges. This note ends with a discussion of the potential impact of *Schultz* and a brief conclusion.

II. BACKGROUND

On its face the Constitution arguably prohibits Congress from delegating its legislative power.⁸ Additionally, the Constitution places a restriction on the judiciary, requiring that the courts be "necessary."⁹ These prohibitions and limitations reflect the drafters' intent to create a system containing adequate checks and balances.¹⁰ Nowhere does the Constitution mention smaller, specialized entities empowered with the ability to legislate and adjudicate. However, with minuscule textual support from the Constitution, the presence and influence of

⁶Id. at 731.

⁷Marykay Foy, Note, *The Authority of the Administrative Agency to Decide Constitutional Issues: Richardson v. Tennessee Board of Dentistry*, 17 J. NAALJ 173, 186-188 (1997).

⁸U.S. CONST. art. I, § 1 ("All legislative power herein granted shall be vested in a Congress of the U.S. shall consist of a Senate and a House of Representatives.").

⁹U.S. CONST. art. III, § 1 ("The judicial Power of the U.S., shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). This particular argument against administrative agencies was "decided" over half a century ago by the New Jersey Supreme Court when it held that agency adjudications do not fall under the "inferior courts" provision of the Federal Constitution. *Mulhearn v. Federal Shipbuilding Co.*, 66 A.2d 726 (N.J. 1949).

¹⁰GERALD GUNTHER et al., CONSTITUTIONAL LAW 354 (13th ed. 1997).

administrative agencies is undeniable.

Common law systems have always needed and employed administrative bureaus and boards and commissions.¹¹ The industrial revolution and growth of the railroad in the United States spurred the need for many specialized regulatory entities.¹² Agencies were essential in the early 1900's to the nation's growth and stability.¹³ At that time there was a strong desire to insulate administrative actions from judicial review whenever it was constitutionally feasible.¹⁴ Several decades later, Roosevelt's aggressive New Deal's distributional programs were brought to life through administrative agencies.¹⁵

In 1946, Congress enacted the Administrative Procedures Act.¹⁶ The Administrative Procedures Act ("APA") codified the means by which an agency could both legislate and adjudicate.¹⁷ Several provisions provided for broad agency discretion and unreviewable decision making power.¹⁸ Shortly thereafter the Atomic Energy Commission was created, establishing the international scope of administrative agencies.¹⁹

Several court decisions evince the evolution and growth of the agency system since the passage of the APA. According to *Vermont Yankee Nuclear Power Corporation v. National Resources Defense Council, Inc.*, courts cannot impose additional procedural requirements to those contained in the APA for rulemaking upon an agency.²⁰ *Morrison v. Oldon* confirmed the position that the President does not

¹¹ROSCOE POUND, *The Place of Administration in the Legal System*, in ADMINISTRATIVE LAW: ITS GROWTH, PROCEDURE AND SIGNIFICANCE 1, 8 (1942).

¹²CARROW, MILTON, THE BACKGROUND OF ADMINISTRATIVE LAW 1 (1948).

¹³ROSCOE POUND, *The Rise of Administrative Justice*, in ADMINISTRATIVE LAW: ITS GROWTH, PROCEDURE AND SIGNIFICANCE 27, 28 (1942). During the early 1900's many statutes established administrative tribunals to eliminate the delay and expense encountered when regulating public utilities.

¹⁴Id.

¹⁵ROBERT RABIN, *Federal Regulation in Historical Perspective*, in FOUNDATION OF ADMINISTRATIVE LAW: INTERDISCIPLINARY READERS IN LAW 39, 40 (Peter H. Schuck 1994).

¹⁶ADMINISTRATIVE PROCEDURE ACT 5 U.S.C. § 500 (1996).

¹⁷Id. §§ 553, 554.

¹⁸Id. §§701-706.

¹⁹CARROW, MILTON, THE BACKGROUND OF ADMINISTRATIVE LAW 1 (1948).

