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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Hon. Joe M. Crosby, Master-in-Equity

Appellate Case No. 2023-000017

South Carolina Board of Financial Institutions. . . . . Appellant,

v.

CDM Corporation, Inc. and Guardian Fiduciary Services, LLC,. . . . . Respondents.

AMICUS BRIEF OF ATTORNEY GENERAL

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Interests of *Amicus Curiae*

This case involves important issues of administrative law that implicate the regulatory authority of a state agency. Given the importance of these legal principles and the importance of the issue to Board of Financial Institutions, the Attorney General respectfully files this brief on behalf of the State to provide further context and analysis on relevant issues of state administrative law. Specifically, the Attorney General submits this brief to assist the Court in determining whether the Master-in-Equity erred in failing to give deference to the Board of Financial Institutions' interpretation regarding the definition of "trust business" as used in S.C. Code Ann. § 34-21-10 (issue II on appeal).

Argument

I. The Attorney General's Office generally defers to an agency's interpretation of a statute or regulation that it administers.

It is the policy of the Attorney General's Office to defer to a "reasonable agency interpretation of a statute [or regulation], particularly if the administrative interpretation is long-standing and has been consistently followed." Op. S.C. Atty. Gen., 1990 WL 599359 (Nov. 27, 1990); *see also* Op. S.C. Atty. Gen., 2022 WL 2388825 (June 22, 2022) ("It is this Office's long standing policy, like that of our state courts, to defer to an administrative agency's reasonable interpretation of the statutes and regulations that it administers."); Op. S.C. Atty. Gen., 1985 WL 258985 (Sept. 12, 1985) ("Thus, when there exists an administrative interpretation of an agency regulation, this Office is not free to choose a different construction of that regulation even if we believe a difference construction to be more reasonable than that chosen by the agency. This Office must defer to any reasonable construction applied by the agency.").

In applying this policy, the Attorney General's Office has urged deference to agency action in a variety of regulatory contexts. *See, e.g.*, Op. S.C. Atty. Gen., 2022 WL 4229451 (Sept. 7,

2022) (deferring to State Election Commission); Op. S.C. Atty. Gen., 2005 WL 2250210 (Sept. 8, 2005) (deferring to the Department of Revenue).

With respect to the Board of Financial Institutions specifically, the Attorney General's Office has suggested that deference to board may be appropriate in certain circumstances. *See* Op. S.C. Atty. Gen., 2019 WL 6244759 (Nov. 8, 2019) ("As is discussed further below, if the BFI interprets section 34-26-500 to limit community-based credit unions to a single group, a court would likely grant it administrative deference because the statutory language contains ambiguities."). To support this conclusion, the Attorney General's Opinion cited S.C. Code Ann. § 34-26-210(1), which authorizes the board to "establish procedures to implement any provision of this chapter and to define any term not defined in this chapter."

II. Courts generally defer to an agency's interpretation of a statute or regulation that it administers.

South Carolina courts have also long deferred to an agency's interpretation of a statute or regulation that it administers. South Carolina's deference doctrine can arguably be traced back to two cases from the early 20th century—*Read Phosphate Co. v. South Carolina Tax Commission*, 169 S.C. 314, 168 S.E. 722 (1933) and *Stovall v. Sawyer*, 181 S.C. 379, 187 S.E. 821 (1936). *See Kiawah Dev. Partners, II v. South Carolina Dep't of Health and Env't Control*, 411 S.C. 16, 32, 766 S.E.2d 707, 718 (2014) (discussing origins of deference doctrine in South Carolina). *Read Phosphate* and *Stovall* recognized two separate—but related—principles of agency deference.

1. Courts defer to an agency's interpretation of an ambiguous statute or regulation.

In *Read Phosphate*, the South Carolina Supreme Court recognized the principle that courts should defer to an agency's interpretation of a statute or regulation that it administers. In doing so, the Court quoted federal authority for the proposition that the "construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration,

and ought not to be overruled without cogent reasons." *Read Phosphate Co. v. South Carolina Tax Commission*, 169 S.C. 314, 168 S.E. 722, 728 (1933). The Court explained that deference to agencies is warranted largely because of agency expertise. *See id* ("The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are called upon to interpret."); *see also Kiawah Dev. Partners, II*, 411 S.C. at 34, 168 S.E. at 718 ("Thus, we give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations.").

In the years following *Read Phosphate*, the South Carolina Supreme Court subsequently clarified the application and scope of the deference doctrine. For example, in *Carolina, C. & O. Ry. of S.C. v. S.C. Tax Comm'n*, 197 S.C. 529, 15 S.E.2d 764, 769 (1941), the Court noted that the doctrine would not apply "where there is practically no evidence of any construction having been placed on the law by the [relevant agency] . . . ." The Court also emphasized that the "doctrine giving effect to executive construction is usually and properly restricted to cases in which the meaning of the statute is really doubtful." *Carolina, C. & O. Ry. of S.C. v. S.C. Tax Comm'n*, 197 S.C. 529, 15 S.E.2d 764, 769 (1941). The Court later explained that the meaning of a statute is not doubtful "where the language of a statute is plain and unambiguous and conveys a clear and definite meaning . . . ." *Glens Falls Ins. Co. v. City of Columbia*, 242 S.C. 237, 242, 120 S.E.2d 573 (1963).

Under its modern formulation, South Carolina state courts generally follow a two-step process in determining whether to afford deference to an agency interpretation of a statute or regulation. *Kiawah Dev. Partners, II v. South Carolina Dep't of Health and Env't Control*, 411 S.C. 16, 32 (2014). In the first step, "a court must determine whether the language of a statute or

regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation." *Id*.

