5-1996

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Administrative Law
by Susan Wells Drechsel*

I. INTRODUCTION

The Eleventh Circuit Court of Appeals addressed a broad range of administrative law issues during 1995. In a case of first impression for the Eleventh Circuit, the court held that a criminal defendant's time spent in halfway and safe houses cannot be credited against the defendant's sentence. In reaching this conclusion, the court deferred to a "program statement" issued without notice and comment by the United States Department of Justice's Bureau of Prisons. The court

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1. Dawson v. Scott, 50 F.3d 884 (11th Cir. 1995). See discussion infra part III.
2. 50 F.3d at 888.
3. Id. at 886.
also discussed, but did not decide, the first impression issue for the circuit of the proper scope of judicial review in an appeal of a criminal conviction for violation of an Endangered Species Act regulation. 4 In this case, the court applied the same scope of judicial review that would be applied in a proceeding for direct review of the rule, and upheld the defendant's conviction for the unlawful sale of Alabama red-bellied turtles. 5

The court continued its trend of deferring to an agency's factfinding and statutory interpretation, 6 including its emphasis on deferring to an agency's resolution of perceived policy issues. 7 However, the court did reverse an agency's decision that applied a statutory requirement non-uniformly to the same type of Medicare provider. 8

The court issued three opinions addressing the scope of federal court jurisdiction in administrative law matters. The court declined, on Article III grounds, to review a Federal Communications Commission ("FCC") decision to preempt state and federal court jurisdiction over "lowest unit charge" complaints. 9 The court also held that a prisoner must exhaust his or her administrative remedies at the Bureau of Prisons before a court can consider a Bivens claim for both injunctive and monetary relief. 10 In addition, the court held that the time limitation for judicial review of a regulation issued under the Manufactured Housing Act was triggered by the date that the challenged rule was published in the Federal Register. 11

Finally, the court addressed the adequacy of an agency's consultation with an advisory council where the statute requires consultation "to the extent feasible." 12 In deciding whether additional consultation was required after issuance of the proposed rule and before issuance of the final rule, the court applied the "logical outgrowth" standard usually

4. United States v. Guthrie, 50 F.3d 936, 944 (11th Cir. 1995). See discussion infra part III.
5. 50 F.3d at 944, 947.
6. See discussion infra part III.
7. Dawson, 50 F.3d at 890; Florida Manufactured Hous. Ass'n v. Cisneros, 53 F.3d 1565, 1577 (11th Cir. 1995).
8. Sarasota Memorial Hosp. v. Shalala, 60 F.3d 1507 (11th Cir. 1995). See discussion infra part III.
11. Florida Manufactured Hous. Ass'n v. Cisneros, 53 F.3d 1565, 1573 (11th Cir. 1995). See discussion infra part II.
12. Cisneros, 53 F.3d 1565, 1575 (quoting 42 U.S.C. § 5404(b) (1980)). See discussion infra part IV.
used to determine when a proposed rule must be reissued for notice and comment.\textsuperscript{13}

II. JURISDICTION TO REVIEW AGENCY ACTION

A. Application of Article III's "Case or Controversy" Requirement to Judicial Review of Agency Decisions

In \textit{Miller v. Federal Communications Commission},\textsuperscript{14} the court considered a challenge by several candidates for public office to a declaratory ruling by the FCC. In that ruling, the agency stated that \textit{all} complaints against broadcasters for failing to offer political candidates the "lowest unit charge" for advertisements during the final weeks of a campaign \textit{must} be lodged with the Federal Communications Commission.\textsuperscript{15} The FCC initiated the declaratory ruling proceeding on its own motion, after observing "inconsistent decisions in state and federal court litigation brought by candidates alleging overcharging by broadcast stations."\textsuperscript{16}

