

ADMINISTRATIVE DEFERENCE IN COLORADO

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Colorado has been described by one scholar as an “intermediate deference” state.¹ That is probably a fair description, though it might also be characterized as a generous one. The reality is that the Colorado Supreme Court has described its position on deference to the state’s administrative agencies in varied and sometimes inconsistent formulations.²

Indeed, even within one single decision, a careful reader can find multiple slightly different deference standards, all with citations to relevant precedent. Perhaps most striking is this paragraph from *Coffman v. Colorado Common Cause*³:

Moreover, we must give particular deference to the reasonable interpretations of the administrative agencies that are authorized to administer and enforce a particular statute. *Tivolino Teller House, Inc. v. Fagan*, 926 P.2d 1208, 1211 (Colo.1996). On review, an agency decision will be sustained unless arbitrary or capricious, section 24-4-106(7), C.R.S. (2004), or unsupported by the evidence or contrary to law, *Regents of the Univ. of Colorado v. Meyer*, 899 P.2d 316, 317 (Colo.App.1995). However, although we find persuasive an administrative interpretation of statute that is

* Associate Justice, Colorado Supreme Court. Many thanks to my law clerk, Angela Boettcher, for her help with this essay.

1. Michael Pappas, No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine, 39 MCGEORGE L. REV. 977, 1011 (2008).

2. See, e.g., *N. Colo. Med. Ctr. v. Comm. on Anticompetitive Conduct*, 914 P.2d 902 (Colo. 1996); *Huber v. Kenna*, 205 P.3d 1158 (Colo. 2009); *El Paso Cnty. Bd. of Equalization v. Craddock*, 850 P.2d 702 (Colo. 1993); *BP Am. Prod. Co. v. Colo. Dep’t of Revenue*, 369 P.3d 281 (Colo. 2016).

3. 102 P.3d 999 (Colo. 2004).

a reasonable construction consistent with public policy, *Aurora v. Bd. of County Comm'rs*, 919 P.2d 198, 203 (Colo.1996), it is for this court to determine all questions of law, interpret applicable statutes, and apply such interpretations to the facts, *Meyer, supra*. Likewise, even though an agency construction of statute should be given appropriate deference, its interpretation is not binding on this court. *See El Paso County Bd. of Equalization v. Craddock*, 850 P.2d 702, 704 (Colo.1993).⁴

In this one paragraph, first we see the importance of according “particular deference” to the agency tasked with enforcing a statute.⁵ However, what follows is the observation that the court will only “find persuasive an administrative interpretation,” with the understanding that it is ultimately the court’s job to interpret the law.⁶ Finally, the opinion says that an agency’s interpretation is entitled to “appropriate deference” but is “not binding” on courts.⁷ Colorado’s case law on deference to agency interpretation includes all of these approaches.⁸

It was only recently, however, that the Colorado Supreme Court was asked directly to take a position on whether the state aligned its law with federal law on the relationship between courts and administrative agencies. The ask came in a wage claim dispute, *Nieto v. Clark’s Market, Inc.*,⁹ and, as discussed further below, the court declined to adopt federal law on administrative deference.¹⁰ This essay begins by describing the interpretive challenges presented in *Nieto* and the court’s approach to those challenges. It then considers where the law of deference to agencies stands in Colorado, given

4. *Id.* at 1005.

5. *Id.*

6. *Id.*

7. *Id.* *See also* Colo. Min. Ass’n v. Bd. of Cnty. Comm’rs of Summit Cnty., 199 P.3d 718, 731 (2009) (citing *Lobato v. Indus. Claim Appeals Off.*, 105 P.3d 220, 223 (Colo. 2005) for the proposition that “[i]n reviewing the proper construction of a statute de novo, we may accord deference to the agency’s interpretation of its statute, but we are not bound by that interpretation”).

8. *See generally Coffman*, 102 P.3d.

9. 488 P.3d 1140 (Colo. 2021)

10. *Id.*

that the state has decided to chart its own path rather than adopt the federal approach.

