



Reinforcing Limits On Its Use, Supreme Court Upholds *Auer* Deference In Veterans Affairs Dispute

Kisor v. Wilkie, No. 18-15

Decided June 26, 2019

Today, the Supreme Court reaffirmed that an agency's reasonable interpretation of its own ambiguous regulations is entitled to deference.

Background:

In 1982, the Department of Veterans Affairs ("VA") denied a Vietnam War veteran's claim for benefits after concluding that the veteran did not suffer from post-traumatic stress disorder ("PTSD"). When the veteran again sought benefits in 2006, the VA changed course, this time awarding benefits after concluding that the veteran *did* suffer from PTSD. This case arises out of a disagreement as to whether the veteran was also entitled to retroactive payments under a VA regulation permitting such payments when the VA fails to consider "relevant" records—in this case, records describing the veteran's combat experience. The VA contends that the newly submitted records are not "relevant" because they do not go to the reason for its 1982 denial of benefits, *i.e.*, that the veteran did not have PTSD. Citing both *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997)—which require federal courts to defer to an agency's reasonable interpretation of its own ambiguous regulations—the Federal Circuit deferred to the VA's interpretation of "relevant," and affirmed the VA's denial of retroactive payments.

"*Auer* deference retains an important role in construing agency regulations. But even as we uphold it, we reinforce its limits."

Justice Kagan,
writing for the Court

Gibson Dunn filed an *amicus* brief for State and Local Government Associations urging the Court to reverse the decision below.

Issue:

Should the Supreme Court overrule *Bowles v. Seminole Rock & Sand Co*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997), which require courts to defer to an agency's reasonable interpretation of its own ambiguous regulations?

Court's Holding:

No. If, after exhausting the traditional tools of construction, a court concludes that a regulation is genuinely ambiguous, that the agency's interpretation is reasonable, and that the context of the agency interpretation entitles it to controlling weight, a court must defer to the agency's interpretation.

What It Means:

- Although four justices would have overruled *Auer*, the majority declined to do so. Nonetheless, the Court “reinforce[d]” the limits on when such deference can be deployed. These limits are robust: “When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean. . . . But that phrase ‘when it applies’ is important—because it often doesn’t.”
- First, a court may not afford *Auer* deference unless the regulation is genuinely ambiguous. This requires exhausting “all the ‘traditional tools’ of construction,” as even “hard interpretative conundrums . . . can often be solved.” Second, a court must conclude that the agency’s reading of the ambiguous regulation is “reasonable,” which the Court emphasized “is a requirement an agency can fail.” Finally, a court must “make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight.” In undertaking this inquiry, courts should consider a variety of factors, including whether the agency’s interpretation constitutes the agency’s “official position,” whether the interpretation “implicate[s]” the agency’s “substantive expertise,” and whether the interpretation reflects a “fair and considered judgment,” as compared to a “convenient litigating position.”
- The Court’s discussion of *stare decisis* could have repercussions in other cases, as well. The Court highlighted three reasons for declining to overrule *Auer* and *Seminole Rock*. First, those precedents have long been applied by lower courts. Second, overruling the precedents would cast doubt on many settled constructions of rules. And third, Congress remains free to alter the effect of *Auer* and *Seminole Rock* through legislation. As Justice Gorsuch’s opinion concurring in the judgment states, “the majority retains *Auer* only because of *stare decisis*.”

- The Court did not foreclose the possibility of revisiting other questions involving deference to agencies, including the *Chevron* doctrine under which courts generally defer to agency interpretations of ambiguous statutes. As the Chief Justice’s concurring opinion makes clear, “[i]ssues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress.” For this reason, the Chief Justice does “not regard the Court’s decision today to touch upon the latter question,” a point with which Justice Kavanaugh agreed in his own opinion concurring in the judgment.

As always, Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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