The Eleventh Circuit dismissed the candidates' petition for judicial review after finding that the issue presented in the petition "constitutes a hypothetical question rather than an actual case or controversy."\textsuperscript{17} The court first characterized the FCC's declaratory ruling as a mere interpretive rule:

\begin{quote}
The Commission's declaratory ruling . . . is not a regulation promulgated pursuant to section 315(d) [of the Communications Act]. Unlike the regulations found at 47 C.F.R. . . . , the ruling does not define relevant statutory terms, dictate the use of certain industry practices, or prescribe appropriate methods for calculating the lowest unit charge. Furthermore, the declaratory ruling is not an adjudication of a pending case involving a dispute between a candidate and a broadcast station licensee. It is not a decision, a letter of admonition, or an order levying a penalty of forfeiture, a loss of operating authority, or a refund to the candidate. Because it is axiomatic that Congress has not delegated, and could not delegate, the power to any agency to oust state courts
\end{quote}

\textsuperscript{13} 53 F.3d at 1576.
\textsuperscript{14} 66 F.3d 1140, 1146 (11th Cir. 1995).
\textsuperscript{15} \textit{Id.} The FCC ruled that "any state cause of action dependent on any determination of the lowest unit charge under Section 315(b) of the Communications Act, or of some other duty arising under that subsection, is preempted by federal law. The sole forum for adjudicating such matters shall be this Commission." 66 F.3d at 1143 (quoting 6 F.C.C.R. 7511 (1991)). The agency also preempted state causes of action based on section 315(b) that are filed in federal district court under diversity jurisdiction. \textit{Id.}
\textsuperscript{16} 66 F.3d at 1143.
\textsuperscript{17} \textit{Id.} at 1142.
and federal district courts of subject matter jurisdiction, the FCC's declaratory ruling amounts to an agency opinion—a pronouncement interpreting the Communications Act to the effect that Congress has impliedly abolished state and federal court jurisdiction over lowest unit charge violations.  

Then, noting that the case or controversy requirement of Article III19 "appl[ies] with the same stringency in the administrative law context,"20 the court concluded that "[f]ederal courts simply are not permitted to render advisory opinions regarding agency pronouncements."21

B. Exhaustion of Administrative Remedies

In Irwin v. Hawk,22 issued per curiam, the court affirmed the district court's dismissal of a federal prisoner's civil rights claim under Bivens,23 based on the prisoner's failure to pursue his administrative remedies at the Federal Bureau of Prisons.24 Because exhaustion was required by Bureau regulations, and not explicitly by statute, the court reviewed the district court's dismissal under an "abuse of discretion" standard.25

In upholding the district court's dismissal for failure to exhaust, the court focused principally on distinguishing the plaintiff's claim from that presented in McCarthy v. Madigan.26 In McCarthy, the United States Supreme Court held that a federal prisoner who initiates a Bivens action solely for money damages need not exhaust the Bureau of Prisons grievance procedure.27 In contrast, emphasized the Eleventh Circuit, Mr. Irwin sought both injunctive and monetary relief.28 Thus, stated the court, "the grievance procedure probably would be capable of producing the type of corrective action desired."29

18. Id. at 1144 (emphasis added).
20. 66 F.3d at 1146.
21. Id.
22. 40 F.3d 347 (11th Cir. 1995).
24. 40 F.3d at 348.
25. Irwin, 40 F.3d at 348 (citing Kobleur v. Group Hospitalization & Med. Svs., Inc., 954 F.2d 705, 711 (11th Cir. 1992)). The factors to be considered are: "(1) whether requiring exhaustion in this case would further the policies underlying the doctrine; and (2) whether any exceptions to the doctrine are applicable." Id.
26. 40 F.3d at 348.
28. 40 F.3d at 348.
29. Id. (quoting McCarthy, 503 U.S. 140, 153 n.5 (1992)).
The court also rejected the prisoner's "general and conclusory allegation" that exhaustion of his remedies at the Bureau of Prisons would be futile because of "the bias of the administrative process." The court found that the Bureau of Prisons' three-level administrative review process "provides inherent insulation against potential bias and prejudice arising at the institutional level." In addition, the court noted that even though administrative denial of the prisoner's requests for relief was the likeliest outcome, "in denying relief the Bureau may give a statement of its reasons that is helpful to the district court in considering the merits of the claim." Thus, exhaustion would not be a futile exercise.