I. NIETO V. CLARK'S MARKET

In *Nieto*, the Colorado Supreme Court faced the question of how to interpret the provisions of the Colorado Wage Claim Act¹¹ related to employer-provided vacation pay.¹² The case required the court to reconcile several different provisions of the Wage Act and in particular to determine whether they should be read together to create a separate “vesting” requirement for earned vacation pay.¹³ It also forced the court to confront directly what kind of deference it should accord the interpretation of the statute promulgated by the Colorado Department of Labor and Employment, Division of Labor Standards and Statistics (“CDLE”), the state agency responsible for enforcing the Wage Act.¹⁴

A. *The Colorado Wage Claim Act and Vacation Pay*

The subsection of the Wage Act that directly addresses vacation pay provides that:

“Wages” or “compensation” means:

...

(III) Vacation pay earned in accordance with the terms of any agreement. If an employer provides paid vacation for an employee, the employer shall pay upon separation from employment all vacation pay earned and determinable in accordance with the terms of any agreement between the employer and the employee.¹⁵

This provision standing alone suggests that vacation pay is due when it is “earned” and “determinable.” However, complicating

11. COLO. REV. STAT. § 8-4-101 (2020).

12. *Nieto*, 488 P.3d at 1140.

13. *Id.* at 1141–42.

14. *Id.* at 1148–49.

15. COLO. REV. STAT. § 8-4-101 (2020).

matters, “wages” and “compensation” are also generally defined at section 8-4-101(14)(a)(I), which provides that “[n]o amount is considered to be wages or compensation until such amount is earned, vested, and determinable.”¹⁶ And section 8-4-109(1)(a) requires that “wages or compensation for labor or service earned, vested, determinable, and unpaid” be paid immediately upon an employee’s discharge.¹⁷ Given these statutory provisions, the court was confronted with the question of whether vacation pay must be “vested” to be payable at the end of an employment relationship and, if so, what “vesting” means in the context of vacation pay.¹⁸

This question carries particular significance because the Wage Act does not itself create substantive rights beyond the right to payment at regular intervals, a prohibition on deductions from wages other than those specified by statute, and the right to payment of earned but unpaid wages and compensation upon separation from employment.¹⁹ However, the Wage Act does “nullif[y] any effort to circumvent its requirements by contract, providing that ‘any agreement . . . by any employee purporting to waive or modify such employee’s rights in violation of this article shall be void.’”²⁰ Thus, as described further below, whether an employer and employee can agree to a vesting requirement that impacts whether vacation pay is actually earned at separation is an important question on which the statute is not a model of clarity.

B. *Carmen Nieto’s Claims*

The question was presented to the court in the context of Carmen Nieto’s discharge from Clark’s Market in 2017 after her eight-and-a-half years of employment by the store.²¹ During her employment, Nieto earned vacation pay in accordance with the policy in the

16. *Id.* (emphasis added).

17. COLO. REV. STAT. § 8-4-109 (2020) (emphasis added).

18. *Nieto*, 488 P.3d at 1142–43.

19. COLO. REV. STAT. § 8-4-101–125 (2020).

20. *Nieto*, 488 P.3d at 1144 (discussing COLO. REV. STAT. § 8-4-121).

21. *Id.* at 1142.

Clark's Market employee handbook.²² Under that policy, "vacation time is earned during the anniversary year previous to [when] it is actually taken," and the amount earned each year "is based on . . . length of employment," as delineated in the policy.²³ The policy further explains that "[v]acation time cannot be carried over from year to year" and "must be taken in the twelve- (12) [sic] month period following the date it is earned."²⁴ Finally, and significantly, the policy includes a clause forfeiting unused vacation pay upon separation:

In the event you voluntarily leave Clark's Market and give at least two (2) weeks written notice, you will receive vacation benefits earned as of your last anniversary date but not taken by the date of separation. . . . If you are discharged for any reason or do not give proper notice, you will forfeit all earned vacation pay benefits.²⁵

