In the

Supreme Court of Ohio

JAMES A. LANG, TEDDY H. SHARP, AND MARK A. LAIBE	:	CASE NO. 2011-1740
Plaintiffs-Appellees,	:	On Appeal from the Seneca County Court of Appeal Third Appellate District
v.	:	
DIRECTOR, OHIO DEPARTMENT OF JOB AND FAMILY SERVICES,	:	Court of Appeals Case Nos. 13-10-33, 13-10-34, 13-10-35
Defendant-Appellant.	:	

BRIEF FOR PLAINTIFFS-APPELLES JAMES A. LANG, TEDDY H. SHARP, AND MARK A. LAIBE

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INTRODUCTION

This is an appeal involving three individuals who applied for Alternative Trade Adjustment Assistance (hereafter "ATAA") after their jobs in Tiffin, Ohio moved to Mexico. ATAA is a wage subsidy program that partially replaces lost wages for workers over 50 years of age available under the Trade Adjustment Assistance (TAA) program, a federal-state income support and retraining program authorized by federal law and operated in Ohio by appellant Director, Ohio Department of Job and Family Services (hereafter "ODJFS"). The purpose of TAA is to assist individuals, such as appellees, adversely impacted by the consequences of national trade policies, including a shift in production overseas.

The three appellees here are James A. Lang, Teddy H. Sharp, and Mark A. Laibe. All three appellees are former employees of American Standard in Tiffin, Ohio and all lost their jobs due to the closing of this facility in December 2007. All three promptly found new work at lower wages soon after they lost their work at American Standard and each of them then sought to use the ATAA program after they reached age 50 to close the gap between their former wages at American Standard and their lower wages in their new jobs. Their separate ATAA applications were each denied by ODJFS, solely because each had found reemployment before each of their respective 50th birthdates, although they each sought only to participate in ATAA for months after they reached 50 years of age and met all the remaining eligibility conditions for ATAA.

In denying appellees' ATAA applications, ODJFS relied upon a "reemployment by age 50 requirement" that is not found in the ATAA federal statute, but appears in an interim guidance letter of the U.S. Department of Labor (Training and Guidance Letter 2-03, ODJFS Appendix, Ex. S).The Ohio Unemployment Compensation Review Commission (UCRC)

ultimately ruled that it was contractually bound to follow the guidance letter by its agreement to operate TAA in Ohio and applied that guidance letter in each of these cases. (*See* ODJFS Appendix, Ex. E (Lang case), Ex. J (Sharp), and Ex. M (Laibe)).

In effect, appellees were denied ATAA under the federal guidance letter because they each found reemployment *too soon*, even though each then sought to participate in ATAA after he reached age 50. That result is contrary to the statutory text, the expressed intent of Congress in establishing the ATAA program, and the purpose of TAA.

APPELLEES' STATEMENT OF THE FACTS

The decision of the Court of Appeals summarized the facts of this case and the proceedings below in detail. (Decision of the Court of Appeals, ¶ 2-13, ODJFS Appendix, Ex. C., page 1-8) Appellees provide this additional statement of the facts to provide information not provided by ODJFS in its brief.

A. Trade Adjustment Assistance Background

In this case, American Standard's Tiffin, Ohio location was certified as eligible for TAA (Petition No. TA-W-62775) on March 11, 2008 due to a shift in production of the work performed in Ohio to a location in Mexico. ("Notice" 73 Federal Register 16064 (March 26, 2008) and U.S. Department of Labor Determination available online at <http://www.doleta.gov/ tradeact/taa/taadecisions /taadecision.cfm?taw=62775>).

Once group eligibility for TAA for a particular workforce is granted by the federal agency, Congress has provided that TAA shall be administered through agreements with cooperating state agencies "as agent for the United States," and that these state agencies "will receive applications for, and will provide, payments *on the basis provided in this part.*" 19 U.S.C. § 2311(a)(emphasis added).

Reflecting the federal-state nature of TAA, Congress made the individual administrative decisions of cooperating state agencies granting and denying benefits to individuals certified for group eligibility for TAA "subject to review in the same manner and to the same extent as determinations under the applicable State [unemployment compensation] law and only in that manner and to that extent." 19 U.S.C. § 2311(d).[1] Because of this Congressional mandate, this case comes before this Court pursuant to Ohio Revised Code Section 4141.282, which provides for judicial review of Ohio unemployment compensation cases.

B. The Proceedings Below

It is uncontested that James A. Lang, Teddy H. Sharp, and Mark A. Laibe lost their employment in December 2007 when the American Standard facility in Tiffin was closed. Each filed separate applications for ATAA when they turned 50 years of age and they found reemployment within 26 weeks of their layoffs from American Standard.

Each appellee separately elected to participate in ATAA and had their applications denied by ODJFS because they were not yet 50 years old at the time they obtained reemployment.

In Mr. Lang's case, he was awarded ATAA benefits following a favorable decision on May 1, 2009 by Unemployment Compensation Review Commission (UCRC) Hearing Officer Jared W. Wade. In relevant part, this decision concluded:

> ODJFS is relying upon the U.S. Department of Labor's TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 2-03, which was issued on August 2, 2003, and states that an individual must meet several conditions to be eligible for ATAA, and that one of those conditions is that the individual '[b]e at least age 50 at time of reemployment." However, in regard to being as least age 50, 19 United States Code Section 2318(a)(3) does not require that an individual be at least 50 <u>at the time of reemployment</u> in order for the individual to be eligible for ATTA. Therefore, the Hearing Officer finds that the claimant is not ineligible for

[1] The TAA statute defines "state agency" as the "agency of the State which administers the State law," 19 U.S.C. § 2319(9), and defines State law as "the unemployment insurance law of the State." 19 U.S.C. § 2319(10).

ATAA as a result of the claimant not being at least 50 years of age when he obtained reemployment with Clinton Township.

(ODJFS Appendix, Ex. G, page 3)(Emphasis in original).

This decision was subsequently vacated by the UCRC, which assigned a new Hearing Officer. Following another hearing, in which ODJFS introduced its TAA operating agreement with the Labor Department, the UCRC issued a decision on November 4, 2009 holding that Mr. Lang was not entitled to participate in ATAA. Relying upon Ohio's agreement with the U.S. Department of Labor, the Commission now reasoned that:

> Ohio has agreed to follow the guidelines established by the US Department of Labor in order to fund this program and one of those guidelines is that an individual must be fifty years of age at the time they are reemployed and at the time the claimant was reemployed with Clinton Township, he was not fifty years of age. Based upon the US Department Training and Employment Guidance Letter #2-03, the Commission finds that the claimant did not meet the qualifications for filing a valid Application for Alternative Trade Adjustment Assistance and the application must be disallowed. Based upon this finding, claimant received benefits to which he was not entitled and he is required to repay those benefits to the Ohio Department of Job and Family Services.
>
> (Lang UCRC Decision, page 4, ODJFS Ex. E.)

Separate UCRC hearings were held in Mr. Sharp's and Mr. Laibe's cases before UCRC Hearing Officer Emily Biscoe. Two days after the full UCRC decision in Mr. Lang's case, this Hearing Officer issued identical decisions in each case. In her reasoning, Hearing Officer Biscoe specifically referenced the decision of the UCRC in the appeal of appellee James A. Lang holding that Ohio is bound by the interpretations of the U.S. Department of Labor under the terms of its agreement with U.S. Department of Labor to operate TAA in the state of Ohio (Sharp Commission Decision, page 3, ODJFS Appendix Ex. J; Laibe Commission Decision, page 3, Appendix Ex. M).