C. Trigger for Time Limitation on Filing Petition for Review: Date of Order or Date of Publication in Federal Register?

In Florida Manufactured Housing Ass'n v. Cisneros, discussed more fully below in Section III of this article, the court considered whether the time limitation for filing a petition for review of a rulemaking order by the Department of Housing and Urban Development ("HUD") was triggered by the date on the order itself or by the date of the order's publication in the Federal Register. The applicable statute in this case was the Manufactured Housing Act, which requires filing of a petition for judicial review "prior to the sixtieth day after such order is issued." The court rejected the agency's argument that the term "issued" refers to the date on which the rulemaking order was dated, rather than when it was published in the Federal Register. First, the court declined to defer to HUD's interpretation of this provision of the Manufactured Housing Act, emphasizing that the agency had interpreted the term "issued" differently in the same rulemaking proceeding. Second, the court stated, "HUD's latest interpretation contravenes the plain meaning of the term 'issued.' The verb 'issue' clearly refers to an act of public pronouncement and not to the act of arriving at a private decision within

30. Id. at 349.
31. Id. at 349 n.2.
32. Id. at 348 (quoting Greene v. Meese, 875 F.2d 639, 641 (7th Cir. 1989)).
33. 53 F.3d 1565 (11th Cir. 1995).
34. Id. at 1573.
35. Id. (citing 42 U.S.C. § 5405(a)(1) (1974) (emphasis added)).
36. Id. at 1574.
37. Id.
the agency. Third, HUD's interpretation of "issued" would give the agency "the power to manipulate the jurisdiction of the federal courts." Finally, "[a]s a matter of fairness," said the court, "the sixty-day filing period should not begin to run until the public has notice of the final rule's content."

III. JUDICIAL REVIEW OF AGENCY ACTION

A. Review of an Agency's Regulation in a Criminal Proceeding

In United States v. Guthrie, an appeal of a criminal conviction, the court considered a challenge to the United States Fish and Wildlife Service's listing of the Alabama red-bellied turtle as an endangered species. The defendant had entered a plea of guilty in 1991 to charges of violating the Endangered Species Act. The defendant's plea was conditioned upon his right to appeal several issues, including the validity of the Fish and Wildlife Service's decision in 1987 to list the Alabama red-bellied turtle as an endangered species. The defendant claimed that the Alabama red-bellied turtle is not an endangered species as defined by the statute, because the turtle is a hybrid and not a pure species. In the proceedings before the district court, the defendant sought permission to test the DNA of the turtles that were the subject of his conviction, citing studies which allegedly demonstrated that the Alabama red-bellied turtle was not a pure species. The district court denied these motions.

The court addressed three issues in its review of the Fish and Wildlife Service's action: (1) the scope of judicial review in a collateral challenge to an agency's regulation; (2) the scope of the record in the collateral review; and (3) whether the Fish and Wildlife Service's listing of the Alabama red-bellied turtle as an endangered species was arbitrary and capricious.

On the first issue—the scope of judicial review in a collateral challenge to an agency's action—the court noted that this issue had not

38. Id. (quoting RANDOM HOUSE UNABRIDGED DICTIONARY 1015 (2d ed. 1993)).
39. Id.
40. Id. at 1574-75.
41. 50 F.3d 936 (11th Cir. 1995).
42. Id. at 937.
44. 50 F.3d at 939.
45. Id.
46. Id. at 939-40.
47. Id.
48. Id. at 942-44.
been addressed previously by the Eleventh Circuit; and the court did not resolve the issue in this case. After briefly discussing cases from other circuits and the United States Supreme Court "suggest[ing] that collateral review of any agency regulation in a criminal proceeding should be narrow or nonexistent," the court decided to apply the same scope of review in this collateral challenge that would be applied in a direct challenge to the regulation: "Even assuming that the scope of collateral review is as broad as the scope of direct review, the regulation in this case must still be upheld."