In light of this forfeiture clause, Clark's did not include Nieto's earned but unused vacation pay in her final paycheck, and it refused her written demand for payment.²⁶ Nieto then sued Clark's Market for withholding her vacation pay.²⁷ She based her claim on the Wage Act's provision that an employer must "pay upon separation from employment all vacation pay earned and determinable in accordance with the [employee handbook]."²⁸ Nieto argued that her vacation pay was "earned and determinable," and that the portion of the handbook purporting to waive her right to vacation pay because she was discharged was void under the Wage Act.²⁹

Clark's Market moved to dismiss Nieto's complaint for failure to state a claim, arguing that the terms of Nieto's employment

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

agreement forfeited her earned vacation pay because she was terminated, so she had no right to that pay.³⁰ The trial court granted the motion, reasoning that the Wage Act “clearly and unambiguously gives employers the right to enter into agreements with its employees regarding vacation pay,” and that these agreements could include forfeiture clauses like the one in Nieto’s handbook.³¹ Thus, even though Nieto had accrued vacation pay, the court concluded that she had forfeited it.³² The Colorado Court of Appeals affirmed that decision, reasoning that the Wage Act “creates [no] substantive right to payment for accrued but unused vacation time” and “merely ‘establishes minimal requirements concerning when and how *agreed* compensation must be paid.’”³³

The Colorado Supreme Court reversed the court of appeals.³⁴ The court concluded that the language of the Wage Act was ambiguous and thus turned to other interpretive aids for guidance.³⁵ In particular, the court looked to the language and structure of the Wage Act, and to the Act’s purpose, legislative history, and administrative interpretation to conclude that “[a]lthough the [Wage Act] does not create an automatic right to vacation pay, when an employer chooses to provide such pay, it cannot be forfeited once earned by the employee.”³⁶ In reaching this conclusion, as discussed further below, the court had occasion to dig into the question of what kind of deference it would accord to the CDLE interpretation of the relevant statutory provisions.

C. Nieto’s Deference Analysis

After the court of appeals affirmed the decision of the trial court that Nieto was not entitled to her vacation pay, the CDLE, which is

30. Nieto v. Clarks’s Mkt., Inc., 2018 WL 10483997, at *1 (Colo. Dist. Ct. May 7, 2018).

31. *Id.* at *2.

32. *Id.*

33. Nieto v. Clark’s Mkt., Inc., 490 P.3d 479, 482 (Colo. App. 2019) (quoting Barnes v. Van Schaack Mortgs., 787 P.2d 207, 210 (Colo. App. 1990)).

34. Nieto v. Clark’s Mkt., Inc., 488 P.3d 1140, 1143 (Colo. 2021).

35. *Id.*

36. *Id.* at 1150.

responsible for enforcing the Wage Act, promulgated a rule directly contradicting the court's holding.³⁷ Nieto argued at the Colorado Supreme Court that state courts should give deference to agency interpretations in accordance with the rule announced by the United States Supreme Court in *National Cable & Telecommunication Ass'n v. Brand X Internet Services*^{38, 39}

In *Brand X*, the Supreme Court held that that the federal Administrative Procedure Act⁴⁰ permits a federal agency to abrogate a court's prior interpretation of an ambiguous statute.⁴¹ The Court explained that this power flowed directly from the reasoning of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*^{42, 43} Under *Chevron*, a court is required to defer to an agency's reasonable interpretation of an ambiguous statute even if the court concludes that a better interpretation exists.⁴⁴ Therefore, an agency can look at an ambiguous statute even after a court has construed that statute and can select a different, reasonable interpretation.⁴⁵ The Court's majority thus explained that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."⁴⁶

The Colorado Supreme Court declined Nieto's invitation to adopt *Brand X* deference for the Colorado Administrative Procedure Act.⁴⁷ Indeed, the court went further, explaining that "just as we decline to follow *Brand X*, we are unwilling to adopt a rigid

37. See Dep't of Lab. & Emp., 7 COLO. CODE REGS. 1103-7:2, Rule 2.17 (2019) [hereinafter CDLE Rule 2.17].

38. 545 U.S. 967 (2005).