In relevant part, the Laibe decision read:

> The U.S. Department of Labor has established a written agreement with the state of Ohio. In order to secure funding for the citizens of Ohio under the Trade Adjustment Assistance Program, the State of Ohio must agree to administer the federally-funded program in the method established by the U.S. Department of Labor and follow the directives of that agency. Ohio has agreed to follow the guidelines established by the U.S. Department of Labor in order to fund this program, and one of those guidelines is that an individual must be fifty years of age at the time they are reemployed in order to qualify for ATAA benefits. At the time the claimant was reemployed with National Electric Carbon, he was not fifty years of age.
>
> The Hearing Officer recognizes that the U.S. Department of Labor's TEGL No. 2-03 includes requirements that are not included in the United States Code, as cited above. However, the Unemployment Compensation Review Commission has reviewed the issue in *In re James A. Lang*, Appeals Docket Number C2009-160-0031, issued November 4, 2009, and determined that the Ohio Department of Job and Family Services and the Unemployment Compensation Review Commission are bound by the interpretation of the U.S. Department of Labor.
>
> Based upon the U.S. Department Training and Employment Guidance Letter No. 2-)3, the Hearing Officer must conclude that the claimant did not meet the qualifications for filing a valid Application for Alternative Trade Adjustment Assistance and the application must be disallowed. (*Id.*, page 3)(emphasis added).

As noted, identical language is found in the Sharp decision with the only exception that the decision refers to Mr. Sharp's reemployment with Cooper Tire. (ODJFS Appendix Ex. J, p. 3.)

Appellees brought timely actions for review to the Court of Common Pleas for Seneca County. The Court of Common Pleas of Seneca County (Kelbley, J.) reversed the ODJFS' denials in a consolidated decision on August 10, 2010 (Journal Entry of Judgment, ODJFS Appendix, Ex. D). ODJFS then appealed, and following briefing and oral argument, the Court of Appeals, Third Appellate District (Shaw, J. with Williamowski, J; with Rogers, J dissenting), likewise upheld appellees eligibility for ATAA, holding that since appellees did not seek to participate in the ATAA program until they were 50 years old, and they had met all remaining statutory requirements for ATAA eligibility set by Congress when they elected to participate in

ATAA, were eligible for ATAA. (Court of Appeals Decision, August 29, 2011, ODJFS Appendix Ex. C.) ODJFS then successfully sought review in this Court.

ARGUMENT

Appellees' Proposition of Law I:

Where appellees satisfied all statutory eligibility requirements established by Congress regarding ATAA wage subsidy payments, found reemployment in less than 26 weeks, and elected to participate in ATAA upon reaching age 50, every eligibility requirement under the plain language of the statute was satisfied.

A. Standard of Review

Congress has provided that individual state agency decisions regarding TAA are "subject to review in the same manner and to the same extent as determinations under the applicable State [unemployment compensation] law and only in that manner and to that extent." 19 U.S.C. § 2311(d). The standard of review for unemployment appeals is set forth in Ohio Revised Code, Section 4141.282(H), which provides for judicial review of unemployment compensation cases:

> The court shall hear the appeal upon receipt of the certified record provided by the commission. If the court finds that the decision of the commission was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse, vacate, or modify the decision, or remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission.

The underlying facts in this appeal are not contested. The legal question involves statutory interpretation. Questions of statutory construction are matters of law. *Miller v. Dept. of Indus. Relations* (1985), 17 Ohio St.3d 226, 479 N.E.2d 254; *Clemmer v. Ohio State Racing Comm'n* (1995), 107 Ohio App.3d 594, 596, 669 N.E.2d 267. Courts exercise de novo review over questions of statutory construction in Ohio unemployment compensation appeals. *State v. Wemer* (1996), 112 Ohio App.3d 100, 103, 677 N.E.2d 1258; *Frato v. Ohio Bureau of Employment Services,* (1991) 77 Ohio App.3d 193, 197.

In summary, the Ohio statutory provision providing for judicial review authorizes Ohio courts to reverse where that statutory interpretation is "unlawful" or" unreasonable" and Congress has authorized this Court to review TAA cases "in the same manner and to the same extent". Both of the lower courts held that ODJFS' reliance upon the informal Labor Department guidance was unreasonable and contrary to Congressional intent.

Appellees will divide their argument to this Court into two main parts. First, we will argue that TEGL 2-03's "age 50 at reemployment" requirement is unlawful and unreasonable because it denies ATAA benefits to individuals, such as appellees, that meet all ATAA statutory requirements when they elected to participate in ATAA. This statutory interpretation argument will establish both that the plain meaning of the ATAA law and a proper construction of this law dictate that appellees are eligible for ATAA benefits. Second, we will show that neither Ohio's contractual obligations to follow U.S. Department of Labor guidance as its agent, nor judicial deference to administrative interpretations warrants reversal of the lower court in the circumstance of this case. Accordingly, this Court should affirm the decision below.

B. The Statute Mandates ATAA Eligibility Whenever Individuals Fifty Years of Age Who Are Reemployed Within 26 Weeks Elect to Participate.

To begin, the administrative interpretation defended here by the agency does not comport with the requirements of the plain language of Congress. "Ordinarily, courts must give the words used in statutes their plain and ordinary meaning." *Radcliffe v. Artromick Int'l* (1987), 31 Ohio St.3d 40, 42, 508 N.E.2d 953, 955. "In ascertaining the legislative intent of a statute, 'It is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.'" *Bernardini v. Board of Education*, (1979) 58 Ohio St.2d 1, 4, 387 N.E.2d 1222, 1224 (citation omitted). As former Chief Justice Rehnquist has stated, "In expounding a statute, we must not be guided by a single sentence or member of the sentence, but look to the provisions of

the whole law, and to its object and policy." *Philbrook v. Glodgett*, (1975) 421 US 707 at 713; 95 S.Ct. 1893 at 1898; 44 LEd2d 525.

Before this Court, ODJFS makes no effort to show this Court that its administrative interpretation can be squared with the text or intent of the ATAA statute. ODJFS offers no serious discussion of the statutory analysis of the Court of Appeals in its brief. However, any judicial review in this Court involving statutory construction must start with a careful consideration of the text, meaning, and overall intent of the ATAA statute concerned, and that analysis is the core of appellees' argument on appeal.

In its 2002 TAA amendments, Congress established the Alternative Trade Adjustment Assistance program. 19 U.S.C. § 2318.[2] By its plain terms, workers are eligible for ATAA if they elect to participate, they are at least 50 years old, and they obtain reemployment within 26 weeks of their separations. The ATAA program's statutory eligibility rules are found at 19 U.S.C. §2318(a)(3)(B), which provides the following rules for "individual eligibility":

> A worker in the group that the Secretary [of Labor] has certified as eligible for the alternative trade adjustment assistance program may elect to receive benefits under the alternative trade adjustment assistance program if the worker—
>
> (i) is covered by a certification under Subpart A of this part;
> (ii) obtains reemployment not more than 26 weeks after the date of separation from the adversely affected employment;
> (iii) is at least 50 years of age; and
> (iv) earns not more than $50,000 a year in wages from reemployment;
> (v) is employed on a full-time basis as defined by State law in the State in which the worker is employed: and
> (vi) does not return to the employment from which the worker was separated. (Emphasis added.)

[2] As with ODJFS' brief, citations to the federal statute herein are to the statute as passed in 2002 and in effect at all relevant times, unless specifically noted otherwise. ODJFS Appx Ex. Q.

In other provisions of Section 2318, Congress set up a two-year eligibility period for ATAA payments replacing half of lost wages, 19 U.S.C. § 2318(a)(2)(A), and an overall limit of $10,000 in ATAA payments during ATAA's two-year eligibility period, 19 U.S.C. § 2318(a)(4).

In its policy guidance to states concerning ATAA, the Secretary of Labor issued a Training and Employment Guidance Letter (TEGL), No. 2-03 (August 6, 2003). This TEGL stated in Section E that "To be eligible for ATAA, an individual must meet the following conditions at the time of reemployment: 1. Be at least age 50 at time of reemployment." (Emphasis added.)(ODJFS Appendix, Ex. S, page 7)(Hereafter cited as TEGL 2-03). This interim guidance was issued simultaneously with the effective date of the ATAA program, one year after ATAA's enactment in the 2002 amendments. No regulations have ever been issued.