Second, the court followed the rule, which is applied in direct judicial review of agency action, that "a court does not consider any evidence that was not in the record before the agency at the time that it made the decision or promulgated the regulation." Thus, the court decided not to consider, in this collateral review, the defendant's proffered evidence that the Alabama red-bellied turtle is not a pure species subject to the Endangered Species Act. The court noted that the defendant had ample opportunity to put this evidence before the Fish and Wildlife Service earlier, either in a petition for direct judicial review of the rule listing the turtle as an endangered species or in a petition requesting that the agency revise its listing. The court stated, "[p]lurmitting a challenge to an agency regulation on the grounds of new scientific evidence to be made collaterally in a criminal prosecution would deprive the courts of the expertise of the administrative agency, and would prevent the agency from fulfilling its function." In addition, the court stressed, "[w]e will not reward that choice [of the defendant to violate the law, rather than to seek to change it] by allowing him to bypass the agency and receive judicial review of the regulation in light of the new [evidence]."

Third, the court determined that the Fish and Wildlife Service did not act arbitrarily or capriciously in adopting its regulation listing the Alabama red-bellied turtle as an endangered species. The agency did not "‘entirely fail [] to consider an important aspect of the problem . . . .’

49. Id. at 943-44.
50. Id. at 943.
51. Id. at 944. The court also noted that the Endangered Species Act does not contain a provision, similar to that in the Clean Air Act, which expressly prohibits review of certain agency actions in civil or criminal proceedings for enforcement. Id.
52. Id.
53. Id.
54. Id.
55. Id.
56. Id.
57. Id. at 945.
Nor was the [agency's] finding 'so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'

In this decision, the court also noted that "[t]his circuit is 'highly deferential' to an agency's consideration of the factors relevant to its decision."

Based on the discussion above, the court upheld the defendant's conviction under the Endangered Species Act.

B. Deference to an Agency's Statutory Interpretation on Preemption

In Lohr v. Medtronic, the court deferred to the Food and Drug Administration's ("FDA") interpretation of the Medical Device Amendments of 1976, on the issue of that federal statute's preemption of state law. In this case, the plaintiffs had sued Medtronic under several state law theories for manufacturing an allegedly defective pacemaker. The Medical Device Amendments of 1976 included an express preemption provision, which the FDA had interpreted in a regulation.

The court rejected Medtronic's argument that the United States Supreme Court's decision in Cipollone v. Ligget Group, Inc. required an analysis governed entirely by the express language of the statute:

Cipollone did not prohibit reliance on an agency's preemption regulation. While the opinion speaks only of "the express language" of the statutes, neither of the statutes examined in Cipollone had regulations interpreting its preemptive scope and nothing in the opinion indicates that the issue of preemption regulations was ever raised or considered. Moreover, the Supreme Court... has examined another agency's preemption practices in at least one post-Cipollone case. We are therefore unable to conclude that Cipollone created an express preemption rule which forecloses our examination of the FDA's regulations.

Having determined that Cipollone posed no barrier to considering the FDA's interpretation of the statutory provision on preemption, the court

59. Id. (citing Husson v. Madigan, 950 F.2d 1546, 1553 (11th Cir. 1992)).
60. Id. at 946-47.
64. 21 C.F.R. § 808.1(d) (1995).
66. 56 F.3d at 1344 (citing American Airlines v. Woolen, 115 S. Ct. 817, 825 (1995) (discussing the Department of Transportation's interpretation of its authority to displace courts in air carrier contract disputes)).
reviewed the agency's interpretation under the *Chevron* standard and found it reasonable and entitled to deference by the Court.

