

**[J-99-2025] [MO: Dougherty, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

LUTHERAN HOME AT KANE AND	: No. 7 MAP 2025
SIEMON'S LAKEVIEW MANOR ESTATE	:
	:
	: Appeal from the Order of the
	: Commonwealth Court at No. 303
v.	: CD 2023 dated June 4, 2024,
	: Affirming the Decision of the
	: Department of Human Services,
DEPARTMENT OF HUMAN SERVICES	: Bureau of Hearings and Appeals
	: at Nos. 090-08-0113, 090-08-
	: 0130, 090-08-0134, 090-08-0157,
APPEAL OF: LUTHERAN HOME AT KANE	: 090-08-0158, 090-08-0159, 090-
AND SIEMON'S LAKEVIEW MANOR	: 08-0164, 090-08-0170, 090-08-
ESTATE, SUSQUEHANNA VALLEY	: 0174, 090-08-0176, 090-08-0186,
NURSING AND REHABILITATION CENTER,	: 090-08-0187, 090-08-0188, 090-
RHEEMS NURSING & REHABILITATION	: 08-0192, 090-08-0193, 090-08-
CENTER, ELLEN MEMORIAL HEALTH	: 0200 and 090-08-0213 dated
CARE CENTER, AND ELIZABETHTOWN	: March 1, 2023
NURSING AND REHAB CENTER	:
	: ARGUED: November 20, 2025

CONCURRING AND DISSENTING OPINION

JUSTICE DONOHUE

DECIDED: October 1, 2026

I agree with the result reached by the learned Majority based on its thorough interpretation of the text of 55 Pa. Code §1187.91(1)(iv) (the “Regulation”).¹ It correctly identifies an ambiguity in the Regulation which is designed to, among other things, set

¹ The provision states, in relevant part:

(iv) Prior to price setting, cost report information will be indexed forward to the 6th month of the 12-month period for which the prices are set. The index used is the 1st Quarter issue of the CMS Nursing Home Without Capital Market Basket Index.

forth the calculation of medical assistance reimbursement rates for long-term care skilled nursing facilities to include an inflation factor. “Cost report information” as used in the Regulation is an undefined term capable of at least two reasonable interpretations and, as such, it is ambiguous. *A.S. v. Pennsylvania State Police*, 143 A.3d 896, 905-06 (Pa. 2016). Applying the Statutory Construction Act² to discern the meaning of the term, Majority Op. at 6-61, the Majority concludes that “cost report information” as used in the Regulation reflects year end totals reported by the providers. *Id.* at 55. As a result, the Majority holds that the Department’s interpretation of the Regulation is correct. *Id.* at 61.

I depart from the Majority because despite its recognition that the Statutory Construction Act must be used to interpret administrative rules,³ the Majority insists that there continues to be a role for deference to an administrative agency’s interpretation of its own regulation and that our precedent requiring agency deference is not inconsistent with application of the Statutory Construction Act because the two can be harmonized. *Id.* at 42-43 n.26. So here, the Majority states that “because our application of the SCA provides the answer, **there is no need to turn to deference principles.**” *Id.* at 61 (emphasis added). Since the Majority makes clear its view that deference principles must remain a part of our jurisprudence, I can only read this statement to mean that if a regulation remains ambiguous after application of all of the tools in the Statutory Construction Act, then deference is to be afforded to the agency’s interpretation of its own regulation.

If I am correct in my reading of the Majority opinion, this treatment of the role for deference to an agency’s interpretation of its own regulation is strikingly similar to the role for such deference announced by consensus of the majority in *Kisor v. Wilkie*, 588 U.S.

² 1 Pa.C.S. §§ 1501-1991 (“Statutory Construction Act” or “SCA”).

³ *Id.* at 44.

558 (2019). *Kisor* requires that deference not be afforded to the agency interpretation unless the regulation is genuinely ambiguous. *Id.* at 574. So it seems does the Majority.

The Majority declines to adopt *Kisor*'s framework because it "does not translate onto Pennsylvania's method for interpreting the text of regulations which [] is provided by the General Assembly in the SCA." Majority Op. at 38. The Majority recognizes that the *Kisor* method for determining genuine ambiguity is incompatible because it requires a court, before considering the agency interpretation, "to exhaust all the traditional tools of construction." Majority Op. at 41 (quoting *Kisor*, 588 U.S. 574-75) ("To make that effort, a court must carefully consider the text, structure, history, and purpose of a regulation, **in all ways it would if it had no agency to fall back on.**") (emphasis added). Because Section 1921(c)(8) of our Statutory Construction Act makes consideration of the agency's interpretation a tool to discern the meaning of a regulation and that treatment is not equivalent to *Auer* deference,⁴ it plays an earlier role in interpreting an ambiguous regulation. *Id.* This rejection of *Kisor* and the reason for doing so is right on the money. However, the Majority's conclusions in this regard are irreconcilable with its later suggestion that when all of tools of statutory construction fail, the fallback is to give deference to the agency's interpretation of its own regulation. *Id.* at 61.