39. *Nieto*, 488 P.3d at 1149.

40. 5 U.S.C. § 551 (2018).

41. *Brand X*, 545 U.S. at 983.

42. 467 U.S. 837 (1984).

43. *Brand X*, 545 U.S. at 982.

44. *Id.* at 982–83.

45. *Id.* at 983.

46. *Id.* at 982.

47. *Nieto v. Clark's Mkt., Inc.*, 488 P.3d 1140, 1149 (Colo. 2021).

approach to agency deference that would *require* courts to defer to a reasonable agency interpretation of an ambiguous statute even if a better interpretation is available.”⁴⁸ In so doing, the court noted that its precedent on the scope of deference to administrative interpretations of ambiguous statutory provisions had been inconsistent, explaining:

True, we have, at times, appeared to embrace *Chevron-style* deference for purposes of the Colorado Administrative Procedure Act. See, e.g., *N. Colo. Med. Ctr., Inc. v. Comm. on Anticompetitive Conduct*, 914 P.2d 902, 907 (Colo. 1996); *Huber v. Kenna*, 205 P.3d 1158, 1164 (Colo. 2009) (Martinez, J., concurring). But in other cases, we have made clear that, while agency interpretations should be given due consideration, they are “not binding on the court.” *El Paso Cnty. Bd. of Equalization v. Craddock*, 850 P.2d 702, 704–05 (Colo. 1993); see *BP Am. Prod. Co. v. Colo. Dep’t of Revenue*, 2016 CO 23, ¶ 15 n.5, 369 P.3d 281, 285 n.5; *Ingram v. Cooper*, 698 P.2d 1314, 1316 (Colo. 1985).⁴⁹

Having said that, the court noted that “[t]he CDLE interpretation of [the Wage Act] is in fact consistent with the statute’s purpose, language, structure, and legislative history,” and that the agency’s earlier interpretation of the statutory provision had been the same.⁵⁰ The court concluded, therefore, that the agency’s interpretation was “further persuasive evidence” that vacation pay, once earned, could not be forfeited.⁵¹

D. Administrative Deference in Colorado

Nieto tells us that Colorado does not take a “rigid” approach to deference in that the state courts will not bind themselves to accept an agency interpretation of an ambiguous statute.⁵² Where does that leave agency deference in Colorado law? Despite the variety of

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

different ways that deference has been described, ultimately, the starting position for Colorado courts is that they “review the proper construction of statutes de novo; in doing so, [they] accord deference to the agency’s interpretation of its statute, but [they] are not bound by it.”⁵³ This formulation suggests both independent responsibility and something called deference. It still leaves unclear what the contours of that deference might be.

Not long after the *Nieto* decision, the Colorado Supreme Court was again confronted with the question of how much deference an agency interpretation was due. In *Gomez v. JP Trucking, Inc.*,⁵⁴ the court explained that it would examine whether a particular agency interpretation had the “hallmarks” of agency work “possessing the power to persuade.”⁵⁵ The court went on to note that the Advisory Bulletin at issue in that case was “quite thorough,” that it considered a range of feedback, that it was consistent with other pronouncements by the same agency, and that its “reasoning [struck] us as valid.”⁵⁶

So, what are the indicia of agency interpretation that might give it “the power to persuade?” Examining the state’s previous rulings on deference, a couple of through lines emerge. First, when an agency is actually exercising some particular expertise in its interpretation, courts are more likely to say they defer to that

53. *Lobato v. Indus. Claim Appeals Off.*, 105 P.3d 220, 223 (Colo. 2005). *See also* *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 326 (Colo. 2004) (“[W]e give considerable weight to an agency’s interpretation of its own enabling statute, but we are not bound by the agency’s legal interpretations.”); *Specialty Rests. Corp. v. Nelson*, 231 P.3d 393, 397 (Colo. 2010) (same); *Bd. of Cnty. Comm’rs v. Colo. Pub. Utils. Comm’n*, 157 P.3d 1083, 1088 (Colo. 2007) (“[W]e may consider and defer to an agency’s interpretation of its own enabling statute and [of] regulations the agency has promulgated.”); *Washington Cnty. Bd. of Equalization v. Petron Dev. Co.*, 109 P.3d 146, 150 (Colo. 2005) (“While they do not bind our construction of the applicable law, we consult and ordinarily defer to the implementing agency’s guidance, rules, and determinations, if they accord with the constitutional and statutory provisions they implement.”).