As noted above, this underlined TEGL language is the sole rationale for denying plaintiffs' applications for ATAA. In other words, the statutory interpretation issue before this Court is whether appellees must turn 50 prior to reemployment, as required by the TEGL, or whether they must turn 50 prior to electing to participate and remain eligible for ATAA payments so long as each met all the statutory requirements in Section 2318. We will now show that, on this question, the lower courts properly ruled in appellees' favor.

Clearly, Congress drew a statutory line between workers under age 50 and those over age 50 when it created ATAA. As an initial requirement, the ATAA statute requires that a worker "may elect to receive benefits under the alternative trade adjustment assistance program if the worker . . . is at least 50 years of age" and meets the other five statutory individual eligibility criteria. 19 U.S.C. § 2318(a)(3)(B). Plaintiffs are not trying to step across any statutory lines because they are not seeking ATAA payments for any month before each turned 50 years of age.

In addition to requiring participants be at least age 50, Congress required that individuals getting ATAA find reemployment within 26 weeks after separation from TAA certified employment. 19 U.S.C. § 2318(a)(3)(B)(ii). Contrary to this statutory language, TEGL 2-03 combines these two, separate statutory eligibility rules into a single requirement that individuals reach age 50 prior to reemployment. If Congress had wished to combine these separate age and reemployment eligibility requirements, it could have done so by combining the 26 week reemployment requirement in 2318(a)(3)(B)(ii) with the age 50 requirement in 2318(a)(3)(B)(iii). Congress did not do so. Congress provided separate reemployment and age 50 requirements.

Congress clearly intended that ATAA eligibility was based upon six separate requirements because Congress separated the fifth requirement from the sixth requirement with the word "and" at the end of Section 2318(a)(3)(B)(v). And, when the word "and" is used between the last two elements of a series of statutory provisions, it denotes an intent equivalent to inserting the word "and" between each of the listed elements. According to the ordinary meaning of the language used by Congress, ATAA eligibility requires that individuals must meet each of the six separate requirements for eligibility. There is no statutory language that indicates that these six requirements should be modified or supplemented by the Labor Department.

TEGL 2-03 requires that an individual not only be 50 years old and obtain reemployment within 26 weeks of separation, but that he or she also must be 50 *at the time of reemployment.* Clearly, TEGL 2-03 improperly combined these two independent ATAA statutory elements into a single age 50 at reemployment requirement in contravention of Congress' expressed intent.

All parties agree that appellees likewise met both the age 50 requirement and the 26 week reemployment requirement. Thus, uncontested facts in this appeal demonstrate that appellees fall

within the ATAA eligibility lines drawn by Congress: individuals who find work within 26 weeks of their separation from TAA-certified employment and are also 50 years of age at the time they elect to participate in ATAA. Thus, each appellee can receive ATAA payments under the plainly expressed intent of Congress in 19 U.S.C. § 2318.

Additionally, there is nothing in the purpose of TAA or the intent expressed by Congress that supports limiting ATAA payments in the manner proposed here by ODJFS and the U.S. Department of Labor. TAA laws are remedial legislation, and, as such, they are to be construed broadly to effectuate their beneficial purposes. *Former Employees of IBM v. Secretary of Labor* (2005) 403 F.Supp.2d 1311 (Court of International Trade). With respect to interpreting the TAA program's eligibility rules, courts have recognized that in enacting the Trade Adjustment Assistance program, Congress reflected what the federal District of Columbia Court of Appeals called a "mood of largesse." *International Union, UAW v. Brock* (1987) 816 F.2d 761, 765-766 (D.C. Cir.).

Recently, when enacting its 2009 TAA amendments, Congress reconfirmed its solicitude for trade impacted workers by adding a new section to TAA (Section 288 of P.L. No. 111-5, codified at 19 U.S.C. § 2397a)(2009) providing that the Secretary of Labor should apply the TAA statute "with the utmost regard for the interests of workers." Congress did not disturb this provision when it subsequently reauthorized TAA more recently in 2010 and 2011, and the Court of Appeals properly took note of this Congressional solicitude for trade impacted workers in reaching its favorable decision. In summary, the ATAA statute's language, intent, and purpose all confirm that appellees are eligible for ATAA.

Observing the conflict between the ATAA statute and TEGL 2-03, the majority of the Court of Appeals concluded:

> Congress had a choice to implement the age 50 requirement at the date of separation, the date of reemployment, or the date that the individual elects to receive ATAA benefits. Clearly, by choosing the latter Congress gave full effect to its intention to apply the ATAA provisions with the utmost regard for the interests of the worker by selecting the least restrictive age requirement to determine a worker's eligibility. (Appendix, Ex. C, ¶27, page 16-17.)

This reasoning by the court below is fully supported by the language, purpose, and intent expressed by Congress in establishing the ATAA program. It should be affirmed.

Proposition of Law II.

Where there are no statutory gaps or ambiguities requiring administrative interpretation, courts should not defer to an informal administrative guidance that is contrary to the legislative intent plainly expressed in that statute's language, purpose and legislative history.

A. The ATAA Statutory Eligibility Requirements, Read as a Whole, Provide Clear Guidance and Are Not Ambiguous.

The Court of Appeals carefully reviewed the statutory language here when reaching its favorable result. In so doing, the court rejected ODJFS' contention that the restrictive language of the TEGL was justified because Congress had been silent on the question of how old workers must be at the time of reemployment. The court below stated:

> In reviewing the plain language of 19 U.S.C. § 2318(a)(3)(B), we find no ambiguity on the question of when an individual must attain age 50 to be eligible for ATAA benefits. Rather, the statute clearly states that a worker may elect to receive benefits under the alternative trade adjustment assistance program if the worker is at least 50 years of age. Therefore, it is apparent that the statute is not silent, as ODJFS contends, but demonstrates that Congress has directly spoken to when an individual must be at least 50 years old to be eligible under the ATAA provisions and it is at the time the individual elects to receive benefits. (Appendix, Ex. C, ¶ 25, page 15-16.)

In this Court, ODJFS no longer argues Congressional silence in the ATAA law, but shifts its attack throughout its brief to an alleged "ambiguity" in the ATAA statute. But, as the Court of Appeals found, "Congress has directly spoken to when an individual must be at least 50 years

old under the ATAA provisions." Accordingly, there is no ambiguity in the ATAA statutory language that justifies administrative interpretation.

Further, absence of ambiguity is more firmly established when the ATAA statute's language, intent and purpose are fully considered. This requires looking at *all* the pertinent language of the ATAA statute. In particular, we will show that consideration of the ATAA statutory language in its entirety completely undercuts any ODJFS arguments dependent upon establishing ambiguity in the statute. Rather than silence or ambiguity, Congress has expressed its expansive intent regarding ATAA clearly, and this Court must give effect to that intent by affirming the lower court.

Rather than showing any ambiguity in the ATAA statute's eligibility rules by examining the statutory text, the brief of ODJFS offers a number of imaginative hypotheticals to demonstrate that there were unanswered questions that required administrative interpretation to operate ATAA in other portions of the ATAA program. "Congress drafted only a skeleton of the ATAA program and authorized the Department [of Labor] to flesh out the details." ODJFS Brief at 11.

The fact that there were gaps in other portions of the ATAA program involving certification issues (ODJFS Brief at 11) or how to count overtime income when calculating participants' annual income or look at transferable skills or the treatment of overtime (*id.*, page 12), entirely misses the key statutory interpretation point here: are there any gaps in the six individual eligibility rules Congress established in 19 U.S.C. § 2318(a)(3)(B)? And here, two UCRC hearing officers, the Common Pleas Court judge, and the Court of Appeals majority all concluded that rather than filling an ambiguity in ATAA, TEGL 2-03 was in conflict with Section 2318(a)(3)(B).

