

CONCURRING OPINION

JUSTICE WECHT

DECIDED: October 17, 2018

I join the learned Majority’s Opinion in full. I write separately to comment upon the evolution of the *Tire Jockey*¹ standard, and upon the manner in which litigants may challenge administrative actions.

Appellees are operators of partial-rights taxicabs in Philadelphia. With the enactment of Act 94 in 2004,² Appellees became subject to a regulatory overlap by the Public Utility Commission (“PUC”) and the Philadelphia Parking Authority (“PPA”). PUC and PPA resolved this overlap by entering into a Jurisdictional Agreement in February 2005, subjecting Appellees to PPA’s regulations. In 2011, PPA promulgated regulations pursuant to the Regulatory Review Act, 71 P.S. §§ 745.1-745.14, and the Commonwealth Documents Law, 45 P.S. §§ 1201-08, which, pursuant to the Jurisdictional Agreement, it sought to apply to Appellees.

In November 2011, Appellees filed a petition for review in the Commonwealth Court’s original jurisdiction challenging the Jurisdictional Agreement and the application of the new regulations to partial-rights taxicabs. Appellees argued that the Jurisdictional Agreement was invalid because it violated Act 94, Appellees’ rights to due process, and Appellees’ rights to equal protection generally and under the Uniformity Clause of the Pennsylvania Constitution. Appellees also raised two challenges to the regulations.

¹ See *Tire Jockey Serv., Inc. v. Dep’t of Env’tl. Prot.*, 915 A.2d 1165 (Pa. 2007).

² 53 Pa.C.S. §§ 5701-45.

Appellees argued that the regulations exceeded PPA's statutory authority, and that they violated Appellees' substantive due process rights.

The Commonwealth Court invalidated the Jurisdictional Agreement on substantive due process grounds. As to Appellees' challenges to the regulations, the Commonwealth Court examined whether the regulations exceeded the authority provided to PPA in Act 94. The court held that the challenged regulations, as they applied to Appellees, were arbitrary and unreasonable and, therefore, exceeded PPA's statutory authority.

I join the Majority's reversal of the Commonwealth Court's invalidation of the Jurisdictional Agreement. To withstand this substantive due process challenge, the government action must seek to achieve a valid state objective by means that are rationally related to that objective. *Khan v. State Bd. of Auctioneer Exam'rs*, 842 A.2d 936, 946 (Pa. 2004). Here, as the Majority Opinion explains, the Jurisdictional Agreement meets the rational basis standard and, therefore, is constitutional. See Maj. Op. at 21-22.

As to Appellees' challenge to the PPA's regulations, the Majority correctly recognizes that the Commonwealth Court resolved this challenge not upon substantive due process grounds, as PPA now maintains, but upon an analysis of whether the regulations exceeded the grant of statutory authority. In doing so, the Commonwealth Court relied upon *Tire Jockey*.

In *Tire Jockey*, this Court established two layers of analysis to resolve a challenge to an agency's interpretation of its governing regulation. The first layer of analysis examines "(1) whether the interpretation of the regulation is erroneous or inconsistent with the regulation, and (2) whether the regulation is consistent with the statute under which it was promulgated." *Tire Jockey*, 915 A.2d at 1186. The second layer of analysis provides that, "when an agency adopts a regulation pursuant to its legislative rule-making

power, as opposed to its interpretative rule-making power, it is valid and binding upon courts as a statute so long as it is (a) adopted within the agency's granted power, (b) issued pursuant to proper procedure, and (c) reasonable." *Id.*

Tire Jockey was this Court's attempt to build upon a past effort to harmonize this two-step analysis into "a uniform and joint application." *Tire Jockey*, 915 A.2d at 1186, n.20 (citing *Popowsky v. Pa. Pub. Util. Comm'n*, 910 A.2d 38, 53 (Pa. 2006)). At issue in *Popowsky* was the PUC's interpretation of its regulation. Considering this interpretation, the Court first questioned whether PUC's interpretation of its regulation was consistent with the plain language of the regulations, and found that it was. Next, the Court assessed whether the regulation was consistent with the statute under which it was promulgated. *Popowsky*, 910 A.2d at 53. To resolve this question, the Court invoked the three-part test used to determine whether a regulation is valid and binding upon the courts. *Id.* at 54 (because the rule-making power at issue was legislative in nature, "to be binding, the regulations must fall within the power delegated to the PUC, be enacted according to proper procedures, and be reasonable").

