

THE  
NATIONAL LAW REVIEW

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## Wisconsin Supreme Court Ends Judicial Deference To Agency Legal Interpretations

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Wednesday, September 19, 2018

In a recent decision, the Wisconsin Supreme Court greatly diminished the power of Wisconsin state agencies to rely on their own legal interpretations in disputes with other parties. This decision will benefit companies and individuals challenging adverse determinations by Wisconsin state agencies in circuit court.

In *Tetra Tech v. Department of Revenue*, the Court abrogated its long-standing doctrine of judicial deference to agency legal conclusions. Now, instead of applying either “great weight” or “due weight” deference to agency interpretations of statutes (or applications of statutes to undisputed facts), courts must exercise independent judgment on all questions of law. Courts may still take into account the expertise of agencies under appropriate circumstances, but may defer not to their judgment.

### Wisconsin’s longstanding deference framework

Under Chapter 227 of the Wisconsin Statutes, final determinations of state agency actions are generally subject to judicial review in the circuit courts. For decades, courts deferred to agency interpretations of statutes within the agency’s area of expertise. And ever since a 1995 Supreme Court decision, Wisconsin courts applied a two-tier approach to deference:

- Under *great weight deference*, courts upheld any reasonable interpretation of a statute, even if the court believed there was a more reasonable interpretation. Courts applied this level of deference if the statute was within the agency’s area of expertise and the agency had a long history of applying the statute.
- Under *due weight deference*, courts upheld the agency interpretation as long as there was not a more reasonable interpretation. In other words, if the court found two interpretations equally reasonable, the agency won. Due weight deference applied if the agency was charged with administering the statute and had some history interpreting it.

If the conditions for great weight or due weight deference were not met, courts applied no deference.

This deference framework applied to both interpretations of statutes and application of statutes to undisputed facts. They did not, however, apply to agency factual determinations or to an agency’s interpretations of its own rules.

Further, courts applied these levels of deference on all levels of appeal. Judicial review of agency decisions involves three levels of review: the circuit court, the court of appeals, and the Supreme Court. Each court reviews the agency’s decision rather than the lower court’s. Thus, each court applied the same deference to the agency, giving even more prominence to the agency decision.

In practice, this deference framework often resulted in forgiving judicial scrutiny of agency actions. In cases where great weight deference applied, businesses faced a steep uphill battle to overturn an agency interpretation of law. Agencies applied their own longstanding interpretations of statutes that effectively carried the force of precedent.

The deference framework served as a deterrent to parties who otherwise might have appealed agency

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decisions, and it undercut attempts to negotiate favorable resolutions with agencies in cases involving reasonable disputes about the law.

## **Tetra Tech overturns the deference framework**

*Tetra Tech* was decided from an unusual procedural posture – after the Department of Revenue prevailed before the circuit court and court of appeals in a case revolving around interpretation of a tax statute, Tetra Tech (the taxpayer) sought review in the Wisconsin Supreme Court. On its own accord, the Supreme Court asked the parties to brief whether the deference framework should be overruled.

The agency took the unusual position of arguing that its own determinations should not be accorded deference, but insisted on a middle approach under which agency determinations would be given “due consideration.”

The Supreme Court, tracing the history of the deference doctrine, held that interpreting the law was the judiciary’s sole province. Characterizing deference as a “decision-avoidance doctrine,” the Court explained that allowing agencies to authoritatively interpret the law created a separation of powers problem – and in the Court’s words, “core powers are not for sharing.”

The Court therefore abolished “great weight” deference, requiring courts to independently interpret the law and apply a *de novo* standard of review to agency legal conclusions.

The Court also found that “due weight” deference was improper. It also observed, however, that the concept of “due weight” had a statutory basis, and therefore held that courts may continue to give “due weight consideration” by giving appropriate respect to agencies’ experience. This due weight, the Court noted, should not be viewed as deference, but as a matter of persuasion. In other words, courts may still take agency interpretations into account when appropriate in the independent exercise of the Court’s judgment. Agencies must explain how their experience, technical competence, and specialized knowledge make due weight appropriate.

## **Tetra Tech’s practical effect**

The immediate consequence of *Tetra Tech* is that final agency determinations will be reviewed by courts without any deference to the legal conclusions of the agency – including for currently pending cases.

This change poses a number of broader, strategic considerations for companies:

- *Better chances on judicial review:* Decisions for which agencies typically received great weight deference will now be much easier to challenge in court. Also, because each reviewing court takes a fresh look at the agency decision without applying deference, there is little incentive not to appeal adverse decisions.
- *Increased leverage in agency negotiation:* The end of deference to agencies means that businesses negotiating with agencies where an interpretation of statute is an issue should have added leverage. The agency cannot count on the courts to rubberstamp their decisions.
- *Precedents in jeopardy:* Longstanding agency interpretations – even if previously upheld by a court applying great weight deference – should now be fair game.
- *Reviews of factual determinations unchanged:* Factual findings made by agencies at an evidentiary hearing will still get deferential “clear error” review.
- *What about agency interpretations of their own regulations?* Previous cases gave agencies even greater deference to interpretations of their own regulations (as opposed to statutes). This issue was not addressed in *Tetra Tech*, but it may be the next target.
- *Are federal courts the next domino?* Tetra Tech applies to decisions made by Wisconsin state agencies on review in state court – not to federal agency decisions in federal court, which receive a similar level of deference (called Chevron deference). Many commentators predict that the U.S. Supreme Court will mimic Wisconsin by discarding, or at least undermining, deference to agency decisions.

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