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WHO SIGNS THE CHECKS? *GROFF V. UNITED STATES*

DUSTIN APPEL*

WHAT DOES the federal government owe to firefighter pilots who die in the line of duty, and does who signs their paychecks change the answer? In *Groff v. United States*, the Court of Appeals for the Federal Circuit addressed both issues.¹ The Public Safety Officers' Benefits Act ("PSOBA") provides benefits to public safety officers, including a payment of \$250,000 to the relatives of those who die from injuries sustained in the line of duty.² Congress established the program in recognition of the physical risks that such officers regularly undertake and the value that the government places upon their service.³ The Bureau of Justice Assistance ("BJA"), within the Department of Justice, administers the benefits program.⁴ In *Groff*, the court upheld the BJA's determination that private contract firefighter pilots are not "public safety officer[s]" and, thus, are not entitled to the death benefit.⁵

Lawrence Groff and Craig LaBare were pilots for private contractors who provided firefighting services to the California Department of Forestry and Fire Protection ("CDF") and the U.S. Forest Service ("USFS"), respectively.⁶ Although the CDF and USFS exclusively controlled and directed their flight activities, the pilots' service contracts explicitly stated that they were pri-

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¹ See generally *Groff v. United States*, 493 F.3d 1343 (Fed. Cir. 2007).

² 42 U.S.C.A. § 3796(a) (West 2003 & Supp. 2007).

³ *Groff v. United States*, 72 Fed. Cl. 68, 76, 88 (Fed. Cl. 2006) (holding that Groff was a "public safety officer" within the meaning of PSOBA), *rev'd*, 493 F.3d 1343 (Fed. Cir. 2007).

⁴ 42 U.S.C.A. § 3796(a); *Groff*, 72 Fed. Cl. at 69.

⁵ *Groff*, 493 F.3d at 1346.

⁶ *Id.* at 1346-47.

vate employees and that each employer was required to maintain its own liability insurance.⁷ Groff died in a mid-air collision while flying a CDF helicopter to combat a wildfire, whereas LaBare lost his life when his air tanker crashed during a flight to deploy fire retardant onto a forest fire.⁸ In letters to the BJA in support of Groff's claim for the death benefit, the CDF identified him as an "officially recognized and designated member of the [CDF]."⁹ The BJA ultimately denied claims brought on behalf of both men, holding that neither satisfied the statutory definition of a "public safety officer."¹⁰

When the families appealed these decisions in separate actions, the Court of Federal Claims reversed and awarded the benefit to Groff but, acting through a different judge, affirmed the BJA denial of the death benefit to LaBare.¹¹ The Court of Appeals for the Federal Circuit took both cases on consolidated appeal and resolved the split in favor of the government.¹²

The critical issue before the court was "whether the BJA acted lawfully when it determined" that privately employed pilots who perform fire-fighting duties for public agencies are not "'public safety officers' within the meaning of the PSOPA."¹³ First, the court held that the BJA's interpretation was entitled to the standard of deference articulated by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁴ Applying the *Chevron* standard, the court found that the BJA's determination was proper.¹⁵

Chevron deference, under which the court will defer to a reasonable administrative interpretation, is appropriate where Congress intended "to delegate to the agency the authority to make determinations carrying the force of law."¹⁶ In this case, the court first quoted the language of *Mead* that a "very good indica-

⁷ *Id.*

⁸ *Groff*, 72 Fed. Cl. at 69.

⁹ *Id.* at 83-84.

¹⁰ *Groff*, 493 F.3d at 1346-48.

¹¹ *Id.* at 1346-47.

¹² *Id.* at 1345-46.

¹³ *Id.* at 1349.

¹⁴ *Id.* at 1350. The *Chevron* doctrine recognizes that in order to administer congressionally created programs, an administrative agency must have the power to formulate policy and make rules to fill in legislative gaps. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1974).

¹⁵ *Groff*, 493 F.3d at 1353.