Remaining ATAA statutory provisions beyond the individual eligibility rules in Section 2318(a)(3)(B) fully address any lingering fears of ambiguity regarding individual eligibility for ATAA. In addition to the individual eligibility requirements set out in paragraph (a)(3)(B), Congress also provided in paragraph (a)(2)(A) that "A State shall use the funds provided to the State under section 2313 of this title to pay, for a period not to exceed 2 years, to a worker described in paragraph (3)(B), 50 percent of the difference between - (i) the wages received by the worker from reemployment; and (ii) the wages received by the worker at the time of separation." 19 U.S.C. §2318(a)(2)(A). And, Congress limited these two year payments to $10,000 over the two year period by providing that "The payments described in paragraph (2)(A) made to a worker may not exceed $10,000 per worker *during the 2-year eligibility period.*" 19 U.S.C. §2318(a)(4)(emphasis added). Congress further left the decision of when in the two-year period to apply to affected workers who "may elect to receive benefits" if otherwise eligible for ATAA. 19 U.S.C. § 2318(a)(3)(B).

Rather than supporting the restrictive "age 50 at reemployment" interpretation of the TEGL, the fact that Congress established a two-year eligibility window and permitted retroactive ATAA benefits undercuts ODJFS' restrictive position. If Congress sought to limit the reach of ATAA to only those who were age 50 at reemployment, it could have required an application at the time of reemployment when writing the statute. It did not do so; it provided a 26 week reemployment requirement and an independent age 50 requirement.

In addition, nothing in these statutory provisions indicates any intent to adopt measures to narrow the range of individuals assisted by ATAA. Instead, the entire ATAA provision enacted by Congress evinces its intent to pay workers ATAA *at any point* during the two-year eligibility period established for ATAA when they meet the statutory requirements and *elect* to participate.

This could be at the time of reemployment, at the time age 50 is reached, or at the time their income falls beneath the annual $50,000 limit. Thus, the danger purportedly avoided by the TEGL's restrictive age 50 at reemployment requirement is in fact not a danger. Instead, the restrictive approach of TEGL 2-03 violates the clear intent of Congress.

Additional support for appellee's reading of the ATAA statute is provided by the legislative history of the 2002 TAA amendments. In its Conference Report, the Congress summarized the eligibility requirements for the newly adopted ATAA program, stating:

> An adversely affected worker may be eligible to receive a wage subsidy if the worker obtains reemployment not more than 26 weeks after the date of separation from the adversely affected employment, is at least 50 years of age, earns not more than $50,000 a year in wages from reemployment, is employed at least 30 hours a week in the reemployment, and does not return to the employment from which the worker was separated. (Emphasis added.)
>
> U.S. House of Representatives, Conference Report, "Trade Act of 2002," House Report 107-624, page 127-128.

There is nothing in this Congressional eligibility summary that furnishes any support for combining the statute's age 50 eligibility requirement with its 26 week reemployment requirement into a separate "age 50 at reemployment" requirement.

In conclusion, the statute, read as a whole, and in light of its plain meaning and legislative history proves that Congress wanted as many eligible individuals as possible to get ATAA benefits, including those who elect to participate if they reach age 50 after finding reemployment within 26 weeks of layoff and elect to participate within the two-year eligibility period. Affirming the Court of Appeals will only provide relief to those individuals, like appellees, who have found work within 26 weeks and elect to participate in ATAA after they reach age 50.

B. The Labor Department's Restrictive Age 50 at Reemployment Requirement Does Not Provide Reasonable Guidance in the Administration of ATAA.

ODJFS asserts that this Court must defer to TEGL 2-03's restrictive interpretation because it is "reasonable." In asking this Court to reverse the Court of Appeals, ODJFS furnishes this Court with a number of scenarios that prove, in their view, that TEGL 2-03's age 50 at reemployment requirement has some reasonable and valid role in implementing ATAA. In so doing, they offer post-litigation rationalizations that fail to prove that TEGL 2-03 is a reasonable administrative measure aligned with the rest of the ATAA program. Indeed, ODJFS' arguments offer this Court to understand that the challenged TEGL provision is unreasonable when assessed carefully in the context of the ATAA statute and other Labor Department ATAA guidance.

In one hypothetical, ODJFS claims that workers of ages as low as 48 could gain access to ATAA benefits in the absence of an age 50 at reemployment restriction, making ATAA available to "thousands more workers than Congress intended" and resulting in payments of up to two years of retroactive ATAA benefits to these individuals. ODJFS Brief at page 17.

To begin, this assertion concerning retroactive benefits is plainly wrong because ODJFS' hypothetical assumes that any judicial invalidation of the TEGL's age 50 at reemployment restriction leaves the ATAA program without an age 50 requirement. The statute itself, of course, states that workers must find reemployment within 26 weeks of their separation from TAA-certified employment *and* they must be 50 years old to participate in ATAA. Striking down the age 50 at reemployment rule would have no impact on the statute's explicit requirement that a TAA certified worker "may elect to receive benefits under the alternative trade adjustment assistance program if the worker . . . is at least 50 years of age." 19 U.S.C. § 2318(a)(3)(B)(iii). Certainly, some workers who are less than age 50 at reemployment might conceivably apply for benefits if they reach 50 years of age within the 2-year eligibility window set by Congress for

ATAA as long as they found reemployment within 26 weeks. However, the fact that retroactive benefits are available in some cases does not translate to workers less than 50 years of age receiving 2 years of retroactive ATAA benefits outside of the terms of statutory eligibility requirements. This will be fully explained below.

Indeed, other Labor Department ATAA guidance contradicts ODJFS' assertion that the "age 50 at reemployment" restriction is reasonably designed to prevent younger workers from taking advantage of the program through the issuance of retroactive benefits. The initial Labor Department interim instructions on ATAA in TEGL 2-03 were augmented subsequently by the department in TEGL 2-03, Change 1, which included an attachment with a number of questions and answers regarding ATAA for state agencies in an attachment. Most significant for the consideration of this appeal is Question 41 and its Answer in TEGL 2-03, Change 1, which applies directly to the appellee's facts.

> Q: In the event a worker applies for ATAA and is denied by virtue of being 49 years old, would the worker qualify when he/she turns 50 and is still reemployed?
>
> A: TEGL 2-03, Section E, requires that an individual be 50 years of age at the time of reemployment to be considered for the ATAA wage subsidy. Therefore, a worker denied by virtue of being 49 years old would not qualify if he/she turns 50 and is still reemployed in the same job. However, in the unusual circumstance that the worker becomes separated from the initial reemployment and reemployed again within 26 weeks from his/her qualifying separation and has turned 50, he/she may be eligible for the ATAA wage subsidy at that time.
> (ODJFS Appendix, Ex. T, page 10.)

Obviously, this exchange involves the very situation faced by appellees. Each found reemployment when they were 49 and then elected to participate in ATAA when they reached age 50. And, at a minimum, Answer 41 shows that measuring ATAA eligibility at the time of reemployment is not uniformly utilized as the keystone eligibility milepost claimed by ODJFS.

Further, the exchange involving Question and Answer 41 in TEGL 2-03, Change 1 is significant because it shows that the "age 50 at reemployment" requirement does not introduce clarity or reasonableness to ATAA, but instead produces absurdity. Under the interpretation offered in Answer 41, if appellees had delayed their job search, continued drawing unemployment compensation, and returned to work only after turning 50 they could get ATAA. Or, if they obtained reemployment prior to turning 50, got laid off, and then were reemployed within 26 weeks after they turned 50, they are also eligible according to Change 1, Answer 41. But, under Answer 41, since appellees all found work within the 26 week requirement at age 49, and then applied for work after they reached age 50, they are ineligible under TEGL 2-03 and Answer 41. This sort of line drawing is hardly the reasonable exercise that ODJFS is claiming for the operation of the age 50 at reemployment requirement.

What is gained by making 49 year old workers delay reemployment to obtain TAA? As noted by the courts below, the age 50 at reemployment requirement of TEGL 2-03 is undercutting rapid reemployment, which the Labor Department has asserted is a major purpose of the ATAA program. With regard to ATAA's purpose, TEGL 2-03 stated:

> It is essential that the Department of Labor ("DOL"), State Workforce Agencies "SWA"), long One-Stop Career Center partners and other mission critical partners work together to move trade-affected workers into new jobs as quickly and effectively as possible. To this end, the primary focus of ATAA reemployment benefits and services will be toward rapid, suitable and long-term employment for adversely affected older workers served by the program. (TEGL 2-03, ODJFS Appendix, Ex. S at page 2.) (Emphasis added.)