Section 1921(c) of the Statutory Construction Act, which delineates interpretive rules to discern the intent of the legislature when a statute is ambiguous, is equally applicable to discerning the intent of the drafters of ambiguous administrative regulations. 1 Pa.C.S. § 1502(a)(1)(ii); 1 Pa. Code § 1.7. The Statutory Construction Act offers eight points of analysis for discerning the intent of the drafters⁵ and, as noted by the Majority,

⁴ *Auer v. Robbins*, 519 U.S. 452 (1997).

⁵ According to the Statutory Construction Act,

(continued...)

the factors are not prioritized one over another. Majority Op. at 40. One of the factors to be considered is the “administrative interpretations of such [regulation.]” 1 Pa.C.S. § 1921(c)(8), 1502(a)(1)(ii).

Contrary to the Majority’s view, the Statutory Construction Act and agency deference cannot be harmonized. The insistence on shoehorning the two-step analysis articulated in *Tire Jockey*⁶ into regulatory interpretation under the Statutory Construction Act⁷ lies at the heart of my disagreement with the Majority because it continues to embed agency deference in our judicial function of interpreting the law expressed in agency regulations.

The Majority recognizes that regulatory interpretation presents a question of law for which our review is plenary and de novo but, in contradiction, insists on conducting that review in the context of the two-part analysis’ articulated in *Tire Jockey*: (1) whether the interpretation of the regulation is erroneous or inconsistent with the regulation, and

(c) When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:

- (1) The occasion and necessity for the statute.
- (2) The circumstances under which it was enacted.
- (3) The mischief to be remedied.
- (4) The object to be attained.
- (5) The former law, if any, including other statutes upon the same or similar subjects.
- (6) The consequences of a particular interpretation.
- (7) The contemporaneous legislative history.
- (8) Legislative and administrative interpretations of such statute.

1 Pa.C.S. § 1921(c).

⁶ *Tire Jockey Serv., Inc. v. Dep’t of Env’t Prot.*, 915 A.2d 1165, 1186 (Pa. 2007).

⁷ Majority Op. at 42-43 n.26.

(2) whether the regulation is consistent with statute under which it was promulgated. Majority Op. at 42-43 (internal citations omitted). According to the Majority, in addressing the first factor, the only one at issue in this case, courts are to use the process mandated by the Statutory Construction Act and specifically Section 1921(c) where the language is ambiguous. Majority Op. at 43. This means that the focus of the interpretative process is the agency's interpretation, not the regulation itself. In support of this proposition, the Majority relies on *Corman v. Acting Secretary of Pennsylvania, Department of Health*, 266 A.3d 452 (Pa. 2021), and *S & H Transport Inc. v. City of York*, 210 A.3d 1028 (Pa. 2019). However, both of these cases simply stand for the proposition that the Statutory Construction Act is used to construe the terms of an ambiguous administrative regulation. Obviously, the focus of the analysis is not on the agency's interpretation of a regulation since that is one of the factors considered in discerning the drafter's intent in the Section 1921(c) analysis. Our role is to determine the meaning of the text of the regulation.

The Majority's ability to discern the meaning of the text of the regulation without resort to deference principles highlights the problem with the Majority's insistence on maintaining deference to an agency as part of our jurisprudence in interpreting regulations. The Majority is forced to create a role for deference in some type of case and implies that it comes into play where the application of the Statutory Construction Act fails to give meaning to a regulation. In other words, when the agency's interpretation of its regulation as one of the interpretive factors under Section 1921(c)(8) does not shed light on the intent of the agency in promulgating the regulation so as to assist in interpreting the text of the regulation, the court should then elevate the agency's interpretation by giving it deference in saying what the regulation means. This is nonsensical and contrary to our established law when encountering indecipherable

language after engaging in the interpretation process.⁸ The Statutory Construction Act and deference to an agency's interpretation of its own regulation cannot be harmonized because to do so requires elevating an agency's interpretation to an outcome determinative status in the interpretive process in contravention of the Statutory Construction Act which gives no such status to an agency's interpretation.