²⁰*Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978).

possess the power to remove officers from independent agencies.²¹

The decision that possibly most epitomizes the growth in agency power is *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*²² *Chevron* held that an agency rule or interpretation must be given deference, even over and above any potentially contrary judicial interpretation.²³ An agency, when acting within the scope of its particular specialized field, is presumed correct.²⁴ Continuing the ongoing trend of expanding agency powers through judicial interpretation, several states have recently given administrative law judges the power to rule on the constitutionality of agency regulations.²⁵

It is important to note that the evolution of the administrative agency system faced and still faces many opponents. Anti-agency sentiments reached their peak in the late 1930's, as evidenced in a report by the American Bar Association's chairman of the special committee on administrative law.²⁶ The attorney general during the 1980's, Edward Meese, stated "the entire system of independent agencies is of questionable constitutionality."²⁷ Justice Scalia continued the constitutional construction argument by stating that, "It is difficult

²¹*Morrison v. Oldon*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) citing *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935).

²²*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984).

²³*Id.*

²⁴*Id.*

²⁵Marykay Foy, Note, *The Authority of the Administrative Agency to Decide Constitutional Issues: Richardson v. Tennessee Board of Dentistry*, 17 J. NAALJ 173, 186-188 (1997).

²⁶ROBERT RABIN, *Federal Regulation in Historical Perspective*, in FOUNDATION OF ADMINISTRATIVE LAW: INTERDISCIPLINARY READERS IN LAW 39, 40 (Peter H. Schuck 1994) (excoriating the regulatory system for "administrative absolutism"). The article contained a list of suspect "tendencies" of administrative agencies compiled by Mr. Roscoe Pound. Included among the "tendencies" were: (1) to decide without a hearing, (2) to decide on the basis of matters not before the tribunal, (3) to decide on the basis of pre-formed opinions, (4) to disregard jurisdictional limits, (5) to do what will get by, and (6) to mix up rulemaking, investigation, and prosecution, as well as the functions of advocate, judge, and enforcement authority.

²⁷Bernard Schwartz, "Shooting the Piano Player"? *Justice Scalia and Administrative Law*, 47 ADMIN. L. REV. 1, 3 (Winter 1995) citing Howard Kurtz, *Agencies Authority Challenged, Justice Department Seems to Side with Conservatives on Regulating Power*, WASH. POST, Jan. 3, 1985, at A17. Mr. Meese urged that "we should abandon the idea that there are such things as 'quasi-legislative' or 'quasi-judicial' functions that can be properly delegated to independent agencies."

to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the legislature."²⁸

III. DISCUSSION

A. FACTS

In *Schultz v. Springfield Forest Product*, an employee, Gregory D. Schultz, sued for a percentage increase of disability benefits.²⁹ Mr. Schultz fell from a ladder while working for Springfield Forest Products as a veneer dryer feeder.³⁰ Mr. Schultz sustained injuries to his left elbow and his L-1 vertebra.³¹ The severity of these injuries prompted Mr. Schultz to file a claim seeking permanent partial disability.³²

The amount of disability award recoverable to Mr. Schultz is determined by a rule promulgated by the director of the Department of Consumer and Business Services.³³

B. CASE HISTORY

SAIF Corporation rendered the initial disability award. The decision by SAIF Corporation complied with the director's rule for disability awards of the type sought by Mr. Schultz.³⁴ The Appellate Review Unit of the Department of Consumer and Business Services

²⁸*Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

²⁹*Schultz*, 151 Or.App. at 729.

³⁰*Id.*

³¹*Id.*

³²*Id.*

³³Or. Admin. R. 436-035-0320 (5) ("A worker may be entitled to unscheduled chronic condition impairment where a preponderance of medical opinion establishes that the worker is unable to repetitively use a body area due to a chronic and permanent medical condition. "Body area" means the cervical/upper thoracic spine (T1-T6)/shoulders area and the lower thoracic spine (T7-T12)/lowback/hips area. Chronic conditions in the middleback are considered a part of the lowback/hips body area.").