Encouraging laid off workers to wait before accepting reemployment, just so they can maintain ATAA eligibility is patently contrary to the purposes of ATAA as expressed in TEGL 2-03.

Are all the ATAA eligibility requirements administered at the time of reemployment? In the court below, Judge Roberts stated in his dissent that he would uphold TEGL 2-03 because all

six of the ATAA eligibility requirements "must be determined at the time the individual obtains reemployment." (Court of Appeals Decision, ¶ 39, ODJFS Ex. C, page 22.) ODJFS likewise argues that all six of the ATAA individual eligibility requirements "logically are measured at the time of reemployment." ODJFS Brief at 15. These arguments are not supported by the ATAA administrative guidance furnished by the Labor Department, which we now examine closely.

To begin this examination, we not that Questions and Answers in TEGL 2-03, Change 1 demonstrate that other eligibility rules for ATAA are not tied only to the time of reemployment, but vary in their application during the two-year TAA eligibility period. So, in the situation where a worker initially obtains reemployment with wages above $50,000, if the worker is separated from that job and later accepts a lower paying job, the worker can reapply for ATAA and gain eligibility so long as the new job falls within the 26 week reemployment eligibility requirement. (*See* TEGL 2-03, Change 1: Question and Answer 40, Ex. T, page 12).

This necessarily means that the $50,000 ATAA eligibility requirement is not invariably measured in relation to initial reemployment. Why is it more reasonable to measure the $50,000 income limit at any time in the two-year eligibility period, while only measuring age at the time of reemployment? Indeed, income is measured as frequently as weekly under the ATAA program, and at no point for time periods longer than a month under TEGL 2-03, Change 1 (*Id.*, Question and Answer 29, Ex. T, page 9).

As another example found in Change 1, if a person eligible for ATAA "quits or is fired from his/her job, and finds another job," that person "can reapply for ATAA when he/she obtains subsequent employment for up to two years from the date of original reemployment." (*Id.*, Question and Answer 21, Ex. T, page 7.) Similarly, in answer to a question regarding workers

laid off and reemployed prior to a TAA certification, the Department explains why these workers can obtain retroactive payments, stating:

> A: TEGL 2-03, Section E, provides that the two year eligibility period for receiving ATAA payments begins with the first day of the ATAA qualifying reemployment and that the individual has two years from that date to apply. This means that the payments may be made retroactively if the worker has obtained qualifying reemployment within 26 weeks of layoff and later applies for the program.
>
> (*Id.*, Answer 36, Ex. T, page 11.)

In short, the idea that measuring all six ATAA eligibility requirements from the time of reemployment supports restricting eligibility only those who are 50 when reemployed is not supported by the Labor Department's own interpretative guidance for ATAA.

ODJFS offers another example that it claims supports its contention that measuring ATAA eligibility at the time the worker elects to participate in ATAA "could lead to unintended results." ODJFS Brief at 15. In its example, ODJFS claims that if a worker initially laid off from a $65,000 job found reemployment at a $44,000, but did not immediately apply for ATAA, that worker would not be eligible if she had obtained a salary increase to $52,000 in the interim—if her eligibility was judged at the time she applied.

This purported dilemma, however, is avoided simply by accepting a retroactive application and paying this individual ATAA for every month (or shorter period) she met the requirements of ATAA. There are a number of relevant portions of TEGL 2-03 and TEGL 2-03, Change 1 that show that, in reality there are no "unintended consequences" arising from ODFJS' example. To begin, TEGL 2-03 states that the "application for ATAA must be filed within two years of the first day of qualifying reemployment." (TEGL 2-03, page 6, ODJFS Appendix, Ex. S, page 8). States are required to have a documentation period and payment frequency of no more than a month, according the guidance, and periods of employment need not be consecutive.

"Once approved for the ATAA program, individuals who continue to meet the eligibility criteria are paid ATAA benefits until a total of $10,000 in benefits has been received, or a period of two years has elapsed since their first qualifying reemployment. . . . "*Id.*, page 8-9. TEGL 2-03 continues, "The ATAA wage subsidy will be paid on a weekly, biweekly, or other payment frequency not to exceed monthly, as established by the state, ensuring that the total payment does not exceed the $10,000 maximum over a two-year period." *Id.*, page 8-9.

Question and Answer 36 in TEGL 2-03, Change 1 (partially quoted above) addresses any remaining questions and disposes of any risk of "unintended consequences" arising from retroactive payments of ATAA. It reads, in relevant part:

> Q: . . . .[I]f workers apply and qualify for ATAA, can they receive a retroactive payment for the period they were employed prior to the date of ATAA certification? Could these workers receive a lump-sum payment of $10,000 if the difference between pre-separation and reemployment wages were sufficient to warrant such a payment? Would this also apply to workers who do not apply for the subsidy until the end of the eligibility period?
>
> A: TEGL 2-03, Section E, provides that the two year eligibility period for receiving ATAA payments begins with the first day of the ATAA qualifying reemployment and that the individual has two years from that date to apply. This means that the payments may be made retroactively if the worker has obtained qualifying reemployment within 26 weeks of layoff and later applies for the program. In addition, a lump-sum payment is possible if the difference between the pre-separation and reemployment wages were sufficient to warrant such a payment. (ODJFS Appendix, Ex. T, page 11.)

In short, ODJFS has failed to show that there is a legitimate need for the TEGL's "age 50 at reemployment" restriction to keep otherwise eligible individuals from drawing ATAA at any point during its two-year eligibility period. Other administrative guidance does not support ODJFS' claims of reasonableness for TEGL 2-03. If income can be considered on a week-by-week or monthly basis and if workers can elect to participate in ATAA retroactively for up to two years, why must the Act's age 50 requirement be measured only at the time of

reemployment? If individuals who choose to do so, or who are not initially qualified for ATAA can apply retroactively for the program, why are those who turn 50 after they have found reemployment barred from doing so? ODJFS' hypotheticals reveal even more clearly than shown previously in this case that the age 50 at reemployment requirement is simply a bureaucratic fiat that plays no reasonable role in administering ATAA.

There is no valid administrative reason why the age 50 requirement could not be measured the time an individual elects to participate in ATAA. Among the individuals negatively impacted by the Labor Department's restrictive interpretation are the appellees here—who were not 50 when they obtained employment within the 26 week period required, but who were 50 when they sought to participate in ATAA. They should prevail in this appeal.

C. This Court Should Not Defer to An Informal Administrative Interpretation Interposing A Requirement That Individuals Must Be Fifty Years of Age at the Time of Reemployment to Receive ATAA.

ODJFS has shifted ground in defending its position during this litigation. In seeking review here and before the Court of Appeals, the agency framed its position in terms of the longstanding test for evaluating challenged administrative interpretations under *Chevron USA v. Natural Resources Defense Council, Inc.* (1984), 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694. Here, ODJFS doesn't even cite this U.S. Supreme Court case in its brief on the merits, instead relying upon Ohio case law concerning judicial deference involving a number of statutes other than unemployment compensation. Under either Ohio jurisprudence or case law applying *Chevron*, however, ODJFS cannot show that this Court is bound by to deny ATAA to appellees by deferring to TEGL 2-03's age 50 at reemployment requirement.

ODJFS asserts that TEGL 2-03 is reasonable and deserves deference. But, its brief does not successfully show that its interpretation is reasonable or persuasive. In its brief, ODJFS

doesn't offer this Court a serious defense of the TEGL's text or its relation to the statute it is supposedly implementing. In reality, ODJFS does not urge any sort of typical judicial deference to administrative interpretations before this Court; ODJFS is urging blind deference to the TEGL. Blind deference, however, is not the law.

In Ohio, as under the federal case law applying *Chevron,* the Courts will not accept an agency regulation that exceeds the scope of the underlying statute. This Court recently reaffirmed that principle of administrative law in *McFee v. Nursing Care Mgmt. of America* (2010), 126 Ohio St. 3d 183, 2010 Ohio 2274. *McFee* concerned the application of an Ohio Administrative Code Section promulgated by the Civil Rights Commission. The *McFee* court noted that if an administrative rule exceeds the statutory authority established by the General Assembly, the agency has usurped its legislative function, thereby violating the separation of powers established by the Ohio Constitution. *Id.* at ¶ 24.

