No. 30116 - Cookman Realty Group, Inc. v. Barbara Taylor, Chief, Office of Water Resources, Division of Environmental Protection; The West Virginia Department of Environmental Protection

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Starcher, Justice, concurring:

In the instant case, the West Virginia Department of Environmental Protection ("DEP") appeals a lower court judgment that construed the Groundwater Protection Act, *W.Va. Code*, 22-12-1 to -14, and an accompanying regulation, W.Va. C.S.R. § 47-57-4.1 (1994), as precluding DEP from ordering appellee Cookman Realty Group, Inc. ("Cookman Realty") to eliminate motor-oil contamination from its property in Grant County absent evidence that Cookman Realty was the originator of such pollution. The DEP argues that the circuit court erred in failing to afford proper deference to its "policy" interpretation of its own legislative rule, which the DEP argues is ambiguous as to the reach of the agency's power to order remediation.

The Court's opinion holds that there is no ambiguity in the text of the subject regulation; I do not differ with that holding. The concurrence by Justice Albright states that even if there were some ambiguity in the statute or regulation at issue in the instant case, the agency's "policy" interpretation of the regulation, at best an interpretive rule, is not formulated pursuant to discretion given by statute to the DEP; and therefore may not be used against Cookman. *W.Va. Code*, 29A-1-2(c) [1982]. I agree with this point also.

I write separately to emphasize the point that in general, while an agency's interpretation of its own regulations should not *ipso facto* be given deference, the agency's views should nevertheless be recognized and given *the weight that their own persuasiveness demands*. The proper approach is the "multi-factor approach" of *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944).

In *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995), this Court undertook to define the standard governing judicial review of an agency's construction of a *statute* that the agency was charged by law with administering. As a starting point, we noted in Syllabus Point 1 of *Appalachian Power* that "[i]nterpreting a statute or a regulation presents a purely legal question subject to *de novo* review." This point was qualified, however, by a recognition that "an inquiring court—even a court empowered to conduct *de novo* review—must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion." 195 W.Va. at 582, 466 S.E.2d at 433.

Borrowing heavily from federal case law on the subject, Syllabus Point 3 of *Appalachian Power* directs that a reviewing court first ascertain whether a statute is silent or ambiguous as to a particular matter so as to sanction an independent interpretation on the part of the administrative agency:

> Judicial review of an agency's legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. In deciding whether an administrative agency's position should be sustained, a reviewing court applies

> the standards set out by the United States Supreme Court in *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). The court first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it conforms to the Legislature's intent. No deference is due the agency's interpretation at this stage.

Where clear evidence of legislative intent is lacking, a reviewing court is obligated to defer to a reasonable construction placed upon a statute by an agency's legislative rule. As we instructed in Syllabus Point 4 of *Appalachian Power*,

> If legislative intent is not clear, a reviewing court may not simply impose its own construction of the statute in reviewing a legislative rule. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious. W. Va. Code, 29A-4-2 (1982).

Accord, Syllabus Point 3, *City of Wheeling v. Public Service Comm'n*, 199 W.Va. 252, 483 S.E.2d 835 (1997) (per curiam); Syllabus Point 5, *West Virginia Health Care Cost Review Authority v. Boone Memorial Hosp.*, 196 W.Va. 326, 472 S.E.2d 411 (1996).

Appalachian Power, as noted, dealt with an agency's construction of a *statute* through the promulgation of a legislative rule which itself had the force of law. While there is language in *Appalachian Power* that appears to support DEP's reliance upon the *Chevron* approach in context of *rules*, *see* 195 W.Va. at 586 n.13, 466 S.E.2d at 437 n.13 (noting that

second step of *Chevron* analysis would apply in the "unlikely event that we found that a legislative rule, valid in all respects, was itself ambiguous as to its intent or meaning"), this Court, I believe, will clearly not extend full-blown *Appalachian Power-Chevron* deference to an agency's informal interpretation of its own regulation.

Admittedly, the principle that an administrative agency should be afforded substantial deference with respect to its interpretation of a regulation penned by its own hand has a firm basis in federal case law that predates the United States Supreme Court's adoption of the *Chevron* standard. In *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945), the Court held that an administrative agency's construction of its own ambiguous regulation is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id*. at 414, 65 S.Ct. at 1217. Under this standard of judicial review, an agency's interpretation of an ambiguous regulation controls "so long as it is 'reasonable,' that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations" *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150-51, 111 S.Ct. 1171, 1176, 113 L.Ed.2d 117 (1991) (internal citations and quotations omitted); *see also Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 94-95, 115 S.Ct. 1232, 1236, 131 L.Ed.2d 106 (1995) (applying rule that reviewing court must defer to a "reasonable regulatory interpretation"); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994) (stating that HHS Secretary's interpretation of agency regulations is entitled to "substantial deference"); *Lyng v. Payne*, 476 U.S. 926, 939, 106 S.Ct. 2333, 2341, 90 L.Ed.2d 921 (1986) (an "agency's construction of its own

regulations is entitled to substantial deference"). The Supreme Court has consistently reaffirmed this principle,[1] and has gone so far as to apply this form of controlling deference to an agency pronouncement set forth in the relatively informal medium of an *amicus* brief. *See Auer v. Robbins*, 519 U.S. 452, 462, 117 S.Ct. 905, 912, 137 L.Ed.2d 79 (1997) (holding that *Seminole Rock* standard applies in such context so long as there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question").