³⁴*Schultz*, 151 Or.App. at 729-730.

affirmed the award.³⁵ Mr. Schultz requested a hearing to challenge the award amount.³⁶

Following the hearing the ALJ increased the disability award previously determined by SAIF corporation.³⁷ The ALJ held that the director's rule was invalid and she declined to apply it because it exceeded the director's authority.³⁸ The ALJ opined that the rule, which awarded unscheduled chronic condition impairment only where the total unscheduled impairment in a body area equaled or exceeded 5%,³⁹ was arbitrary because the scheduled chronic condition rule⁴⁰ lacked such a restriction.⁴¹ SAIF Corporation sought review of the ALJ's decision.⁴²

The Worker's Compensation Board modified and reduced the disability award granted by the ALJ.⁴³ The Board reasoned that: 1) neither the ALJ nor the Board had authority to invalidate the director's rule, and 2) in the alternative, the rule did not exceed the director's statutory authority to promulgate disability standards.⁴⁴

First, the Board looked at the applicable statutes in an attempt to determine the authority vested in both the Director and the Board.⁴⁵ No statute authorized or supported the ALJ's invalidation of a

³⁵Id. at 730.

³⁶Id.

³⁷Id.

³⁸Id.

³⁹OAR 436-035-0320(5)(a) ("Unscheduled chronic condition impairment is considered after all other unscheduled impairment within a body area, if any, has been rated and combined under these rules. There the total unscheduled impairment within a body area is equal to or in excess of 5%, the worker is not entitled to any unscheduled chronic condition impairment.").

⁴⁰OAR 436-35-010(6)(a) ("Scheduled chronic condition awards are not restricted to instances when total impairment is less than five percent.").

⁴¹Schultz, 151 Or.App. at 732.

⁴²Id.

⁴³Id.

⁴⁴Id.

⁴⁵In the Matter of the Compensation of Gregory D. Schultz, 47 Van Natta 2265 (1995). According to statute ORS 656.726(3)(f) the Director is to "provide standards for the evaluation of disabilities." Per ORS 656.283(7) "the Administrative Law Judge *shall apply* to the hearing of the claim such standards for the evaluation of disability *as may be adopted by the director pursuant to ORS 656.729.*" [Emphasis added.] Additionally, per ORS 656.295(5) "The board shall apply to the review of the claim such standards for the evaluation of disability *as may be adopted by the director pursuant to ORS 656.726.*" [Emphasis added.]

Director's rule.⁴⁶ The Board noted that it itself also lacked any power to ignore standards established by a Director.⁴⁷

Finding no statutory supporting for the ALJ decision the Board turned to the case cited by the claimant.⁴⁸ The *Welliver Welding Works* ("Welliver") case involved a vocational assistance claim that had been denied and was subsequently argued before a referee.⁴⁹ The referee set aside the director's denial of benefits because he held that the director's rule was an invalid interpretation of the applicable statute.⁵⁰ The Board on review affirmed the referee's decision to invalidate the director's rule.⁵¹ In distinguishing *Welliver* from *Schultz* the Board noted that at the time of the *Welliver* decision there was statutory authority allowing the Board to so invalidate a Director's rule regarding vocational assistance.⁵² No such statute existed when *Schultz* was decided.⁵³ In fact, the only party authorized by statute to review a director's rule is the director himself, subject to judicial review.⁵⁴

A thoughtful dissent argues that the rule's inconsistencies contravene the legislative intent to provide relief for all injuries suffered during employment.⁵⁵ The dissent also states that the Board should apply the ALJ's findings and invalidate the limitation established by the director's rule.⁵⁶

C. DECISION

On December 24, 1997, the Court of Appeals of Oregon affirmed the Worker's Compensation Board's holding that the

⁴⁶Id.

