Agency Deference Survives – For Now – in Recent Supreme Court Opinion

06.27.2019 | By Brian Ferrasci-O'Malley, Paul S. Weiland

On June 26, 2019, the Supreme Court issued its opinion in *Kisor v. Wilkie* (No. 18-15), a case concerning what level of deference courts owe to federal agency interpretations of their own regulations. The issue before the Court arises frequently in environmental cases due to the volume and complexity of regulations promulgated by federal agencies under the nation's major environmental laws, as well as the amount and variety of interpretations of those regulations that emanate from the agencies. These interpretations can range from preambles to the regulations that appear in the *Federal Register*, to statements on agency websites, to letters sent to regulated parties. Often these interpretations are the only guideposts regulated entities have to make sense of ambiguous regulations. For these reasons, entities subject to federal environmental regulation should take particular note of the Court's holding.

The petitioner in the case, Mr. Kisor, sought to overturn a prior Supreme Court holding, *Auer v. Robbins* decided in 1997, that agency interpretations of their own regulations are subject to deference unless they are plainly erroneous or inconsistent with the regulation. While the Court ruled 9-0 in favor of the named petitioner in *Kisor*, the general validity of *Auer* deference barely survived. The Court clarified and reaffirmed the limits of the doctrine, while also strongly suggesting that later challenges to Auer and other broad agency deference doctrines could turn out differently.

Kisor concerned a Vietnam War veteran, Mr. Kisor, who sought both retroactive and prospective disability benefits from the U.S. Department of Veterans Affairs (the VA). The VA denied the retroactive portion of the benefits based on the agency's interpretation of the term relevant official service department records as found in its regulations at 38 CFR § 3.156(c)(1). Mr. Kisor challenged that finding, arguing for a different interpretation of the term relevant, which was undefined in the VA's regulations. The lower courts held the term relevant was indeed ambiguous and, therefore, the VA's interpretation was entitled deference under *Auer*.

When the Supreme Court accepted certiorari of *Kisor,* many observers wondered if the Court would take the opportunity to overrule *Auer* and pull back on the amount of deference given to agencies, a decision that would have had significant effects in light of the volume and complexity of federal regulation. Arguments to discard *Auer* deference suggest that the doctrine essentially allows agencies to make their own de novo policy judgments in the context of particular decisions, rather than being guided by the best interpretation of a rule and its meaning at the time it was adopted through notice and comment rulemaking. On the other hand, supporters of the doctrine argue that there are strong policy arguments in favor of deferring to expert agencies when their own regulations are ambiguous, most notably the idea that agencies have specialized subject matter expertise and, as such, have particular insight into their own regulations, especially those that are highly technical.

Justice Kagan, writing for the full Court, noted that while as a general matter, agencies have a nuanced understanding of the regulations they administer, and so some level of deference makes sense, deferring to agencies on every question of interpretation is not the answer. The Court's opinion in Kisor takes time to lay out the following sideboards for application of *Auer* deference:

- A court should not afford *Auer* deference unless the regulation in question in genuinely ambiguous.
- The agency's interpretation of a genuinely ambiguous regulation must still be reasonable.
- A court considering applying *Auer* deference must make an independent inquiry into whether the agency's interpretation is due controlling weight, including whether the interpretation (1) is the agency's official position, (2) implicates the agency's substantive expertise, and (3) reflects the agency's fair and considered judgment.

In resolving *Kisor,* the Court held 9-0 that the lower court had improperly applied the concepts underpinning *Auer* deference and sent the case back with instructions for the lower court to consider it again within the sideboards laid out above. But the overall doctrine itself only survived on a 5-4 vote, thanks to Chief Justice Roberts' concurrence in part with the majority, where he agreed that *stare decisis* – the principle that courts should adhere to precedent of prior cases – did not support overruling the *Auer* doctrine in this case. The Justices in the minority made it clear they are ready to overrule the doctrine. Justice Kavanaugh called on *Auer* deference to be formally retired, while Justice Gorsuch went so far as to state in his concurrence that today's decision is more a stay of execution than a pardon. He noted how the Court could not get five votes to affirmatively state that *Auer* deference is lawful or wise, and expressed hope that the Court will overrule *Auer* at its next opportunity.

All in all, the Court's ruling in *Kisor* indicates that the fight over how much deference courts should give agencies remains a hot-button issue. We will continue to watch the Court's decisions in the administrative law arena; check back in this space for more analysis as the Court's term continues.