



## ***Tetra Tech v. DOR – Agency Deference on Questions of Law***

*Working with the Great Lakes Legal Foundation, Wisconsin’s business community provided invaluable input for the court in its watershed agency deference decision. By validating our fairness/due process perspective, the Wisconsin Supreme Court has laid out a path that can help finally reverse the ill-conceived federal Chevron deference doctrine.*

On June 26, 2018, the Wisconsin Supreme Court handed down its decision in *Tetra Tech v. DOR*. The decision ended the judicial policy of deferring to administrative agencies' conclusions of law. It was a major victory for Wisconsin’s regulated community. The ability of agencies to define their own power and reach, even as parties to litigation, was patently unfair.

Whether in the courthouse or agency headquarters, businesses’ views on regulatory mandates were dismissed under the flawed assumption agency technocrats had special expertise on questions of law. But their interpretations were mostly bias, often with the goal of expanding their power and reach over the regulated community.

It was clear to the business community that deference to agencies on questions of law violates their due process rights to a fair hearing. Notably, the brief filed by the Great Lakes Legal Foundation on behalf of 11 business associations was the only brief in the deference trilogy to argue these due process implications.<sup>1</sup> Out of 16 briefs, nine of the ten arguing against deference did not utter a word on the fundamental unfairness when courts provide predisposed favoritism to powerful bureaucrats that are parties to the dispute.

The Foundation allocated over half its brief, 1,687 words, to the argument that “such systematic bias that benefits one party deprives other parties of due process.” Justice Kelly, writing for the court, tracked our brief and dedicated 2,161 words to the idea that under agency deference, “many litigants have lost their right to a decision by an *independent* judiciary.” *Tetra Tech*, ¶67. Other parallels include:

**GLLF:** “Deference afforded agencies to interpret the law compromises the courts’ duty to be impartial arbiters of the law. *Such systematic bias that benefits one party deprives other parties of due process.*” GLLF Br at 6.

**Kelly:** “This *systematic favor deprives* the non-governmental party of an independent and impartial tribunal.” ¶ 67.

**GLLF:** “Due process incorporates the common law maxim that ‘[n]o man is allowed to be a *judge in his own cause* because his interest would certainly bias his judgment.’” Br at 8.

**Kelly:** “When an administrative agency interprets and applies the law in a case to which it is a party, it is to that extent acting *as judge of its own cause.*” ¶ 68.

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<sup>1</sup> In addition to *Tetra Tech*, the Supreme Court requested briefings on the deference issue in *Wisconsin Bell v. LIRC* and *Wisconsin DWD v. LIRC*. But only the *Tetra Tech* decision addressed the matter.