The justifications given for *Seminole Rock* and *Chevron* have much in common,[2] and there has thus far been little to distinguish the two lines of cases with respect to their application. *See Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir.

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[1]The *Seminole Rock* standard was most reaffirmed by dictum in *Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000), where the Court otherwise rejected the contention that *Chevron* deference should apply to an agency's interpretation of a statute contained within an opinion letter. Some commentators have argued that *Christensen* is emblematic of the "strikingly inconsistent" positions taken by the Court, where it has "repudiated strong deference for agency interpretations of ambiguous statutes contained in formats lacking the force of law, while apparently endorsing strong deference for agency interpretations of ambiguous regulations contained in such formats." Robert A. Anthony & Michael Asimow, *The Court's Deferences—A Foolish Inconsistency*, Admin. & Reg. L. News 10 (Fall 2000).

[2]*Chevron* deference has been justified on the basis of an express or implied delegation of authority from the Congress. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 843-44, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). Although the rationale underpinning the holding in *Seminole Rock* has not been explained with the same clarity, the Supreme Court has been stated that "[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin*, 499 U.S. at 151, 111 S. Ct. at 1176.

1997) (noting that "[i]t would seem that there are few, if any, cases in which the standard applicable under *Chevron* would yield a different result that the 'plainly erroneous' or 'inconsistent' standard set forth in [*Seminole Rock*] . . . ."). Indeed, some federal courts have expressly applied *Chevron* in contexts where *Seminole Rock* would be more appropriate. *See, e.g., Samsung Elecs. Am., Inc. v. United States*, 106 F.3d 376, 378 (Fed. Cir. 1997) (deferring to Customs Service's interpretation of its own regulation under *Chevron*); *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 369 (4th Cir. 1994) (applying *Chevron* deference to an agency's interpretation of its own regulations).

A number of commentators have, however, lodged strong objections to giving administrative agencies *Chevron*-type interpretive powers with respect to their own regulations. One of the more persuasive arguments against continued adherence to *Seminole Rock* posits that permitting an agency to have broad power to interpret its own regulations violates constitutional separation-of-powers restrictions by uniting the law-making and law-exposition functions in the same agency hands. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules*, 96 Colum. L. Rev. 612, 638-654 (1996). According to this critique, *Chevron* and *Seminole Rock* operate quite differently:

> In a *Chevron* case, the reviewing court asks whether agency action—usually the promulgation of a rule, an agency enforcement action, or an adjudication—is consistent with an authorizing statute. If the reviewing court is effectively bound by the agency's interpretation of the statute, separation remains between the relevant lawmaker (Congress) and at least one entity (the agency) with independent authority to interpret the applicable

> legal text. In contrast, under *Seminole Rock*, the reviewing court asks whether the agency action—typically an enforcement action or adjudication—is consistent with an agency regulation. In those circumstances, if the court is bound by the agency's interpretation of the meaning of its own regulation, there is no independent interpreter; the agency lawmaker has effective control of the exposition of the legal text that it has created. In short, whereas *Chevron* retains one independent interpretive check on lawmaking by Congress, *Seminole Rock* leaves in place *no* independent interpretive check on lawmaking by an administrative agency.

Id. at 639 (footnotes omitted). Thus, under this reasoning, it is constitutionally imperative for the courts to "impos[e] an independent judicial check on agencies' interpretations of their own regulations." *Id*. at 682.

Seminole Rock has also been criticized for fostering the promulgation of ambiguous regulations. As one observer has stated, *Seminole Rock* "generates incentives to be vague in framing regulations, with the plan of issuing 'interpretations' to create the intended new law without observance of notice and comment procedures." Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. of Am.U. 1, 12 (1996); *see* Manning, *supra*, at 655 (noting that *Seminole Rock* "removes an important affirmative reason for the agency to express itself clearly; since the agency can say what its own regulations mean . . . the agency bears little, if any, risk of its own opacity or imprecision"); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525, 114 S.Ct. 2381, ___, 129 L.Ed.2d 405 (1994) (Thomas, J., dissenting) ("It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows

the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process.").