This Court's opinion in *Department of Public Welfare v. Forbes Health System*, 422 A.2d 480 (Pa. 1980), where we decided to follow the lead of the United States Supreme

⁸ The Statutory Construction Act does not speak to a situation where the tools of construction fail, but we have. When a statute, or by extension, a regulation involves enforcement under the criminal law, it will be found unconstitutional if it's "so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Commonwealth v. Davidson*, 938 A.2d 198, 207 (Pa. 2007) (quoting *Commonwealth v. Cotto*, 753 A.2d 217, 220 (Pa. 2000)). The doctrine is premised on "due process notions that a statute must provide reasonable standards by which a person may gauge his future conduct, i.e., notice and warning." *Commonwealth v. Ludwig*, 874 A.2d 623, 628 (Pa. 2005) (citing *Smith v. Goguen*, 415 U.S. 566, 572 (1974)). A void-for-vagueness challenge flows from both the Fourteenth Amendment of the U.S. Constitution and Article I, Section 9 of the Pennsylvania Constitution. See *Commonwealth v. Barud*, 681 A.2d 162, 163 (Pa. 1996).

More generally, the Court has articulated the following general principle with regard to indiscernible statutory language: "Where a statute is 'so vague, indefinite, and uncertain that the courts are unable to determine, with any reasonable degree of certainty what the Legislature intended, or is so incomplete or conflicting and inconsistent in its provisions that it cannot be executed, it will be declared inoperative.'" *Willcox v. Penn Mut. Life Ins. Co.*, 55 A.2d 521, 528 (Pa. 1947) (quoting *Miller v. Belmont Packing & Rubber Co.*, 268 Pa. 51, 63, 110 A. 802, 806 (Pa. 1920)). In *Willcox*, the Court attempted to interpret the Community Property Law of 1947 but concluded that the Law was inoperative and void because the Court could not rationally derive meaning from the terms of the Law. *Id.* at 531 ("It follows, therefore, that the Community Property Law is not only vague, indefinite and uncertain but so incomplete, conflicting and inconsistent in its provisions that it is incapable either of rational interpretation or of judicial enforcement and consequently, under the principle previously referred to, it must be held to be inoperative and void.").

Willcox was decided under the Statutory Construction Act of 1937, which was later repealed and replaced with the current Act in 1972. However, the factors for resolving ambiguity in the 1937 Act were the same as the factors currently set forth in the Act. See *Clearfield Borough v. Clearfield Borough Park Auth.*, 285 A.2d 532, 534 (Pa. Commw. 1971), *aff'd*, 301 A.2d 372 (Pa. 1973) (citing 46 P.S. § 551).

Court in affording deference to an administrative agency's interpretation of its own regulation was a late coming and unexplained departure from our prior adherence to the application of the Statutory Construction Act for such interpretations. As reported by the Majority, deference to administrative agencies' interpretations of their own regulations is commonly traced back to the United State Supreme Court's 1945 decision in *Bowles v. Seminole Rock & Sand Co.*⁹ Majority Op. at 16. It took thirty-five years for this Court to reference *Seminole Rock* and, without any articulated reason, it adopted its holding as enunciated in *United States v. Larinoff*, 431 U.S. 864, 872 (1977).¹⁰

In contrast, in 1979, one year prior to *Forbes*, this Court, without reference to agency deference, decided *Department of Environmental Resources v. Locust Point Quarries*, 396 A.2d 1205 (Pa. 1979), a case involving the interpretation of a Department of Environmental Resources regulation relating to fugitive air emissions under the Air Pollution Control Act. Instead, this Court relied on the Statutory Construction Act in its interpretative analysis noting its application to regulations codified in the Pennsylvania

⁹ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) (explaining that when interpreting an administrative regulation, "the ultimate criterion is the administrative agency's interpretation which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation").

¹⁰ The *Forbes* Court held:

In reviewing an administrative agency's interpretation of its own regulations, courts are governed by a two-step analysis. First, "[i]n considering administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" [*Larinoff*, 431 U.S. at 872 (quoting *Seminole Rock*, 325 U.S. at 414)]. Second, the regulations "must be consistent with the statute under which they are promulgated." *Id.* at 873. See also, *Commonwealth v. Beck Electric Constr[.], Inc.*, 403 A.2d 553 (Pa. 1979).

Forbes, 422 A.2d at 482. This is the two-step analysis repeated in *Tire Jockey*.

Code. *Id.* at 1208 & n.8. This Court considered the Agency's interpretation of the regulation but did not elevate it in the interpretative process. *Id.* at 1209-10.¹¹ As for our current regime, the Majority recognizes that in recent cases, this Court has stressed the point that courts are the ultimate arbiters of what a regulation means and that we use the Statutory Construction Act to guide our analysis. Majority Op. at 31 (collecting cases). This is precisely the interpretive framework we used prior to *Forbes* as reflected in *Locust Point Quarries*.