⁴⁷Id.

⁴⁸Id. citing *Welliver Welding Works v. Farnen*, 133 Or.App. 203, 890 P.2d 429 (1995).

⁴⁹*Welliver Welding Works v. Farnen*, 133 Or.App. 203, 206, 890 P.2d 429 (1995).

⁵⁰Id.

⁵¹Id.

⁵²47 Van Natta at 2266. ORS 656.283(2) provided the Board authority to invalidate a director's vocational assistance rule if it conflicted with the vocational assistance statute.

⁵³Id.

⁵⁴Id. n.3. The amended ORS 656.283 no longer provides for Board review of a director's vocational assistance decisions.

⁵⁵Id. at 2269. The dissent argues that the arbitrary nature of disallowing certain acknowledged impairments has the effect of disregarding prescribed statutory authority.

⁵⁶Id. at 2270.

director's rule did not violate the applicable statute. However, unlike the Board, the Court of Appeals concluded that "the Board *does have* the authority to review the validity of a director's rule to determine if it is consistent with applicable statutes."⁵⁷ [emphasis added] The entire discussion by the court about this rule was less than half a page, and reads as follows:

The Supreme Court held in *Nutbrown v. Munn*, 311 Or. 328, 346, 811 P.2d. 131 (1991), cert. den. 502 U.S. 1030, 112 S.Ct. 867, 116 L.Ed.2d 773 (1992), that "[a]lthough it is an authority to be exercised infrequently, and always with care, Oregon administrative agencies have the power to declare statutes and rules unconstitutional." While the issue here is not a constitutional question, the reason for the court's holding in *Nutbrown* applies equally in this context. Administrative agencies, including those with quasi-judicial power, are required to follow the law. If the agency concludes that an administrative rule that it must apply is not in accordance with a statute or is unconstitutional it must follow the superior rather than the subordinate law. It would be an unnecessary limitation of the agency's role for it blindly to apply a rule that is inconsistent with a statute or constitutional provision. See *Hadley v. Cody Hindman Logging*, 144 Or.App. 157, 160, 925 P.2d 158 (1996)(so long as the director prescribed a method that is within the delegation by the legislature, neither we nor the Board may substitute our own judgment regarding the method of computation); cf. *Shubert v. Blue Chips*, 151 Or.App. 710, 951 P.2d 172 (1997)(the Board may not substitute its judgment for that of a director of the Department of Consumer and Business Services regarding temporary disability standards)(emphasis supplied). Additionally, "[i]t would be pointless to reverse an agency for correctly deciding a legal questions on the ground that the agency should have waited for the reviewing court to decide the question." *Cooper v. Eugene School Dist. No. 4J*, 301 Or. 385, 364, 723 P.2d 298 (1986), appeal dismissed 480 U.S. 942, 107 S.Ct. 1597, 94 L.Ed.2d 784 (1987).⁵⁸

Having established the Board's power to review the director's

⁵⁷Schultz, 151 Or.App. at 730.

⁵⁸Schultz, 151 Or.App. at 730.

rule the *Schultz* court turned to the rule in question. The court concluded that the director's rule *was consistent* with applicable statutes and the statutory formula used to determine Mr. Schultz's disability award.⁵⁹ In conclusion the court affirmed the Board's decision finding the director's rule in accord with the applicable statute.⁶⁰

IV. ANALYSIS

Analysis of this decision presents the difficulty of examining a very short and cursory opinion. Very little case law is presented to justify the position taken by the court. Additionally, very little case law exists in the *Nutbrown* case to buttress the rationale of the *Schultz* court. It appears that the Oregon Court, with minimal support, decided the issue by applying it's own common sense.

If administrative agencies can rule on constitutional issues, then there must be an underlying principle to allow such activity. The *Schultz* court found the principle by noting that all adjudications require the following of law, and moreover the law to be followed must be a superior rather than a subordinate law.⁶¹ Therefore, an agency Board, when faced with a director's rule and the statute upon which the director's rule is based, can determine if the subordinate law (i.e. the director's rule) is consistent with the superior law (i.e. the statute).