In other words, the *Popowsky* Court conflated the two layers of analysis. Analyzing the regulation in this manner made sense in *Popowsky*, where the agency's interpretation of the regulation did not differ from the language of the regulation itself. Beyond such circumstances, however, it may be necessary to differentiate between the two layers of analysis.

As articulated in *Tire Jockey*, the first layer of the two-layered analysis examines the validity of the agency's interpretation of its own regulation. The second layer examines the validity of the agency's legislative rule-making. Legislative rule-making is an exercise of legislative power by an administrative agency, pursuant to a grant of that power by the General Assembly. *Id.* at 53.

Although it would appear that the second part of the first layer (“whether the regulation is consistent with the statute under which it was promulgated”) is duplicative of the first part of the second layer (whether the regulation was “adopted within the agency’s granted power”), I would suggest that the two inquiries are distinct. The first layer of analysis resolves a challenge to the agency’s interpretation of its own regulation. Therefore, asking “whether the regulation is consistent with the statute under which it was promulgated” is, more precisely, an examination of whether the regulation *as interpreted* is consistent with the statute under which it was promulgated.

In *Commonwealth, Department of Public Welfare v. Forbes Health System*, this Court focused upon the agency’s interpretation of its own regulation in applying the first layer of analysis. 422 A.2d 480, 482 (Pa. 1980) (examining “whether the regulations as *interpreted* by [the agency] are consistent with the statutes they implement”) (emphasis added). The Court held that, because there was no conflict between the enabling statutes and the agency’s interpretation of its regulation, the agency’s interpretation was valid. *Id.* at 484. *Forbes Health System* makes it abundantly clear that the second part of the first layer of analysis focuses upon the regulations as interpreted by the agency. See e.g., *Pelton v. Commonwealth, Dep’t of Pub. Welfare*, 523 A.2d 1104, 1109 (Pa. 1987) (resolving a challenge to an agency’s interpretation of its regulation by concluding that the agency’s interpretation was consistent with its regulation and that “the agency’s decisions are made within the parameters of the law”).

Focusing upon the agency’s interpretation of its regulations in applying the second part of the first layer distinguishes this analysis from that contemplated by the first part of the second layer of the *Tire Jockey* analysis. In contrast to the first layer of analysis, the first part of the second layer of the *Tire Jockey* analysis requires regulations promulgated pursuant to the agency’s rule-making power to “fall within the power delegated” to the

agency. *Popowsky*, 910 A.2d at 54. This inquiry is focused upon whether the agency's regulations are authorized by the statute, *id.*, and is resolved by examining the language of the statute that granted authority to the agency, *Slippery Rock Area Sch. Dist. v. Unemployment Comp. Bd. of Review*, 983 A.2d 1231, 1239 (Pa. 2009).

Having established that the second part of the first layer of analysis is distinct from the first part of the second layer, I question the wisdom of this Court's attempt in *Tire Jockey* to harmonize the two distinct inquiries. One inquiry addresses a challenge to an agency's interpretation of its own regulation, and one inquiry challenges the regulations themselves. Rather than subjecting an agency action to *Tire Jockey's* two layers of analysis, the nature of the challenge may render the first or second layer of the *Tire Jockey* analysis unnecessary. For example, absent a challenge to an agency's regulation, there would be no need to engage in the second layer of this analysis at all. See *Pelton*, 523 A.2d at 1109 (applying solely the first layer of analysis to determine that the agency's interpretation of its own regulation was consistent with the regulation and the statute); *Forbes Health Sys.*, 422 A.2d at 482 (solely applying the first layer of analysis to uphold the agency's interpretation of its own regulations). The first layer of the *Tire Jockey* test is implicated when the challenged action is an agency interpretation of a regulation. When the challenged action is solely to the regulation itself, such as the challenge to PPA's regulations in this case, only the second layer of the *Tire Jockey* test is implicated.