And yet today, in a case where the ambiguity in the Regulation was resolved without affording any deference to the agency's interpretation of it, the Majority, hellbent on salvaging agency deference, implies that deference is due an agency's interpretation when the meaning of a regulation cannot be determined using the Statutory Construction Act. The Majority Opinion, like all of our precedents upon which it relies, does not answer the core question of why deference should be afforded to the agency's interpretation of an ambiguous (or hopelessly ambiguous) regulation. If one accepts the fundamental proposition that it is the obligation of the courts to declare the meaning of laws,¹² there is

¹¹ The *Locust Point Quarries*' Court distinguished a challenge to the reasonableness of the regulation. Noting that regulations implementing the Air Pollution Control Act are promulgated pursuant to a grant of legislative power, the Court explained that they enjoy a presumption of reasonableness such that courts refuse to substitute their own judgment for that of agencies possessing technical expertise absent a showing that the agency arbitrarily and unreasonably exercised the police power. *Locust Point Quarries*, 396 A.2d at 1210. To prevail in such a challenge, it required establishing that the regulation at issue was not related to the objective of the Air Pollution Control Act, a burden not undertaken by the challenger.

¹² *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Hubley's Lessee v. White*, 2 Yeates 133, 146 (Pa. 1796) ("We cheerfully disclaim all legislative power; but it will not be denied that we possess the right of putting such construction on the acts of the legislature, as appears to us best to accord with their intention, either express or implied. We cannot construe a law differently from the plain clear words of it, under any ideas of convenience or equity.") (internal citations omitted).

no role for deference to the interpretation of the law by an administrative agency. Deference is antithetical to our responsibility to resolve the ambiguity in the language and declare what the text means.

It is clear that our deference jurisprudence is derived from United States Supreme Court precedent so one would think that our extension of deference to administrative interpretations is for the same reasons as the federal high court. Justice Kagan, in her opinion in *Kisor*, clearly articulated the source of *Seminole Rock/Auer* deference: it is rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities. *Id.* at 569. Of course, this cannot be this Court’s basis for extending deference to an agency’s interpretation of its own regulation. We cannot make such a presumption because our General Assembly has explicitly enunciated rules for construing agency regulations and deference to an agency’s interpretation is not one of them. In fact, it is no more persuasive than a variety of other factors articulated in Section 1921(c).

Deference means respect due a superior or elder, “respectful submission or yielding to the judgment, opinion, will, etc., of another[.]” “respect shown for another person, esp[ecially] because of that person’s experience, knowledge, age or power[.]”¹³ There is obviously no place for deference when a court engages in deciding, as a matter of law, what a regulation means. Our review is de novo and plenary. And while agencies, by definition, are subject matter experts, the subject matter of agency expertise is not in the interpretation of the law as codified. This is the expertise of courts, and it is our obligation to apply it in the interpretive process.

¹³ *Deference*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/deference> (last visited July 21, 2026); *Deference*, DICTIONARY.COM, <https://www.dictionary.com/browse/deference> (last visited July 21, 2026); *Deference*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/deference> (last visited July 21, 2026).

As for the role for deference as envisioned by the Majority, I am not aware of any case in which we were unable to discern the meaning of the text of a regulation after employing the Statutory Construction Act and the Majority does not cite to any. However, in the rare instance where this might occur, it is our obligation to declare the regulation void for vagueness or unenforceable.¹⁴ If the Majority is correct that in such an instance we defer to the agency's interpretation, it is inviting agencies to write incomprehensible regulations because its interpretation will ultimately prevail.

For these reasons, I would take this opportunity to dispel the notion that an agency's interpretation of its own regulation is owed any deference in discerning the meaning of the regulation. Thus, while I agree with the result reached by the Majority, I dissent from its suggestion that courts should give deference to an agency's interpretation of its own regulations.¹⁵

¹⁴ See supra note 8.

¹⁵ The Majority affirms the decision of the Commonwealth Court and states that it does so for "slightly different reasons." Majority Op. at 2. It is worth noting that the Commonwealth Court's opinion does not mention the Statutory Construction Act. It does not pretend to interpret the language of the regulation. Once concluding that the regulation was ambiguous, it held that the Department's interpretation was entitled to *Auer* deference. *Lutheran Home at Kane v. Dep't of Human Servs.*, 318 A.3d 164, 183 (Pa. Commw. 2024). Having so concluded, it viewed its task as whether the Department's interpretation is clearly erroneous or inconsistent with the regulation and whether it "reflect[s] [its] fair and considered judgment." *Id.* (citations omitted). Regarding the providers' experts' different methodology and rationale for computing inflation, the Commonwealth Court stated that even if the methodology may be more reasonable and accurate, that does not render the Department's methodology clearly erroneous. *Id.* at 184. Finding the Department's interpretation not clearly erroneous or inconsistent with the statute, it was entitled to deference. *Id.* at 187.

The beginning, middle and end of the intermediate appellate court's rationale was based on deference to the agency's interpretation. If the Majority's intent is to clarify the law, Majority Op. at 2, it is not helpful to suggest that its decision is based on "slightly different reasons" than that of this lower court opinion.