C. **Deference to an Agency's Statutory Interpretation in Traditional Agency Activities**

1. **Deference to a “Program Statement” Issued by the Bureau of Prisons.** *Dawson v. Scott* was a habeas corpus case in which a criminal defendant sought credit against his sentence for cocaine distribution for the 104 days he spent in a halfway house (in lieu of bond) prior to his scheduled trial, and for the 384 days he spent in a safe house after pleading guilty and agreeing to cooperate with the federal prosecutors and before sentencing. In this case of first impression for the Eleventh Circuit, the court in a two to one decision held that such time would not be credited against a defendant's sentence.

In reaching this conclusion, the court relied heavily on a “program statement” issued by the United States Department of Justice’s Bureau of Prisons (“BOP”). The program statement interpreted 18 U.S.C. § 3585(b), which states that a “defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences . . . .” The issue in this case was whether the time the defendant spent in the halfway and safe houses constituted “official detention.”

As an initial matter, the court restated the traditional standard of review of an agency's interpretation of a statute it administers:

To interpret a statute administered by an agency, the *Chevron* court established a “two-step” process. First, if congressional purpose is clear, then interpreting courts and administrative agencies “must give effect to the unambiguously expressed intent of Congress.”

A second level of review, however, is triggered when “the statute is silent or ambiguous with respect to the specific issue.” Where an administrating agency has interpreted the statute, a reviewing court is bound by the *Chevron* “rule of deference.” “A court may not substitute its own construction of a statutory provision for a reasonable interpretation” by an administrative agency. Agency interpretation is

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68. 56 F.3d at 1343-45.
69. 50 F.3d 884 (11th Cir. 1995).
70. *Id.* at 885.
71. *Id.* at 889.
72. *Id.* at 887 (alteration in original).
73. *Id.* at 886.
reasonable and controlling unless it is "arbitrary, capricious, or manifestly contrary to the statute." Thus, "we defer to an agency's reasonable interpretation of a statute it is charged with administering." \(^7\)

After focusing on the language of the statute, the court noted, "[t]o the extent that there is ambiguity in the congressional intent in section 3858(b)," the Bureau of Prisons has "resolved this ambiguity" in a Program Statement. \(^7\) The BOP program statement denied sentence credit for time, like the defendant's, which is spent in a halfway or safe house. \(^7\) Finding that the BOP's interpretation of the phrase "official detention" in section 3858(b) was "'permissible,' 'reasonable,' and not an 'arbitrary, capricious, or manifestly contrary' statutory interpretation," the court deferred to the BOP's interpretation. \(^7\) The court also quoted with favor a statement, by the United States Court of Appeals for the Seventh Circuit, that determining whether a halfway house is sufficiently similar to prison "is not a question susceptible of rational determination, at least by tools of inquiry available to judges. It is a matter of judgment, or policy, or discretion, and we are fortunate in having a policy statement by the Bureau of Prisons which opines unequivocally that it is not." \(^7\) Finally, in upholding the denial of Mr. Dawson's petition for habeas corpus, the court noted that three other circuits had reached the same conclusion. \(^7\)

The interesting point in this case, for administrative law purposes, is that the court accorded the deference required under *Chevron* to an agency "program statement," without focusing on whether this type of agency pronouncement is entitled to deference and, if so, how much deference. \(^8\) The court merely noted that

\[\text{[t]he Third Circuit alone considers the BOP Program Statements to be "internal agency guidelines" that the BOP may alter "at will" and, thus, they are "entitled to a lesser level of deference from the courts.}\]

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74. Id. at 886-87 (citations omitted).
75. Id. at 889.
76. Id.
78. Id. at 890 (quoting Ramsey v. Brennan, 878 F.2d 995, 996 (7th Cir. 1989)).
79. Id. at 891 (citing Moreland v. United States, 968 F.2d 665 (8th Cir.) (en banc) (plurality opinion), cert. denied, 506 U.S. 1028 (1992); Ramsey v. Brennan, 878 F.2d 995 (7th Cir. 1989); United States v. Woods, 888 F.2d 653 (10th Cir. 1989)).
80. Id. at 889.
than are published regulations subject to the rigors of the Administrative Procedures Act, including public notice and comment.\textsuperscript{81}