54. 509 P.3d 429 (Colo. 2022).

55. *Id.* at 441.

56. *Id.*

interpretation.⁵⁷ Second, when agency interpretation has been inconsistent, it is very unlikely to receive deference.⁵⁸ *Gomez* suggests some other indicia: thoroughness, consideration of extensive feedback, and reasoning that strikes the court as valid.⁵⁹

These indicators, and even the notion of “the power to persuade,” strike me as quite inconsistent with the concept of “deference.” The dictionary defines deference as “respect and esteem due a superior or an elder.”⁶⁰ Black’s Law Dictionary explains that to “defer” is to “yield to the opinion of.”⁶¹ Both *Gomez* and *Nieto* employed the language of persuasion in discussing the significance of the relevant agency’s statutory interpretation.⁶² In neither case was there a suggestion that the agency possessed special expertise, so that may be an area in which Colorado courts will continue to truly defer — to recognize that “in some circumstances agencies [are] more

57. See *City of Boulder v. Colo. Pub. Utils. Comm’n*, 996 P.2d 1270, 1279 (Colo. 2000) (“[T]he PUC’s expertise and extensive staff support render it much better able to assess impacts to the public interest from a utility action than the courts. Accordingly, we defer to the PUC’s finding that a utility action benefits the public.”); *Mountain States Tel. & Tel. Co. v. Pub. Utils. Comm’n*, 763 P.2d 1020, 1030 (Colo. 1988) (“[I]n view of the commission’s special expertise in public utility regulation, we give great deference to the PUC in its selection of an appropriate remedy.”). Importantly, however, when the interpretation proposed by the agency does not derive from that agency’s particular expertise, courts do not accord the same deference. See, e.g., *Bd. Of Cnty. Comm’rs*, 157 P.3d at 1089. (“Here, because the interpretation made by the PUC is not one that involves use of its technical expertise, for example ratemaking, we do not owe a high degree of deference to the PUC’s interpretation; nonetheless, we defer to it as a reasonable construction of the pertinent agency statutes and implementing rules, guidance, and determinations.”).

58. *Lobato*, 105 P.3d at 223 (“When the agency interpretation is not uniform or consistent, we do not extend deference and will look to other statutory construction aids.”). See also *Williams v. Kunau*, 147 P.3d 33, 36 (Colo. 2006) (“When the agency’s interpretation is not uniform or consistent we do not owe deference to that interpretation.”).

59. *Gomez*, 509 P.3d at 441.

60. *Deference*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/deference> [https://perma.cc/3BJ5-6D69].

61. *Defer*, BLACK’S LAW DICTIONARY (11th ed. 2019).

62. *Nieto v. Clark’s Mkt., Inc.*, 488 P.3d 1140, 1149 (Colo. 2021); *Gomez v. JP Trucking, Inc.*, 509 P.3d 429, 444 (Colo. 2022).

competent than courts to make these determinations.”⁶³ Otherwise, Colorado appears to be charting the course set by the United States Supreme Court almost 80 years ago in *Skidmore v. Swift & Co.*,⁶⁴ where it explained that agency interpretations, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”⁶⁵ Like the Court in *Skidmore*, Colorado’s review of agency interpretation — not quite deference — considers “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”⁶⁶

63. William R. Anderson, *Chevron in the States: An Assessment and a Proposal*, 58 ADMIN. L. REV. 1017, 1017 – 18 (2006). See also Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 580 (2014) (raising the question of how often state agencies are truly experts).

64. 323 U.S. 134 (1944).

65. *Id.* at 140.

66. *Id.*