Similarly, the U.S. Supreme Court in *Chevron, supra,* recognized that the statute subjected to agency interpretation acts as a limit upon administrative discretion. As the Supreme Court explained there, whether a court must defer to an agency's interpretation of a statute depends first on whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron* , 467 U.S. at 842-843. In short, under both Ohio law and federal law, this Court cannot defer to TEGL 2-03 unless it finds that Congress has not clearly spoken on the question of appellees' eligibility for ATAA.

Even if this Court rejects appellees' argument that Congress has foreclosed deference in this case through its plainly expressed intent, the sort of interim guidance offered in TEGL 2-03 does not warrant deference. In *Mead v. United States* (2001), 533 U.S. 218, 228, the U.S.

Supreme Court summarized its approach to judicial deference to agency interpretations in light of *Chevron:* "The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position . . . ." (Footnotes and citation omitted.) When examined closely, TEGL 2-03 does not merit deference under these well-established criteria.

At the outset, it is important to note that TEGL 2-03 contains significant limitations in terms of the established criteria employed by courts to determine whether an administrative interpretation is worthy of deference by a reviewing court. First, TEGL 2-03 lacks formality as a statement of law. Although published in the Federal Register, TEGL 2-03 is not found in a regulation, as was the Environmental Protection Agency regulation subject to challenge in *Chevron.* Indeed, TEGL 2-03 is described on its face by the Labor Department as an "interim" instruction pending issuance of regulations. (TEGL is controlling guidance "[p]ending the issuance of regulations implementing the provisions of the Act." ODJFS Ex. S, page 2).) In short, TEGLs lack the formality, public input, and care found when agencies are promulgating regulations.

Moreover, TEGL 2-03 does not identify any statutory gap or ambiguity in ATAA or otherwise explain why its "age 50 at reemployment" is required to implement the ATAA program. As a result, TEGL No. 2-03 lacks thoroughness and care because it merely asserts the "age 50 at reemployment" requirement as an added eligibility requirement for ATAA beyond those provided by Congress in Section 2318(a)(3)(B). TEGL No. 2-03 does not discuss the underlying statute or give any agency rationale for adopting the age 50 requirement in addition to those ATAA eligibility rules found in the statute. The age 50 at reemployment requirement is

simply asserted as administrative fiat. For this reason, TEGL No. 2-03 lacks minimal persuasiveness and is not deserving of judicial deference by this Court.

In terms of expertness, unfortunately, the Labor Department has followed a pattern of adopting restrictive interpretations of TAA over the years, rather than adhering to Congress' intent to administer the program by ensuring that it serves the interests of affected workers. And, as a result, other courts have rejected restrictive interpretations of TAA offered over the years to bar TAA to workers who fell within Congressional statutory guidelines. These case offer support for the similar approach followed here by the Court of Appeals.

In *UAW v. Brock, supra,* the U.S. Court of Appeals rejected a Labor Department handbook that narrowly defined an employment test required for eligibility for Trade Readjustment Allowances (TRA is a cash benefit equivalent to unemployment benefits made available under TAA). The court rejected the handbook's interpretation that would have eliminated TRA eligibility for many part-year employees on sick leave or vacation, finding that those workers were "employed" in the ordinary sense of those words and holding that there was no indication that treating them as unemployed was consistent with the TAA statute's plainly expressed intent. The *Brock* court refused to defer to the handbook provision, quoting the Supreme Court's decision in *Chevron* that where the intent of Congress is clear the "court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 816 F.2d at 764, quoting *Chevron,* 467 U.S. 837 at 842-843.

Similarly, in *Eastman v. Administrator, OBES* (1990) 67 Ohio App.3d 318, 323-324, the Court of Appeals for Huron County reviewed a case involving Trade Readjustment Allowances. Noting the beneficial intent of Congress in enacting TAA, the *Eastman* court held that a TAA applicant's permanent layoff should be considered as his "first qualifying separation," rather than

an earlier temporary layoff whose use would have rendered the applicant ineligible for benefits. "As there is obviously room for more than one interpretation of the statute, it should be construed in such a way as to give effect to the general intent of the legislature." 67 Ohio App.3d at 323. As in this case, the Labor Department interpretation at issue in *Eastman* required a more restrictive approach that would have deprived many workers of TRA benefits when they had short term layoffs prior to their final separations from TAA-certified employment. In rejecting this restrictive administrative interpretation, the *Eastman* court noted language in *Chevron* that "[I]t remains the ultimate responsibility of the judiciary to determine congressional intent, and administrative constructions which are contrary to clear congressional intent must be rejected." 67 Ohio App.3d at 323 n. 3. As a result, the *Eastman* court determined that it was not appropriate to defer where the agency's administrative interpretation was contrary to Congressional intent.

In *Department of Labor and Economic Growth v. Dykstra* (2009), 283 Mich. App. 212, 771 N.W.2d 423, a Michigan court was recently confronted by another restrictive Labor Department interpretation concerning TRA eligibility in applying statutory timelines for enrollment in training. Although the applicable statutory text (since changed by Congress) required workers to enroll for training within 8 or 16 weeks of specific events, the Labor Department applied those same time enrollment limits to a separate statutory option to obtain a waiver of the training requirements. As a result, workers who obtained a waiver of training after 8 or 16 weeks were denied TRA benefits, even though the 8 and 16 week statutory time limits appeared to apply only to the enrollment requirement. The Michigan Court of Appeals, closely reading the text of the statute, wrote:

> Because Congress's intent is clear, the Department's determination that the [enrollment] deadlines should apply to the waivers permitted under § 2291(a)(5)(C) and § 2291(c) is not entitled to any deference. Indeed, because the Department's construction of the statutory scheme contradicts Congress's

> unambiguously stated intent to limit application of the § 2291(a)(5)(A)(ii) deadlines, we must reject that construction.

771 N.W.2d at 433, (citation within text omitted). In a similar fashion, the Court of Appeals here did not casually disregard TEGL 2-03, but correctly refused to defer to an interpretation that departed from Congressional intent after engaging in careful analysis.[3]

ODJFS cites a number of Ohio cases in support of its judicial deference defense. While they support the general legal propositions ODJFS is urging before this Court, they do not fall squarely into the facts applicable here or provide binding legal precedent in this appeal.

For example, ODJFS cites *Nw. Ohio Bldg. & Constr. Trades Council v. Conrad* (2001), 92 Ohio St. 3d 282. That case dealt with a challenge to a Bureau of Workers' Compensation rule holding that certain managed care organizations' administrative fees in were to be paid out of the State Insurance Fund. *Id.* at 282. Unlike the TEGL at issue here, the rule under contention in *Conrad* was found in the Ohio Administrative Code. *Id.* at 285. An insurance company challenging the rule argued that the Bureau lacked legislative authority to authorize payments of these costs from the State Insurance Fund. *Id.* at 286.

This Court held that BWC had the statutory authority to implement this administrative rule and that its interpretation was reasonable. *Id.* at 288-89. However, the *Conrad* court specifically found that the issue that the challenged rule addressed—the funding of managed care organizations' administrative fees—was not found anywhere in the statute. *Id.* In this appeal, we have an overall set of statutory ATAA eligibility requirements. Rather than filling a gap or

[3] Appellees will discuss a Wisconsin appellate case involving the same TEGL concerning the 8 and 16 week rule interpreted in *Dykstra* in conjunction with ODJFS' argument that Ohio is contractually bound to follow TEGL 2-03 in Argument D below.

addressing an ambiguity, the TEGL is barring assistance to individuals falling within the ATAA statute's scope. There is no ambiguity here as in the statute involved in *Conrad.*

Another case cited on legislative deference by ODJFS is *Swallow v. Indus. Comm'n of Ohio* (1988), 36 Ohio St. 3d 55. This case also concerned the payment of workers compensation benefits. The court specifically noted that the statute at issue in *Swallow* did not specify whether the payments it provided for were to be made consecutively or concurrently. *Id.* at 56. In the face of this statutory silence, the *Swallow* court found that the Commission's policy was a reasonable interpretation of R.C. § 4123.57(B). Again, statutory ambiguity is not the context for this appeal and there was no claim that the agency interpretation was directly contrary to the underlying statute.

