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Tetra Tech EC, Inc. v. Wisconsin Department of Revenue

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This article is the third installment in our series on the Wisconsin Supreme Court's recently completed 2017-18 term. For previous installments, see here and here.

One decision of the past term merits special attention: *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75. As we predicted (see prior post), *Tetra Tech* was the court's chosen vehicle to revisit and restrict, on its own motion, previously mandated judicial deference to Wisconsin administrative agency decisions. Wisconsin courts before *Tetra Tech* deferred to administrative agency decisions often and extensively. But the "sea change" in the law forewarned by Justice Ziegler in the previous term arrived in June.

At issue in *Tetra Tech* was whether the word "processing" in the sales tax statute was broad enough to cover "processing" of river sediments into sludge, sand, and water. Seven justices agreed that the processing activity in the case had been properly taxed. Five justices agreed that Wisconsin courts should no longer defer to agency conclusions of law. However, no more than two justices agreed on any rationale for these results.

- Justices Kelly and Grassl Bradley would have decided the case on separation of powers grounds; however, they would continue to give "'due weight' to the experience, technical competence, and specialized knowledge of an administrative agency," under Wis. Stat. § 227.57(10).

- Justice Ziegler would have exercised the court's administrative authority to end the practice of deference going forward.

- Justice Gableman would merely have withdrawn language from *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, which held that deference is mandatory.

- Chief Justice Roggensack joined the discussion of deference in both Justice Ziegler and Justice Gableman's opinions.

- Justices Walsh Bradley and Abrahamson would not have changed the century of Supreme Court precedent on agency deference.

Where does this leave agency deference in Wisconsin? Your guess is as good as ours. While two of the concurring opinions (joined by four of the justices) expressed concern that a constitutional decision would require re-litigation of previously resolved cases under a new standard, one would expect that res judicata would prevent re-litigation of old cases, no matter how deference was discontinued.

But even if the validity of final judgments is not in question, other uncertainty is sure to arise after *Tetra Tech*. With Justice Gableman having completed his single term on the court, only four of the current justices have shown themselves willing to do away with agency deference, under various rationales. Because *Tetra Tech* did not definitively resolve the scope of agency deference, the issue is sure to arise again, particularly in contexts different from state tax cases. If an administrative or non-mandatory approach to deference is adopted, rather than a constitutional one, the court could choose to apply deference as it sees fit. The scope of deference is now an unavoidable issue in any administrative agency litigation.

The *Tetra Tech* decision also shows that the 2017-18 court thought the issue important enough to address even though the parties had not asked it to do so. *Tetra Tech* is precedential, but the law on deference to administrative agencies will remain in flux until a majority of the court can settle on a rationale for when and to what extent courts should (or can't) defer to administrative agency interpretations of statutes.

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