The second part of the second layer of analysis examines whether the agency issued its regulation pursuant to proper procedure. *Tire Jockey*, 915 A.2d at 1186. The proper procedure for enacting regulations may vary depending upon the legislative authority under which the regulations are promulgated. See, e.g., *Slippery Rock*, 983 A.2d at 1242 (noting the Department of Labor and Industry's argument that, in

promulgating the Regulation, the Department followed the procedures of the Commonwealth Documents Law, the Commonwealth Attorneys Act, 71 P.S. §§ 732–101-732–506, and the Regulatory Review Act, as required when adopting a legislative regulation); *Germantown Cab Co. v. Phila. Parking Auth.*, 993 A.2d 933, 937 (Pa. Cmwlth. 2010) (“[W]hen promulgating a regulation, an agency must comply with the requirements set forth in the Commonwealth Documents Law, the Commonwealth Attorneys Act and the Regulatory Review Act.”).

The final part of the second layer of analysis examines whether the agency’s regulation is reasonable:

In deciding whether an agency action, such as promulgation of a legislative regulation, is reasonable, we are ‘not at liberty to substitute [our] own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action involved, it is not enough that [the agency’s regulation] shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be so entirely at odds with fundamental principles as to be the expression of a whim rather than an exercise of judgment.’

Slippery Rock, 983 A.2d at 1242 (quoting *Pa. Human Res. Comm’n v. Uniontown Area Sch. Dist.*, 313 A.2d 156, 169 (Pa. 1973)).

Moreover, “[r]egarding the reasonableness prong, ‘appellate courts accord deference to agencies and reverse agency determinations only if they were made in bad faith or if they constituted a manifest or flagrant abuse of discretion or a purely arbitrary execution of the agency’s duties or functions.’” *Tire Jockey*, 915 A.2d at 1186 (quoting *Rohrbaugh v. Pa. Pub. Util. Comm’n*, 727 A.2d 1080, 1085 (Pa. 1999)).

With this framework in mind, an individual or entity that finds itself the target of an administrative agency action or otherwise subject to the agency’s authority, and who wishes to challenge that authority, may do so in a number of ways. Assuming the litigant

has exhausted all required administrative remedies, the litigant may seek redress in the courts by challenging the agency's enabling statute, challenging the agency's regulation, or challenging the agency's interpretation of its regulation.

A challenge to the agency's enabling statute may be a constitutional challenge. For example, a litigant could challenge whether a statute violates the litigant's substantive due process rights. "To constitute a lawful exercise of the state's police power, social and economic legislation must first be directed toward a valid state objective." *Khan*, 842 A.2d at 946. To withstand a substantive due process challenge to which heightened scrutiny does not apply, "a statute or regulation must seek to achieve a valid state objective by means that are rationally related to that objective." *Id.* In the context of a substantive due process challenge subject to rational basis review, it is not enough for the litigant to establish that the legislation is unreasonable. Rather, under the rational basis test, "a statutory classification will be upheld so long as it bears a reasonable relationship to accomplishing a legitimate state purpose." *Commonwealth v. Duda*, 923 A.2d 1138, 1151 (Pa. 2007).

As another example, the litigant could challenge the statute as an unconstitutional delegation of legislative power. See, e.g., *Protz v. W.C.A.B. (Derry Area Sch. Dist.)*, 161 A.3d 827, 831 (Pa. 2017) (providing that, when the General Assembly assigns the authority and discretion to execute or administer a law, the state constitution imposes two fundamental limitations: "first, the basic policy choices must be made by the [l]egislature; and second, the legislation must contain adequate standards which will guide and restrain the exercise of the delegated administrative functions") (internal citations omitted).