¹⁶ *Id.* at 1349-50 (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)).

tor” of intent to delegate such authority lies in “express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”¹⁷ Here, Congress explicitly authorized the BJA to “determine[], under regulations issued pursuant to [the PSOBA],” whether a public safety officer died as “the direct and proximate result” of injuries suffered in the course of duty.¹⁸ The court of appeals began with an explicit adoption of its earlier, implicit conclusions in *Amber-Messick v. United States* and *Chacon v. United States* that “grant of that authority . . . reflect[ed] Congress’s expectation that the BJA would ‘be able to speak with the force of law when it address[ed] ambiguity in the [PSOBA],’” and, thus, that *Chevron* deference attached to the BJA’s interpretations of PSOBA terms.¹⁹

The court then employed another of its own post-*Mead* precedents, in which a Department of Commerce interpretation of ambiguous statutory terms was at issue, to reinforce this holding.²⁰ In *Pesquera*, the court’s grant of *Chevron* deference hinged on the relative formality of the agency’s administrative proceedings, the availability of judicial review, and the fact that the agency regarded past administrative decisions as precedent.²¹ In the case of PSOBA claims, claimants had a right to three levels of administrative review inside the BJA, culminating in a proceeding before the director, with written findings of fact and legal conclusions required at each level.²² BJA determinations were subject to review by the Court of Federal Claims, and lastly, the BJA considered “at least some” of its decisions as precedents.²³ Based on these factors, the court held that the BJA’s consideration of PSOBA claims met the test required to qualify for *Chevron* deference mandated by the Supreme Court under *Mead*, and comported with the Court of Appeals’ own standards articulated in *Pesquera*, *Amber-Messick*, and *Chacon*.²⁴

¹⁷ *Id.* at 1350 (quoting *Mead*, 533 U.S. at 229).

¹⁸ *Id.* (quoting 42 U.S.C.A. § 3796(a) (West 2003 & Supp. 2007)).

¹⁹ *Id.* (quoting *Mead*, 533 U.S. at 229 (citing *Amber-Messick v. United States*, 483 F.3d 1316, 1323 (Fed. Cir. 2007); *Chacon v. United States*, 48 F.3d 508, 512 (Fed. Cir. 1995))).

²⁰ *Id.* at 1350–51 (citing *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372 (Fed. Cir. 2001)).

²¹ *Id.* at 1351.

²² *Id.* at 1352.

²³ *Id.*

²⁴ *Id.*

The court then conducted the two-prong test outlined by *Chevron*: first, whether Congress had spoken to the precise question at issue, and second, in the event of silence or ambiguity, if the agency's construction of the statute was permissible.²⁵ Here, the "precise issue" was "whether the [statutory] term 'public safety officer' . . . include[d] privately employed pilots . . . who render[ed] fire suppression assistance" for public agencies.²⁶ Because the PSOPA defined "public safety officer" only as "an individual serving a public agency in an official capacity, with or without compensation, . . . as a firefighter," the court found that the statute was silent on the subject of contract pilots.²⁷ This silence required an assessment of the BJA's construction of the statute for permissibility under the second prong of *Chevron*.²⁸ The court held it reasonable for the BJA to conclude that the legislature intended to exclude privately employed individuals.²⁹ As its only authority, the court pointed to a quotation in the legislative history from the PSOPA's sponsor that the statute would not apply to "privately employed safety and security officers," even when those officers "were called by a local arm of the government . . . to assist in any way," as sufficient indication of congressional intent to sustain this construction as permissible under *Chevron*.³⁰

Further addressing the reasonableness of the interpretation, the court rejected the assertion that the BJA determination was contrary to the agency's own precedent that a public service officer serving "in an official capacity" is one who is "officially recognized or designated as functionally within or a part of" a public agency.³¹ The court was not swayed by the argument that LaBare and Groff required approval by their public agencies prior to service and were obligated to comply with the same guidelines in their duties as government-employed pilots, nor by

²⁵ *Id.* Under *Chevron*, an interpretation need only be reasonable to be permissible, even if there is more than one possible reasonable interpretation. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1974). See also Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921, 940-41, 941 nn.125-26 & nn.128-29 (2006).

²⁶ *Groff*, 493 F.3d at 1353.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 1352.

³⁰ *Id.* at 1353-54.