In addition to reducing the efficacy of notice-and-comment rule-making procedures, it is further argued that the incentives for ambiguity provided by *Seminole Rock* increase the potential for governmental arbitrariness, since vague regulations provide neither regulators nor regulated parties with explicit guidance as to the standard by which particular conduct must be measured. *See* Manning, *supra*, at 669-74. It is likewise pointed out that any system which increases an agency's proclivity to promulgate vague regulations increases the potential that the agency's actions will come under the control of special interests: "If *Seminole Rock* makes for systematically more indefinite regulations and provides that the regulations mean anything the agency says they mean (within a very broad range), then it becomes far more difficult for an agency to cite its own regulations as a source for resisting blandishments or threats from legislators acting on behalf of organized, but not broadly representative, interest groups." *Id.* at 680.

Based upon these shortcomings, it has been argued that *Seminole Rock* should be abrogated, and that the federal courts should instead apply the multi-factor approach of *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944). *See* Manning, *supra*, at 686-96; *cf.* Anthony, *supra*, at 34 (expressing view that Supreme Court "should make clear . . . the circumstances in which reviewing courts should not 'defer' to agency interpretations, but should form their own interpretations after extending appropriate consideration to agency views"). *Skidmore* places an emphasis upon the "specialized

experience and broader investigations and information available to the agency," 323 U.S. at 139, 65 S. Ct. at 164, and instructs that

> the rulings, interpretations and opinions of [an administrator], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight [accorded an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140, 65 S.Ct. at 164. In the present context, Professor Manning argues that because it "places the burden of persuasion upon the agency to convince a reviewing court of the meaning of the relevant legal text, *Skidmore* satisfies the constitutionally-inspired requirement of an independent interpretive check." Manning, *supra*, at 687. Furthermore, "unlike *Seminole Rock*, *Skidmore* would more generally encourage regulatory clarity by placing a premium on well-explained agency accounts of regulatory meaning." *Id.*

I believe that *Skidmore*, rather than *Seminole Rock*, illuminates the better course for resolving the meaning of ambiguous administrative rules and the course that this Court will follow in establishing the law of West Virginia. Significantly, in *Appalachian Power*, this Court addressed the issue of the appropriate analysis for reviewing an agency's construction of its own interpretive rules,[3] and expressly adopted the *Skidmore* standard. *See* 195 W.Va.

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[3]As we stated in *Appalachian Power*, "[i]nterpretive rules . . . do not create rights but merely clarify an existing statute or regulation." 195 W.Va. at 583, 466 S.E.2d at 434; *see also W.Va. Code*, 29A-1-2(c) (1982) (1998 Repl. Vol.) (defining an "interpretive rule" for (continued...)

at 583, 466 S.E.2d at 434. I discern no basis for affording *Chevron* deference to an agency's informal interpretation of its own regulations, where we have otherwise refused to do so in the case of formal interpretive rules promulgated pursuant to the notice-and-comment provisions of *W.Va. Code*, 29A-3-8 (1985) (1998 Repl. Vol.). Indeed, to do so would run afoul of the spirit, if not the letter, of the Legislature's admonition that such interpretive rules should not be given controlling weight unless they are issued pursuant to a legislative grant of discretion:

> An interpretive rule may not be relied upon to impose a civil or criminal sanction nor to regulate private conduct or the exercise of private rights or privileges nor to confer any right or privilege provided by law and is not admissible in any administrative or judicial proceeding for such purpose, except where the interpretive rule established the conditions for the exercise of discretionary power as herein provided.

W.Va. Code, § 29A-1-2(c).

Thus, in the absence of statutory or other principles that prescribe a different standard of review, judicial review of an administrative agency's interpretation of its own legislative rule should be governed by the standard set forth in *Skidmore*. The agency's construction, while not controlling upon the courts, nevertheless constitutes a body of experience and informed judgment to which a reviewing court should properly resort for guidance. The weight that must be accorded an administrative judgment in a particular case will depend upon (1) the thoroughness evident in its consideration, (2) the validity of its reasoning, (3) its consistency with earlier and later pronouncements, and (4) all those factors which give

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[3](...continued)
purposes of West Virginia Administrative Procedures Act).

it power to persuade, if lacking power to control. As we observed in *Appalachian Power*, under *Skidmore* and its analogues,

> an interpretive rule is entitled to some deference, but it is not to be given the full *Chevron* deference that applies to "legislative" rules. We are obligated to give appropriate consideration to all agency interpretations (which many of our cases have referred to as deference). Then we must decide how much *weight* the interpretation should receive. To say that we give it "no deference" implies that we do not even consider the interpretation, which is not the case. We refuse to become a "rubber stamp" for an agency's action. But, it is more accurate to say that interpretive rules are not to be given controlling weight than it is to say that they would be given no deference. There is, indeed, a great danger in giving *Chevron* deference (and often legislative effect) to rules promulgated without the benefit of legislative oversight.

195 W.Va. at 583 n.7, 466 S.E.2d at 434 n.7 (emphasis in original).

Accordingly, I concur in the majority opinion.