McLean v. Indus. Comm'n of Ohio, 25 Ohio St. 3d 90 (Ohio 1986) similarly concerned the interpretation of a provision of Ohio's workers compensation law. *Id.* at 91. The issue was whether the claimant was considered to have lost his leg (as opposed to just his foot) and qualified for the accompanying workers' compensation benefits under the statute. *Id.* at 91-92. There was no explicit statutory answer to that question, so the *McLean* court relied on agency manuals and guidelines to uphold the commission's denial of the claim, stating, "we specifically decline to substitute our judgment for that of the commission by defining what level of amputation constitutes the loss of a leg or the loss of a foot." *Id.* at 93. Once again, this case is not squarely on point in this appeal, because it involved deference to agency interpretations of a statute that did not address the question being considered.

As pointed out by the court in *Swallow,* it should also be noted that Ohio law explicitly authorized the Workers Compensation Bureau to determine claimants rights to benefits under the law, *id.,* 57, putting that agency's interpretations on a different legal footing than the informal

TEGL at issue in this appeal. The administrative authority of the Secretary of Labor, in contrast, includes the power only to "prescribe such regulations *as may be necessary to carry out this part.*" 19 U.S.C. §2320. Here, the challenged TEGL is not embodied in a regulation and is unnecessary to carry out the ATAA program because it is contrary to Section 2318 and unreasonable.

Appellees agree with ODJFS that when interpreting a federal statute, as in this appeal, judicial deference to federal agencies is potentially applicable, as held in *Charvat v. Ryan* (2007), 116 Ohio St. 3d 294, 2007-Ohio-2838 and *Jones Metal Products Co. v. Walker* (1972), 29 Ohio St. 2d 173. In *Charvat*, this Court deferred to a policy embodied in a published Federal Communications Commission adjudication. In *Jones Metal,* the Ohio Supreme Court considered whether obsolete Ohio female protection statutes were inconsistent with Title VII and therefore unenforceable. *Id.* at 174. In finding that the Ohio laws restricting the nature and number of hours women could work were unenforceable, the Court relied upon Equal Employment Opportunity Commission regulations found in the Code of Federal Regulations. *Id.* at 180-81. This case is easily distinguishable because the *Jones Metal* court was deferring to formal regulations as well as numerous factors other than the EEOC regulations, including the legislative history and policy behind the statute. *Id.* at 177, 180. Here, those factors weigh against administrative deference because the statute does not require interpretation and the TEGL disqualifies individuals who fall within the ATAA statute's terms. Similarly, while the *Charvat* case involved judicial deference to a federal agency interpretation, it fails to address the key questions here; namely, whether TEGL 2-03 offers this Court a reasonable and persuasive basis for judicial deference in this appeal. For this reason, *Charvat* and *Jones Metal* support only the

general rules of administrative law for which it is cited by ODJFS, but their results and holdings are too far afield from the facts and legal context here to constitute binding precedent.

Brock , *Eastman,* and *Dykstra* show that when there is demonstrated conflict between the TAA statute's language and intent and a restrictive Labor Department administrative interpretation of that statute, courts have held in well-reasoned decisions that the statute should control.[4] And, because that is precisely what the Court of Appeals did here, its decision should be affirmed.

Appellees' Proposition of Law III:

ODJFS and the Labor Department are bound to follow Congressional intent and neither has any power to bind this Court to an informal interpretation of ATAA eligibility that is contrary to the statute or to limit this Court's Congressional grant of authority to review TAA cases "in the same manner and to the same extent" as when reviewing Ohio unemployment compensation cases.

Here, the Unemployment Compensation Review Commission relied upon Ohio's operating agreement with the Labor Department as its main rationale for applying TEGL 2-03's age 50 at reemployment provision to appellees' applications for ATAA. According to ODJFS, this agreement makes Ohio contractually bound to follow TEGL 2-03 as agent of the Labor Department. (ODJFS Brief at p. 3-6, 7-10.)

ODJFS asserts that it had a "contractual obligation" to the U.S. Department of Labor, and "had no choice to make the benefits determination that it did." *See* ODJFS Brief at page 7. This argument is untenable on a factual and legal basis. First, as a factual matter, the statutory language authorizing operating agreements clearly mandates that states operating TAA programs under these agreements must do so consistently with the TAA statute. Specifically, Congress has

[4] In terms of the precise ATAA eligibility question presented in this appeal, namely, the age 50 at reemployment restriction of TEGL 2-03, appellees know of no reported or unreported cases deciding this issue in Ohio or in any other state.

provided that TAA will be administered through agreements with cooperating state agencies "as agent for the United States," and that these state agencies "will receive applications for, and will provide, payments *on the basis provided in this part.*" 19 U.S.C. § 2311(a)(emphasis added). Not surprisingly, this language indicates that Congress did not grant the Secretary of Labor or its state agency partners the power to operate TAA under agreements that violate the TAA statute. But, that power is, in reality, the power that ODJFS is claiming for these agreements, a power under which administrative agencies could alter the statute they are charged with implementing.

Second, the cooperating agreement itself states:

> [T]his Annual Cooperative Financial Agreement . . . is entered into between the Employment and Training Administration, U. S. Department of Labor . . . and the . . .State of Ohio . . . for the purposes of carrying out the activities authorized under Subchapters B, C, and D of Chapter 2 of Title II of the Trade Act of 1974, as amended by the Trade Adjustment Assistance Reform Act of 2002 . . . the North American Free Trade Implementation Act, and the implementing regulations at 20 CFR 617.
>
> (Annual Cooperative Financial Agreement, Supplement to Merit ODFJS Brief at page S-3.)(Text omitted, emphasis added.)

Manifestly, the cooperating agreements are intended to permit the Labor Department and states to operate TAA within the parameters set by Congress. The cooperating agreements provide no basis for reading them as altering statutes or enforcing eligibility measures inconsistent with law.

Notably in regard to the impact of the cooperating agreements on this Court, Congress made administrative decisions of cooperating state agencies granting and denying TAA benefits to individuals "subject to review in the same manner and to the same extent as determinations under the applicable State [unemployment compensation] law and only in that manner and to that extent." 19 U.S.C. § 2311(d). As a result, this Court reviews this case with the express approval of Congress, and Congress provided for that review "in the same manner and to the same extent" as cases under Ohio's unemployment compensation law. In light of this plenary language, there

is no indication that Congress intended to give the Department of Labor any authority to limit the power of Ohio's judiciary through its cooperating agreements with agent states.

Taking these two statutory provisions into consideration, the Court of Appeals' majority considered and rejected ODJFS' arguments concerning the impact of cooperating agreements:

> ODJFS is essentially asserting that Department of Labor, via a mere guidance letter, is permitted to unilaterally supersede the role of this State's judiciary in reviewing TAA benefits claims as established by both federal and state law. ODJFS further seems to assert that the previously mentioned "Financial Agreements" between the Governor's office the U.S. Department of Labor, also permit ODJFS to contractually bypass and/or supercede (sic) the express provisions of [TAA law] as well as the statutory standards of review for both the ODJFS, Review Commission and the state court system . . . .We reject these assertions.
>
> (Court of Appeals Decision, ¶ 32, ODJFS Appendix, Ex. C, p. 19.)(Statutory citations omitted.)

Indeed, reading the TAA law as providing any mandate to the Labor Department and cooperating states to override judicial review would raise serious constitutional questions regarding state sovereignty, the separation of powers, and federalism.