A challenge to the agency's regulation may also rest upon constitutional grounds. Thus, a regulation may be challenged, for example, as violating substantive due process, equal protection, or procedural due process. In addition, pursuant to *Tire Jockey*, an

agency's regulation may be challenged as exceeding the agency's granted power, as not being issued pursuant to proper procedures, or as unreasonable. *Tire Jockey*, 915 A.2d at 1186. In this context, the reasonableness of the regulation is assessed pursuant to the deferential standard stated above, which examines whether the agency's regulation was made in bad faith, constitutes a manifest or flagrant abuse of discretion, or is a purely arbitrary execution of the agency's duties or functions. *Id.*

A challenge to an agency's interpretation of its own regulation may also be premised upon the Constitution, as an agency's interpretation of an otherwise constitutional regulation could itself be unconstitutional. See *Forbes Health Sys.*, 422 A.2d at 486 (discussing a procedural due process claim arising from an interpretation of a regulation). In addition, an agency's interpretation of its own regulation may be challenged as invalid in accord with the first level of analysis in *Tire Jockey*. This would require a litigant to establish that the agency's interpretation is erroneous or inconsistent with the regulation or with the statute under which it was promulgated.

Consistent with my understanding of *Tire Jockey*, the challenge in this case to PPA's regulations does not rest upon the agency's interpretation of its regulations, but upon its application of the regulations to Appellees. The Majority Opinion therefore astutely applies only the second layer of analysis provided in *Tire Jockey*. Because there is no question at this juncture as to whether the regulations were adopted within the agency's granted power or issued pursuant to proper procedure, Appellees' challenge depends upon the third part of the second layer of analysis provided by *Tire Jockey*: whether the regulations are reasonable.

Before the Commonwealth Court, Appellees argued that PPA failed to consider the financial impact on partial-rights taxicabs of abolishing all regulatory distinctions between medallion and non-medallion taxicabs. Appellees asserted that they are

required to sustain the regulatory burden of operating a medallion taxicab without receiving any of its benefits.

The Commonwealth Court agreed, finding the regulations “bereft of reasonableness with respect to partial-rights taxicabs.” *Bucks Cty. Servs., Inc. v. Phila. Parking Authority*, 584 M.D. 2011 (Pa. Cmwlth. Nov. 28, 2016), slip op. at 36. According to the Commonwealth Court, by treating all taxicabs the same, the regulations failed to account for material differences between medallion and partial-rights taxicabs. The uniform regulations therefore imposed a disproportionate regulatory burden upon partial-rights taxicabs, which do not have the authority to operate on a citywide basis as medallion taxicabs do. Despite the material differences between medallion and partial-rights taxicabs, the Commonwealth Court observed that PPA presented no witnesses or other evidence to explain its rationale for adopting uniform regulations. Because PPA failed to account for the material differences, the Commonwealth Court held that its imposition of disproportionate burdens upon partial-rights taxicabs rendered its 2011 regulations a purely arbitrary exercise of its rulemaking power.

Before this Court, PPA insists that the Commonwealth Court decided Appellees’ challenge to the regulations on substantive due process grounds, and asserts that the regulations pass rational basis review. As the Majority Opinion establishes, this is simply not correct. See Maj. Op. at 12, n.14 (explaining that the Commonwealth Court resolved Appellees’ challenge to the regulations not upon substantive due process grounds, but because the regulations exceeded PPA’s statutory authority).

Considering Appellees’ challenge, as resolved by the Commonwealth Court, the pertinent analysis is the reasonableness of the regulations under the *Tire Jockey* standard, not the rational basis review that would pertain to a substantive due process challenge. The Commonwealth Court found that applying the regulations to partial-rights

taxicabs was arbitrary, which rendered the regulations unreasonable as to Appellees and, therefore, invalid. Because PPA offers nothing to refute the Commonwealth Court's analysis, I am not persuaded that the Commonwealth Court was incorrect in concluding that the regulations "are bereft of reasonableness" as to partial-rights taxicabs. Therefore, I join the Majority's affirmance of the Commonwealth Court.