One month after the Eleventh Circuit decided \textit{Dawson v. Scott},\textsuperscript{82} the United States Supreme Court issued an opinion in \textit{Reno v. Koray}\textsuperscript{83} on this issue of sentence credit for time spent in "official detention."\textsuperscript{84} The Supreme Court independently assessed the meaning of the statutory phrase "official detention" and reached the same result as the Eleventh Circuit. The Supreme Court also indicated that the BOP policy statement was entitled to "some deference."\textsuperscript{85} The court stated,

As we have explained . . . , the Bureau's interpretation is the most natural and reasonable reading of § 3585(b)'s "official detention" language. It is true that the Bureau's interpretation appears only in a "Program Statement"—an internal agency guideline—rather than in "published regulations subject to the rigors of the Administrative Procedure[s] Act, including public notice and comment . . . ." But BOP's internal agency guideline, which is akin to an "interpretive rule" that "do[es] not require notice-and-comment . . . ," is still entitled to some deference . . . since it is a "permissible construction of the statute."\textsuperscript{86}

\section*{2. Deference to an Agency's Application of Statutory Factors and Assessment of Conflicting Expert Opinion}

In \textit{Florida Manufactured Housing Ass'n v. Cisneros},\textsuperscript{87} the court rejected a challenge by the Florida manufactured housing industry to a regulation adopted by the United States Department of Housing and Urban Development ("HUD").\textsuperscript{88} The regulation at issue substantially strengthened the wind resistance standards for manufactured housing in the wake of Hurricane Andrew. In its review of the regulation, the court considered whether HUD misinterpreted the meaning of "cost," as that term is used in the Manufactured Housing Act.\textsuperscript{89} The court also addressed several claims made by the industry that the regulation was arbitrary and capricious.\textsuperscript{90}

\textsuperscript{82} 50 F.3d 884 (11th Cir. 1995).
\textsuperscript{84} \textit{Id.} at 2021.
\textsuperscript{85} \textit{Id.} at 2022.
\textsuperscript{86} \textit{Id.} at 2027 (citations omitted).
\textsuperscript{87} 53 F.3d 1565 (11th Cir. 1995).
\textsuperscript{88} \textit{Id.} at 1563.
\textsuperscript{89} 53 F.3d at 1568-69.
\textsuperscript{90} \textit{Id.} at 1569.
In promulgating manufactured housing standards, HUD must consider, inter alia, "the probable effect of such standard on the cost of the manufactured home to the public" as well as "the extent to which any such standard will contribute to carrying out the purposes of this chapter."\(^9\) In deciding whether to adopt the rule strengthening wind resistance standards, HUD considered a broad range of societal costs and benefits. The industry challenged this analysis, arguing that the factor identified in 42 U.S.C. § 5403(f) "refers solely to the consumer purchase price of manufactured homes."\(^9\) As described by the court, "the crux of [the manufacturers'] claim is that HUD has erred by merging cost into a general cost-benefit analysis, instead of considering it as a separate, independent criterion."\(^9\)

Noting that the Manufactured Housing Act does not "indicate precisely how HUD is to consider this factor, or how much weight the agency should give cost in weighing it against other factors," the court would not disturb the agency's assessment.\(^9\) The court "decline[d] the . . . invitation to require an agency to accord greater weight to aspects of a policy question than the agency's enabling statute itself assigns to those considerations." As long as the agency gives fair consideration to the relevant factors mandated by law, the importance and weight to be ascribed to those factors is the type of judgment that courts are not in a position to make. Instead, that judgment is for the agency . . . .\(^9\)

The court also noted that even if the "cost" referred to in section 5403(f)(4) was limited to the consumer purchase price, the agency could still consider societal costs and benefits under section 5403(f)(5) of the Act.\(^9\)