³¹ *Id.* at 1354 (quoting *Chacon v. United States*, 48 F.3d 508, 512 (Fed. Cir. 1995)).

the fact that the CDF issued an opinion after Groff's death that stated he was an officially recognized member of the agency.³² Similarly, there was no mention in the court's analysis of the public agencies' exclusive control and direction of the pilots' flights and operations or the nature of their work in conjunction with government-employed pilots.³³ Rather, the analysis turned upon the fact that Groff and LaBare were hired, paid, and subject to termination by their employers.³⁴ To support the BJA's determination that the pilots were *not* "officially recognized or designated as functionally," within their respective agencies,³⁵ the court highlighted provisions of their aviation service contracts, such as the requirement that the pilots' employers maintain liability insurance.³⁶ And, in Groff's case, the contract stipulated that the pilot was not an officer, employee, or agent of the State of California.³⁷ The court held it reasonable for the BJA to conclude that these provisions outweighed any posthumous statements of recognition and designation by the USFS and CDF.³⁸

Critics of the *Chevron* doctrine as it exists today, who claim it gives administrative agencies unbridled power and deprives the court of its authority to interpret the law,³⁹ would likely cite *Groff* as a textbook case for use of the doctrine to uphold an agency's interpretation that is patently unreasonable given the substance of the relationship between contract firefighting pilots and the public agencies that employed them. It is telling that the court expended the bulk of its analysis and citation to its own precedent to invoke the *Chevron* doctrine, but in its brief discussion of the reasonableness of the BJA's construction under *Chevron*, neglected the implications of those self-same precedents. Instead, the court focused exclusively on the most formalistic elements of the pilots' service. A closer look reveals that the court's prior decisions in fact cut sharply against the holding that the BJA's interpretation in *Groff* was reasonable, as does an examination of the practical reality of firefighting aviation.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 1355.

³⁵ *Id.* at 1354.

³⁶ *Id.* at 1355.

³⁷ *Id.*

³⁸ *Id.*

³⁹ See generally Garry, *supra* note 25 (discussing the *Chevron* doctrine and its application, in general, and diffusing particular criticisms of the *Chevron* doctrine).

The court itself recognized that the value of its sole citation to the legislative history of the PSOBA as intent to exclude contractor firefighters from the term “public safety officer” was questionable.⁴⁰ Even taken at face value, the quote clearly concerns personnel who have only a tenuous or *ad hoc* relationship to a public agency. The court’s prior holdings that the term “public safety officer” does not include a state-prison inmate volunteer in a firefighting brigade in *Chacon*⁴¹ or an apprentice firefighter whose duties consisted mainly of incidental support and cleanup, such as rolling up hoses and putting away tools, in *Amber-Messick*,⁴² strongly support this conclusion. By contrast, Groff and LaBare performed the core work of these public agencies in functions indistinguishable from government-employed pilots.

A much better indication of congressional intent in this case is a recent amendment to the PSOBA in the Patriot Act that allowed claims for rescue workers slain in the September 11, 2001 attacks without regard to whether they were public or private employees.⁴³ The amendment is in fact part of a sustained pattern of Congress *broadening* coverage under the statute.⁴⁴ This expansion of who qualifies as a “public safety officer” is perhaps a response to the changing reality of government service⁴⁵ that the court also overlooked in its analysis of reasonableness under *Chevron*.

In the case of firefighting aviation, private contractors now provide the vast bulk of pilots, aircraft, and ground crews for many public agencies.⁴⁶ For example, the aviation program of the CDF currently employs only eighteen public employees to

⁴⁰ *Groff*, 493 F.3d at 1354 (“remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history” (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979))).

⁴¹ *Chacon v. United States*, 48 F.3d 508, 512–13 (Fed. Cir. 1995).

⁴² *Amber-Messick v. United States*, 483 F.3d 1316, 1324–25 (Fed. Cir. 2007).

⁴³ *Groff v. United States*, 72 Fed. Cl. 68, 82 (Fed. Cl. 2006), *rev’d*, 493 F.3d 1343 (Fed. Cir. 2007).

⁴⁴ *Id.* at 79. In fact, legislative history of another recent amendment reveals that its purpose was to reverse restrictive administrative interpretation by the Justice Department. *Id.* at 79–80 (citing 149 CONG. REC. 4650–51 (2003) (statement of Sen. Leahy)).