If a statute or regulation is silent or ambiguous on a given issue, then a court "must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." *Id*. at 33. Generally speaking, courts will defer "to an administrative agency's interpretation with respect to the statute entrusted to its administration or its own regulation 'unless there is a compelling reason to differ.'" *Kiawah Dev. Partners, II v. South Carolina Dep't of Health and Env't Control*, 411 S.C. 16, 32 (2014). In determining whether there is a "compelling reason to differ" with an agency's interpretation of a statute or regulation, the South Carolina Supreme Court considers whether the regulation is arbitrary, capricious, or manifestly contrary to the statute. *Id*. at 34–35.

In *Kiawah Development Partners, II*, the South Carolina Supreme Court concluded that the Department of Health and Environmental Control's interpretation of its own regulation should be afforded deference. In reaching this conclusion, the Court followed the above-referenced two-step process, concluding that the relevant regulation was ambiguous and that DHEC's interpretation of the statute was neither arbitrary, capricious, nor manifestly contrary to the statute." 411 S.C. at 34. In analyzing the second step of the deference process, the Court noted that DHEC's interpretation of the regulation was consistent with its other statutory obligations. *See id*. at 35–36.

2. Courts defer to an agency authorized to fill in the gaps of a statute.

Around the same time the *Read Phosphate* decision was issued, the Court recognized a related principle of agency deference in the *Stovall* decision. In *Stovall*, the Court recognized that agencies have the "power to prescribe rules and impose penalties" for the violation of "general

laws." *Stovall,* 181 S.C. 379, 187 S.E. at 824. The Court concluded that the rulemaking power may include the "duty of classifying . . . those persons who come within the scope of the law" is one such administrative function an agency. *Id*.

To support this point, the Court relied upon the "elementary" principle that "while the Legislature may not delegate its power to make laws, it may vest in administrative officers and bodies a large measure of discretionary authority, especially to make rule and regulations relating to the enforcement of the law." 181 S.C. 379, 187 S.E. at 824 (quoting *Santee Mills v. Query,* 122 S.C. 158, 115 S.E. 202, 206 (1922)).

The Court later further explained that the legislature "may authorize an administrative agency or board 'to fill up the details' by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose." *South Carolina State Highway Dep't v. Harbin*, 226 S.C. 585, 594, 86 S.E.2d 466, 470 (1955) (quoting *Davis v. Query*, 209 S.C. 41, 39 S.E.2d 117 (1946)).

Under the modern formulation of this doctrine, courts have recognized that agencies may be "implicitly authorized" to "interpret, clarify, and explain" or to "fill up the details" of statutes they administer. *See Young v. South Carolina Dep't of Highways and Public Transp.*, 287 S.C. 108, 113, 336 S.E.2d 879, 882 (Ct. App. 1985).[1] These regulations will be upheld so long as they are reasonable. *Id*.

In the *Young* decision, the South Carolina Court of Appeals upheld a regulation issued by the Department of Highways and Public Transportation, which defined a statutory term that was

[1] The Attorney General's Office has also previously recognized this deference principle in a different context. *See* Op. S.C. Atty. Gen., 1997 WL 783366 (Oct. 20, 1997) ("[A]dministrative agencies may be authorized to fill up details by prescribing rules and regulations for complete operation and enforcement of law within its expressed general purpose. Thus, an administrative regulation is valid as long as it is reasonably related to the purpose of the enabling legislation.")

otherwise undefined. In doing so, the Court observed the following: "While the General Assembly did not define 'transient or temporary' by statute, it has implicitly authorized the Department to promulgate regulations governing outdoor sign permits." 287 S.C. at 113.

Taken together, these cases suggest that courts should afford some degree of deference to an agency under South Carolina law in at least two circumstances—first, where a statute is ambiguous and second, where a statutory scheme leaves a gap for an agency to fill.

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Here, the court below should have afforded some degree of deference to the Board of Financial Institutions. As explained in its Initial Brief, the Board has a longstanding practice of defining "trust business" as used in S.C. Code Ann. § 34-21-10 to include a broad range of fiduciary activities and roles. (Appellant's Brief, pp. 12, 18) (explaining the position of the Board and its longstanding practice).

This definition should have been afforded deference for at least two reasons. First, the term "trust business" in S.C. Code Ann. § 34-21-10 is arguably ambiguous.[2] Given this ambiguity, the court below should have deferred to the Board's interpretation in the absence of a "compelling reason to differ." *Kiawah Dev. Partners, II*, 411 S.C. at 32.

Second, even if this Court concludes that the term is not ambiguous, the Board should still be afforded deference because the term "trust business" is undefined. *See* S.C. Code Ann. § 34-26-110. The Board is expressly authorized by statute to "define any term not defined in the chapter." S.C. Code Ann. § 34-26-210(1). As a result, under *Young* and its antecedents, the Board

[2] To the extent this Court seeks to apply the ordinary and popular meaning of the term "trust business," it is bound to apply the ordinary and popular meaning of the term as understood by those who adopted the section. *See City of Charleston v. Oliver*, 16 S.C. 47, 52 (1881).

was authorized by the General Assembly to "fill up the details" of this regulatory scheme. *See Young.*, 287 S.C. at113, 336 S.E.2d at 882.

Conclusion

The decision below raises an important question of administrative law that should be carefully considered by this Court. The Attorney General respectfully submits that foregoing authorities will assist this Court in resolving this question.

Respectfully submitted,

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s/ J. Emory Smith, Jr.

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