Chapter 2 CONGRESS, ADMINISTRATIVE AGENCIES AND THE COURTS

Case Questions

Case 2.1, Mayo Foundation v. U.S., p.32

1. (Q.) Utilizing the *Chevron* framework, how did the Court respond to the first question of whether Congress has "directly addressed the precise question at issue?"
   (A.) The Court determined that Congress had not addressed the precise question at issue. The statute does not define "student" or otherwise attend to the question whether medical residents are subject to FICA.

2. (Q.) Did the Court find that the Treasury Department's interpretation is "based on a permissible construction of the statute "under *Chevron's* second step?
   (A.) The rule easily satisfies *Chevron*'s second step. Regulation, like legislation, often requires drawing lines. The Department reasonably sought to distinguish between workers who study and students who work. Focusing on the hours spent working and those spent in studies is a sensible way to accomplish the goal. The Department thus has drawn a distinction between education and service, not between classroom instruction and hands-on training. The Treasury Department also reasonably concluded that its full-time employee rule would "improve administrability."

Chapter Questions and Problems, p. 37

1. [*Agency regulations as law, Section 2.3; court review of agency determinations on law and policy Section 2.7.]* The second step of the *Chevron* framework applies to this case. The "power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress". *Chevron* 467 U.S., at 843. When an agency fills such a "gap" reasonably, and in accordance with other applicable procedural requirements, the courts accept the result as legally binding. In this case, the FLSA explicitly leaves gaps, for example to the definition of statutory terms such as "domestic service employment" and "companionship services". It provides the Department of Labor with the power to fill these gaps through rules and regulations. The 1974 Amendments, Section 29(b) authorized the Secretary of Labor "to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act." The subject matter of the regulation in question concerns a matter in respect to which the agency is expert. The Department focused fully upon the matter in question. It gave notice, it proposed regulations, it received public comment, and it issued the final regulations in light of that comment. The resulting regulation says that employees who provide "companionship services" fall within the terms of the statutory exemption irrespective of who pays them. On its face the regulation fills a statutory gap. It is the administrative agency, not the reviewing judges who are not experts in the field, who are entitled to deference in reconciling conflicting policies. The case was decided against Ms. Coke.

2. *[The adjudicatory function, Section 2.4; court review of agency determinations, Section 2.7.]* The plain language of Section 7 does not limit coverage to "unionized employees" nor does it turn on the skills or motives of the employee's representative. The Board carefully shaped the contours and limits of the statutory Section 7 rights enunciated in *Weingarten*. The employer can end the interview at any time at its discretion. It need not bargain with the representative permitted to attend the interview. It ordinarily will refuse disclosure and discussion of medical records, if relevant, in the presence of a representative. The *Weingarten* representative is present to assist the employee and may attempt to clarify facts or suggest other employees who may have knowledge of the event. Students may reasonably conclude that the Board's stated policy reasons simply do not make out a strong "policy" case for divesting nonunion workers of the right to a coworker witness or representative at an investigatory interview.

   The dissent points out that the presence of a coworker gives an employee a potential witness, advisor, and advocate in an adversarial situation, and ideally militates against imposition of unjust discipline by the employer. They conclude:

> [I]t is our colleagues who are taking steps backwards. They have neither demonstrated that *Epilepsy Foundation* is contrary to the Act, nor offered compelling policy reasons for failing to follow precedent. They have overruled a sound decision not because they must, and not because they should, <u>but because they can</u>. (underline added).

The *Chevron* principles recognize that the agency to which Congress delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments when resolving competing policy interests which Congress itself did not resolve. The NLRB was in compliance with *Chevron* and labor law precedent when it made the policy choice to overrule the *Epilepsy* decision in its *IBM Corp*. decision. The dissent recognized this when it stated … "because they can". A reviewing court would not have a basis under administrative law to set aside this decision even though the court would have chosen a different interpretation.

Author's Comments:

Note the way the case problem evolves from use of the terms Labor Board regarding the *Weingarten* decision in 1973, later the "Reagan Board", then the "Clinton Board" and then "Bush II Board". Footnote 1 of Chapter 4 presents some discussion on the appointment process of Board members. Section 2.7 of the text contains an excerpt from the *Chevron* decision, that "it is entirely appropriate for this political branch of the government to make such policy choices", as opposed to reviewing judges. The case problem was designed to initiate a discussion regarding whether the Labor Board should be a politically responsive agency? And should the Labor Board be able to reverse policy determinations made by appointees of a prior administration of a different political party? Writing for the Court of Appeals for the District of Columbia Circuit in upholding the Board's *Epilepsy Foundation* case, labor scholar and Senior Appeals Court Judge Harry Edwards stated in part:

> …It is a fact of life in NLRB lore that [the meaning of] certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board. Because the Board's new interpretation is reasonable under the Act, it is entitled to deference.

Should not the maturity of the NLRA and its longstanding precedents established under the Act narrow the Board's policymaking freedom to new and novel case?