Following an expansive discussion of the scope of review under the "arbitrary and capricious" standard in which it noted that this standard is "highly deferential" and "presumes the validity of agency action," the court rejected several arguments by the manufactured home industry that HUD's wind resistance regulations were arbitrary and capricious.\(^9\) The court upheld the regulation against a claim that it would not prevent damage in the event of another hurricane as strong as An-

\(^{92}\) 53 F.3d at 1577 (emphasis added).
\(^{93}\) Id.
\(^{94}\) Id. (emphasis in original).
\(^{95}\) Id. (quoting Hussion v. Madigan, 950 F.2d 1546, 1554 (11th Cir. 1992)).
\(^{96}\) Id. at 1578.
\(^{97}\) Id. at 1572-73.
The court also upheld the regulation's application of uniform construction standards to diverse geographic areas, stating that the agency "neither refused to consider the appropriate factors nor committed a clear error of judgment." Finally, the court upheld HUD's cost-benefit analysis against a series of attacks by experts for the manufactured home industry:

The role of this Court is not to decide whether HUD or the manufacturers used the better technical data and methodologies; instead, our task is to determine whether HUD's explanation of its administrative action demonstrates that it has considered the appropriate factors required by law and that it is free from clear errors of judgment.

3. Rejection of an Agency's Nonuniform Statutory Interpretation. In Sarasota Memorial Hospital v. Shalala, the court rejected the Department of Health and Human Service's interpretation of a provision of the Medicare statute. That statute provides for revision of payments due to hospitals based on a "wage index." The issue in the case was whether the hospital's payment of FICA taxes owed by the employees constituted "wages" (which would be included in the index, and thus increase the government's payments to the hospital) or "fringe benefits" (which would not affect the payment calculation).

The court rejected the Secretary's treatment of the hospital's payments as "fringe benefits," stating:

The Secretary cannot make arbitrary distinctions between the same payments by different providers without any basis. We see no reasonable basis for classifying the same FICA payments as wages when deducted from an employee's gross pay, but as fringe benefits when paid directly by the employer. In this case the Secretary's decision to treat Memorial's employee FICA taxes as a fringe benefit for the limited purpose of excluding it from the 1982 wage index for the Sarasota [Metropolitan Statistical Area] contradicts the definition of fringe benefits and is inconsistent with the Secretary's treatment of employee FICA taxes as wages for most of the other provider hospitals in the nation.

98. Id. at 1581-82.
99. Id. at 1581.
100. Id. at 1580 (emphasis in original).
101. 60 F.3d 1507 (11th Cir. 1995).
102. Id. at 1513, 1514.
103. Id. at 1508, 1511.
104. Id. at 1511.
105. Id. at 1513.
D. Review of an Agency's Factual Findings

In two 1995 cases, the court addressed situations where the agency rejected an administrative law judge's ("ALJ") factual findings. In *Bechtel Construction Co. v. Secretary of Labor*, the court upheld the Secretary of Labor's determination that a nuclear power plant construction contractor had violated the whistleblower provisions of the Energy Reorganization Act. The ALJ agreed with Bechtel that the company had not laid off its employee because of any legally protected activity by the employee, finding that the employee's termination was part of a "bona fide [work]force reduction." The Secretary of Labor disagreed with the ALJ's assessment, finding that the employee had established that he was laid off because he had engaged in a protected activity.

The court upheld the Secretary of Labor's factual findings under the traditional "substantial evidence" test. It elaborated on this standard of review where the ALJ and the agency reach different factual conclusions:

> [W]hen there are disagreements between the Secretary and the ALJ involving questions of fact and credibility, the court may examine the evidence more critically in determining whether there is substantial evidence to support the Secretary's decision. Under that standard, we are not required to choose between the ALJ's and Secretary's determination. Rather, we merely require that the Secretary's choice in adopting two fairly conflicting views, "be supported by articulate, cogent, and reliable analysis." Finding that this standard was met, the court upheld the Secretary's factual findings.