Second, appellant's argument regarding the controlling power of its cooperating agreement with the Labor Department in this matter is contrary to basic precepts of administrative law. It is universally understood that an administrative agency is limited to actions falling within its statutory framework. Accordingly, an agency cannot act in contravention of the statute subject to its administration. 2 American Jurisprudence 2d "Administrative Law," § 59 states as follows:

> An administrative agency has no discretion to disregard the statute or law bestowing power, to ignore or transgress limitations upon its power, or to withhold its approval or authorization where statutory conditions to such approval are met. The discretion which is afforded to administrative discretion may not justify the agency in altering, modifying, or extending the reach of the law created by the legislature. (Citations omitted, emphasis added.)

Later, this same annotation at § 70 discusses agency power to interpret law:

> Agencies cannot by interpretation enlarge the scope of or change a properly enacted statute. An agency cannot modify, abridge, or otherwise change the statutory provisions under which it acquires authority unless the statutes expressly grant it that power. (Citations omitted.)

Here, neither ODJFS nor UCRC has openly claimed that the TAA statute grants the Labor Department or its agent states the authority to act contrary to the statute. However, ODJFS' argument that they have entered into an agreement that requires them to follow TEGL 2-03 is tantamount to arguing that TEGL 2-03 is binding despite the conflict with the ATAA statute recognized by UCRC's hearing officers and the lower courts in this matter. And, once the logical implications of ODJFS' arguments are exposed, their rejection by the Court of Appeals is understood as well grounded in the statutory provisions and facts in this case.

In summary, any argument regarding the binding nature of the cooperating agreements on ODJFS, UCRC, or this Court must fail in light of the fact that the statute authorizing these agreements and the agreement itself only purports to permit these agreements for the purpose of operating TAA in conformity with the TAA statute. Properly considered, nothing in these agreements would make TEGL 2-03 binding in Ohio or insulate TEGL 2-03 from judicial scrutiny "in the same manner" as with an Ohio unemployment compensation determination.

Appellees recognize that there is contrary authority from a closely similar case. In *Wisconsin Dep't of Workforce Development v. Labor and Industry Review Comm'n*, (2006), 725 N.W.2d 304, 2006 WI App 241, the Wisconsin Court of Appeals accepted the state agency's argument there that the state's agreement with the Labor Department was binding upon Wisconsin, including its administrative appellate commission. The case was litigated on the validity and impact of the cooperating agreement as a duel between the two state agency

components. In a divided opinion, the Court of Appeals upheld the applicability of the cooperating agreement and of the validity of the TEGL involved in that case (TEGL 11-02).

In evaluating the precedential value of *Wisconsin Dep't of Workforce Development* here,[5] this Court should note that the court majority had earlier in its opinion determined that the TAA statute there (involving the same 8 and 16 week rule dispute that was the subject of *Dykstra* in Michigan) was ambiguous and that the TEGL was therefore required to resolve that ambiguity. Opinion, ¶ 23, 24, 725 N.W. 2d at 311-312. The Wisconsin court conceded in its opinion that a different situation would obtain if there was a conflict between the statute and a TEGL.

> As for LIRC's argument that it has complied with the agreement because it has correctly interpreted the Act, this argument raises an issue that would need resolution *if* the 11-02 guidance letter conflicted with the plain language of the Act. In that situation, one could argue that the agreement could not be reasonably construed to mean that a state must follow a guidance letter if that is inconsistent with the plain language of the Act. However, in this case we have already concluded that the statutory language at issue is ambiguous and the 11-02 guidance letter gives it a reasonable meaning. *Id.*, ¶ 33, 725 N.W.2d at 314.

In short, the Wisconsin court recognized that the cooperating agreement "could not be reasonably construed to mean that a state must follow a guidance letter if that is inconsistent with the plain language of the Act." And, the Michigan court in *Dykstra* rejected the argument that the state's TAA cooperating agreement required it to follow a TEGL where the court found that the TEGL was in conflict with the plain meaning of the TAA law. *Dyskstra, supra,* 771 N.W.2d at 433 n.7.

In this appeal, the majority of the Court of Appeals panel properly concluded that the ATAA statute was not ambiguous and found that TEGL 2-03 was in conflict with the ATAA

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[5] In Wisconsin, the second-level review administrative body (roughly equivalent to Ohio's UCRC) is a party to an appeal along with the state agency, rather than the state agency only (ODJFS) as in Ohio. Notably, only the Wisconsin state agency and the review commission were represented by counsel and submitted briefs.

statute. This posture places this case in closer alignment with *Dykstra* where the court declined to follow the Wisconsin case. As a consequence, the holding in *Wisconsin Dep't of Workforce Development* is not squarely on point in this case. Admittedly, if this Court concludes that Section 2318 is ambiguous, then the Wisconsin case is closer to the present appeal, although it doesn't follow that this Court could them simply conclude that TEGL 2-03 was a reasonable interpretation of the ATAA statute, as a different statute and TEGL were involved in *Wisconsin Dep't of Workforce Development.*

In summary, in light of the statutory language in Sections 2311(a) and (d) and the terms of the operating agreement itself, this Court should reject ODJFS' claim that its operating agreement means that Ohio's agency and courts are bound by an informal, non-regulatory and interim guidance. The Court of Appeals properly rejected this argument and it should be rejected by this Court.

ODJFS makes a final argument based upon "consistency" and "uniformity" in support of the TEGL's age 50 at reemployment. First, it argues that since Congress has extended the life of TAA through reauthorization or technical amendments four times since 2002 the age 50 at reemployment deserves added judicial deference. ODJFS Brief at 18. In response, we would point out that there is nothing in the record in this case or in ODJFS' Brief that gives even the slightest indication that Congress is aware of the Labor Department's restrictive TEGL or that Congress has ratified or acquiesced in the age 50 at reemployment interpretation. ODJFS points to nothing in these legislative actions—which have made changes in ATAA—involving changing the name of ATAA twice, raising and lowering the $50,000 income limit, or extending

the life of TAA that would support this argument.[6] In these circumstances, the fact that the Labor Department has consistently taken a restrictive interpretation on one element of ATAA eligibility furnishes no indication that Congress has agreed with that interpretation and chosen not to change it. And, it is equally logical to assume that Congress assumes that if the Labor Department is not following its statutory intent then state administering agencies and courts will correct those errors in the application of ATAA.

ODJFS equally fails to make a persuasive case that this Court should reverse the Court of Appeals in order to promote uniformity of ATAA administration. Taken to its extreme, that argument would mean that no state court should step out of line with any Labor Department guidance for sake of preserving administrative consistency. A better way to have consistency of administration would be for the Labor Department to change its approach in light of the decision of the Ohio Supreme Court. This has happened in other instances where the Department lost appeals.[7] In short, a better way to have uniformity would be for ODJFS and the Labor Department to apply the ATAA statute consistently in a fashion that Congress intended.

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[6] With respect to this argument, we note Justice Kennedy's skepticism about a similar claim about implicit Congressional approval of prior judicial decisions in *Central Bank of Denver v. First Interstate Bank* (1994), 511 U.S. 164, 186, 114 S.Ct. 1439, 128 L.Ed.2d 119, "Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. See U. S. Const., Art. I, § 7, cl. 2. Congressional inaction cannot amend a duly enacted statute." (Text and citations omitted.)

[7] For example, in TEGL 8-11, "Availability of Equitable Tolling of Deadlines for Workers Covered Under Trade Adjustment Assistance (TAA) Certifications," October 19, 2011, the Labor Department revised long-standing opposition to giving relief to workers who ran afoul of various TAA application time limits (including instances like the Wisconsin 8 and 16 week rules case discussed *infra*) in light of the decision of the Illinois Supreme Court in *Williams v. Board of Review* (2011), 241 Ill.2d 352, 948 N.E.2d 561. The Department stated that in light of this recent court decision, it now "recognizes" that equitable tolling should apply where it would be "manifestly unfair" to deny a worker TAA benefits based on a missed deadline. TEGL 8-11, Attachment 1, Question 3.

CONCLUSION

In conclusion, for the reasons stated in this brief, the well-reasoned decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief for Appellees was served by U.S. Mail on this 18th day of April, 2012 upon counsel for Defendant-Appellant Director, Ohio Department of Job and Family Services at the address indicated below:

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