⁴⁵ Stephen Barr, *Senate Measure Stokes Feud Over Outsourcing Work to Private Sector*, WASH. POST, Oct. 3, 2007, at D04 (noting “a long-standing Bush administration effort to put large numbers of federal jobs up for competition with the private sector”).

⁴⁶ Steve Geissinger, *Santa Rosa Firefighter’s Widow Persists*, SAN JOSE MERCURY NEWS, Oct. 1, 2007.

oversee a staff of 130 contract employees.⁴⁷ Similarly, the USFS reports that the “majority of the aircraft crews, aircraft and maintenance support is provided by commercial operators through contracts and rental agreements,” while only a “small portion” of their fire suppression crew and fleet comes from other federal, state, or military units.⁴⁸ The reason, according to a USFS spokesperson, is that it simply is not cost-efficient to maintain government crews year-round, and contractors provide a cheaper alternative.⁴⁹ However, while contracts come and go, the same pilots typically remain with their particular public agency for many years, often amassing twenty to thirty years of service, leading some agencies to view the private employer as nothing more than a conduit for payment.⁵⁰ It is also revealing that California has stepped in to fill the gap in coverage⁵¹ by enacting remedial legislation to ensure that contract pilots receive death benefits equal to those of its government-employed pilots.⁵² Thus, in light of the substance of the relationship between the public agencies and their contract pilots, the BJA interpretation—which has the effect of extending coverage to only a fraction of those actually risking their lives to combat fires—hardly seems reasonable, and does not give effect to the original purpose of the statute: to recognize those who serve and the physical hazards they endure.

Despite the decision of the court of appeals, Groff’s wife has vowed to continue her long, expensive legal battle with a petition for review in the Supreme Court, even though it is unlikely

⁴⁷ California Department of Forestry and Fire Protection Home Page, <http://www.fire.ca.gov> (last visited Mar. 19, 2008).

⁴⁸ U.S. DEP’T OF AGRIC., FOREST SERV., ROCKY MOUNTAIN REGION, AVIATION OPERATIONS PLAN 4 (2006), *available at* http://gacc.nifc.gov/rmcc/docs/aviation_operations_plan_2006.pdf.

⁴⁹ Geissinger, *supra* note 46. Money is also apparently at the heart of resistance by the USFS to extend PSOPA coverage to its contract pilots, which it claims could cost as much as \$23,000,000. *Id.*

⁵⁰ *See* Groff v. United States, 72 Fed. Cl. 68, 84 (Fed. Cl. 2006), *rev’d*, 493 F.3d 1343 (Fed. Cir. 2007) (including language excerpted from CDF letters to the BJA in support of claim).

⁵¹ Geissinger, *supra* note 46. Many of the contract employers’ life insurance benefits are or were substantially less than the PSOPA benefit. *Id.* For example, Groff’s family received only \$50,000, with no ongoing benefits, following his death. *Id.*

⁵² *See* CAL. PUB. RES. CODE § 4114.5(a)(1) (West Supp. 2008). The state statute shifts the responsibility to the private employer to provide a payment equal to that of the PSOPA sum in the event the pilot’s survivors are not entitled to the federal benefit. *Id.*

to change the outcome.⁵³ In light of other current, high-profile examinations of government contractors,⁵⁴ however, this case should nonetheless provoke further discussion of the new role private contractual relationships now play in traditional government functions.

Ultimately, the question of what was due to these firefighter pilots did indeed turn on the narrow issue of whose name appeared on their paychecks, rather than on the substance of the work they performed—a result that should provide fodder for critics of *Chevron*. In *Groff*, the court used *Chevron*'s limitation of judicial discretion as a shield to justify an unreasonable administrative interpretation with cramped, formalistic reasoning and to avoid a meaningful analysis of the statutory term that would encompass the substance and practical realities of the public service of these brave firefighters.

⁵³ Geissinger, *supra* note 46.

⁵⁴ Joe Sterling, *Waxman: Contractor's Re-hiring Raises 'Serious Questions'*, CNN, Oct. 5, 2007, <http://www.cnn.com/2007/POLITICS/10/05/waxman.blackwater/> (chronicling the story of a former Blackwater employee accused of murder who was re-hired by a second U.S. contractor overseas).