In *JCC, Inc. v. Commodity Futures Trading Commission*, the court held that the Commodity Futures Trading Commission ("CFTC") did not err when it conducted a de novo review of the factual record regarding defendants' violations of the Commodity Exchange Act, rather than remand the case to the ALJ. In upholding this procedural decision by the Commission, the court emphasized two points. First, the court did not view this case as a "true" de novo review by the Commission, because the Commission had not resolved a credibility dispute on a "cold" record. Instead, the Commission had merely believed prosecution witnesses whose credibility was not challenged by the defendants. "This

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106. 50 F.3d 926 (11th Cir. 1995).
108. *Id.* at 930.
109. *Id.* at 931.
110. *Id.* at 933 (emphasis added).
111. 63 F.3d 1557 (11th Cir. 1995).
was,” noted the court, “a situation where ‘it fairly could be said that a credibility evaluation from hearing and seeing witnesses testify was unnecessary’ on the part of the Commission.” Second, the court emphasized that the Administrative Procedure Act gives the agency the authority to conduct an independent review of the factual record. When an agency conducts such an independent review, it must “expressly reject[] the ALJ’s fact findings and . . . sufficiently articulate[] its reasons for doing so.” The CFTC met this standard. Thus, the court held that the Commission did not err in making its own factual findings rather than remanding the case to the ALJ. It is noteworthy that both the Commission and the ALJ concluded that the defendants had violated the Commodity Exchange Act. The Commission “simply felt that the [ALJ’s] documentation of those [credibility] determinations was too ambiguous to be effectively reviewed on appeal.”

IV. AGENCY CONSULTATION WITH AN ADVISORY COMMITTEE

In Florida Manufactured Housing Ass’n v. Cisneros, discussed more fully above in Part III of this Article, the court rejected a claim that the Department of Housing and Urban Development (“HUD”) had failed to adequately consult with the National Manufactured Home Advisory Council before it adopted regulations which strengthened wind resistance standards for manufactured homes. The Manufactured Housing Act requires HUD to consult with the National Manufactured Home Advisory Council “to the extent feasible” when it revises manufactured home standards. In this rulemaking proceeding, the agency convened the Advisory Council for a two-day session on its proposed rule. The Advisory Council adopted a resolution recommending, inter alia, specific modifications to the proposed rule, additional study, and that the Advisory Council be reconvened to review public comments on HUD’s analysis of the further studies that the Council had recommended. The agency issued the final rule without reconvening the Advisory Council,

112. Id. at 1565.
113. Id. at 1566-67.
114. Id. at 1566 (citing Parker v. Bowen, 788 F.2d 1512, 1520 (11th Cir. 1986) (en banc)).
115. Id. at 1566 n.27.
116. 53 F.3d 1665 (11th Cir. 1995).
117. The Council is composed of eight representatives from each of three groups: consumers, industry, and government agencies. Id. at 1575 n.3 (citing 42 U.S.C. § 5404(a)).
118. Id. at 1575 (citing 42 U.S.C. § 5405(b)).
The court held that HUD had adequately consulted with the Advisory Council.\footnote{Id. at 1568.} Noting that the agency had incorporated some of the Council's recommendations into its final rule, the court stated, "[i]f we were to require reconsultation whenever the Advisory Council demanded it, the process might never end."\footnote{Id. at 1576.} Moreover, "[p]ublic safety was involved, and it is no exaggeration to say that too much delay could have resulted in the loss of life."\footnote{Id.} Finally, the court emphasized that "the final standards were [not] so substantively different that they cannot be considered a 'logical outgrowth' of the proposed standards upon which the Advisory Committee was consulted."\footnote{Id. at 1576 n.4.} However, the court found that "the logical outgrowth test provides a helpful analogy for analyzing the consultation requirement." \footnote{Id.}