However, merely stating a basic premise taught in every first year law school class provides no legal basis for conferring power upon an agency Board. The mere existence of a superior law in no way conveys a power to act. For example, Congress has no duty to address the constitutionality of its laws. Ideally as a society we hope Congress acts responsibly and in accordance with constitutional law. However, Congress can pass all the unconstitutional laws it wants to pass without being required to follow the "superior law." Therefore, the statement that an agency "*must* follow the superior law" cannot be an enforceable proposition unless the agency is given the duty, upon determining if a director's rule is consistent with the applicable statute, to rule

⁵⁹Id.

⁶⁰Id. at 732.

⁶¹Id. at 731.

accordingly. [emphasis added]

Moreover, the court failed to even mention that although Oregon has conferred constitutional review powers upon its administrative agencies, this is clearly the minority position. Therefore, the *Schultz* opinion becomes even more tenuous when one reflects upon the weight placed upon the *Nutbrown* opinion.

Additionally, the Oregon court, without stating as much, has followed the presumption that an agency will act correctly when acting within its arena of specialized knowledge. Accordingly, the court finds it illogical to have an administrative Board decide a rule is consistent or inconsistent with a statute, and then to bar any subsequent ruling on the issue. This assertion is more justifiable than the *Nutbrown* decision from which *Schultz* draws its reasoning. The rule that an agency determination is to be granted great deference was established in the *Chevron* decision.⁶² However, the determination that an administrative agency should be granted the power to make constitutional determinations is far from settled.⁶³

The court's language failed to render a decision that has only one construction. It is unclear if there is an affirmative duty imposed upon the agency Board to determine if the director's rule is inconsistent with the statute. The court's phrases "required to follow the law" and "must follow the superior law" indicate that a requirement has been imposed upon the agency Board. If this construction is correct then there could be problems with issues of exhaustion and appeal. As for the alternative construction, the position that there is no duty imposed is also defensible. First, the reliance upon *Nutbrown*, which imposes no duty to address constitutionality, supports a claim of no duty. Second, the language "[i]f the agency concludes" can be read as an indication that the court felt the agency Board could or could not pursue such an inquiry.

⁶²*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 394 (1984).

⁶³*Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or. 358, 363, 723 P.2d 298 (noting "[e]nough judicial opinions have said that agencies cannot pass on the constitutionality of the laws entrusted to them....but more recently the proposition has been questioned.).

V. IMPACT

The Schultz decision itself will probably cause no more than a slight ripple in the ever-rising tide of administrative agency power. However, besides the cumulative effects of such decisions, there are several related areas that could be affected.

First, there is the issue of reviewability of an agency determination. For example, imagine a director's rule establishing a particular disability award for a specific injury. Parties will proceed and act in reliance on the rule. If, upon review, a board invalidates the director's rule both the affected parties and the agency will be faced with a problem. The rule has been held to be invalid. Is there a prior rule that can provide some guidance for the agency board? If not, where else can the board look? Even if there is some guidance, does the board have the power to "create" a rule when the power has been conferred upon a particular director? And if the board determines that it must wait until the director has promulgated a new rule, the parties' seeking relief will be faced with an undeterminable delay.

Second, there is a potential exhaustion problem. If the board has a duty to determine if a rule is consistent with a statute the issue must be raised to ensure that all administrative remedies have been exhausted. However, if there is no such duty then it will be upon the parties or the board to address the issue.

VI. CONCLUSION

The administrative agency system is here to stay. On a daily basis every United States citizen is influenced by an agency action or decision. The acceptance of this reality has helped agencies evolve into powerful entities with growing independence. Perhaps the not too distant future will include agencies acting with complete, unfettered discretion. If the latest decisions of the 20th century are any indication, the possibility is a strong one.

