Administrative Law § A
Final Exam
Professor Hodas
May 9, 1996
1:00 - 4:00 p.m.

This is a 3 hour closed book examination. The exam is 4 pages long and consists of 3 parts.

Part I consists of 7 short answer questions. Your best 6 answers will count as 30% of your examination grade. It is suggested that your answers to the short answer questions be confined to a short paragraph of one to four sentences.

Parts II and III are essay questions. Part II will count for 40% of your examination grade and Part III will count for 30%. You should allocate your time for each part proportionally. (30% of a 3 hour exam is 54 minutes; 40% is 72 minutes.) Please take the time to read the questions carefully before answering. You should analyze the problems, identify issues and points of law and briefly outline your answer before starting to write.

Please write legibly, using every other line of your blue book.

Good luck on the exam and enjoy your summer!

- I. Short Answer (30%)
- 1. Define public interest theory of law and public choice theory of law and explain how they differ in dealing with public goods.
- 2. What limits, if any, exist on Congress' power to provide for interbranch appointments of "inferior officers?"
- 3. When must a court use the "substantial evidence" test in APA § 706?
- 4. Who has the right to seek judicial review under the APA?

## 5. What is the APA?

- 6. According to the Supreme Court in <u>State Farm</u>, "the scope of reviewing under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of an agency." The court then listed 5 general ways in which an agency action may be arbitrary and capricious. Identify two.
- 7. The enforcement section of the Clean Water Act provides that "whenever ... the Administrator [of EPA] finds that a person is in violation .. [the Administrator] shall issue an order requiring such person to comply ... or [the Administrator] shall bring a civil action" in federal court. You present undisputed evidence that Acme Co. is polluting in violation of the Clean Water Act to the Administrator of EPA. EPA refuses to act. You file a citizen suit in federal court to compel the Administrator to perform the nondiscretionary duty because the Clean Water Act says the Administrator shall. What is the result?

## II. Essay (40%)

In 1994 OSHA issued a notice of proposed rulemaking in the Federal Register called "Control of Hazardous Energy Sources" to prevent injury to workers from ordinary industrial equipment that may suddenly move and cut, crush or otherwise injure a worker. The proposed rule would require the employer, at its sole option, to use either a "lockout" or a "tagout" procedure to prevent injuries. Lockout is the placement of a lock on a switch such as a circuit breaker, so the equipment cannot start up until the lock is removed. Tagout is the placement of a plastic tag to alert employees that the tagged equipment "may not be operated" until the tag is removed. The proposed rule would apply to virtually all equipment in most industries during service and maintenance.

During the 90 day comment period, comments on the NOPR were filed with OSHA by the United Autoworkers, and the Chemical Workers Union, several chemical companies, American Petroleum Institute, candy manufacturers, the Motor Vehicle Manufacturers Association, and Blue Cross. The Unions and Blue Cross opposed the regulation as lacking sufficient protection because the employer is given the choice of either lockout or tagout. These groups want both to be required. The industry groups opposed the regulation as beyond the power of OSHA, unnecessary, and too costly.

After the comment period ended, OSHA began deliberating as to the final rule. About 6 months later, in an unrelated matter before OSHA, documents were filed with OSHA by a group of shipbuilders that discussed, *inter alia*, the efficacy and cost/benefit balance of lockout/tagout procedures. A month later, OSHA issued its final rules in the Federal Register. Unlike the proposed rules, the final rules require all employers to use both lockout and tagout in all situations, except for certain workplace exemptions where neither lockout nor tagout is required. This exemption closely resembles the comment by the shipbuilders. The day before the Federal Register notice of the final Rule, OSHA placed the shipbuilders' comment in the lockout/tagout Rule File. Citizens Against Needless Taxation (CANT) learned of the Rule after it was issued. CANT complained that the regulation was in effect a tax on consumer goods that all citizens would be forced to pay.

Every one of the commentors and CANT timely appealed to the appropriate U.S. Court of Appeals.

- § 6(b) of the OSH Act provides in relevant part: "The Secretary may by rule promulgate, modify or revoke any occupational safety or health standard..."
- $\S$  6(b) (5) adds the following limitation to that power: "The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under [ $\S$  6(b)] shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life."
- § 3(8) of the OSH Act defines "occupational safety and health standard" as "a standard which requires conditions, or the adoption or use of one or more practices ... reasonably necessary or appropriate to provide safe or healthful employment and places of employment."

In its Federal Register notice announcing the Rule, OSHA stated that it was promulgating the Rule under § 6(b) and therefore did not have to do any feasibility analysis under § 6(b)(5). OSHA also stated that the regulation could prevent 122 fatalities and 28,400 lost work days each year. However, OSHA did not indicate which industries posed great risk and which posed little risk; OSHA's data show the danger can be as low as zero in "low impact" industries covered by the Rule to great in "high" impact industries. Even within the high impact category, injury rates can vary by a factor of 20 times among subcategories. OSHA's sole explanation for refusing to separate the data into subgroups is the need for administrative efficiency and the lack of agency resources.

You are a newly-hired attorney in the Department of Labor's General Counsel Office. The General Counsel has asked you to evaluate the parties' positions procedurally and substantively and to identify the strengths and weaknesses of the various positions, including the government's, on appeal. What litigation positions should the government take, and why? If the Rule were to be remanded, should OSHA hold a hearing, and if so, what would/should be required at the hearing? Is there any additional information you would want from the parties or OSHA, and if so, what and why?

## III. Essay (30%)

Section 2057 of the Federal Highway Traffic Code authorizes state police to tow any vehicles illegally parked on the state roads built with federal funds. Owners of towed vehicles can reclaim their cars by (1) paying the traffic ticket plus towing and storage charges, or (2) requesting a hearing at which the question of whether the car was in fact illegally parked will be litigated. All roads in the State of Grace have been built using federal money. Because of congested dockets, it takes several months to get a hearing in Grace.

If the owner of the car chooses to pay the money and retrieve his or her car immediately, and if he or she requests a subsequent hearing at which it is established that the car was not in fact illegally parked, then the money is returned.

Dr. Leslie Smith is employed by a health maintenance organization that requires her to make emergency house calls and to have a car available to her 24 hours a day. Dr. Smith's car was towed while parked in front of a fire hydrant. Instead of either requesting a hearing or ransoming her car, Dr. Smith filed a suit in federal district court under 42 U.S.C. §1983, alleging that when her car was towed, she was making an emergency medical call. Traffic Code §2133 exempts from all parking regulations doctors making such calls. Dr. Smith claimed that the towing of the car deprived her of property without due process of law. Because her car was towed, she was unable to make any more calls that day which hindered her ability to care for patients and perform her job. She also claimed that the loss of her car impaired her ability to make housecalls and thereby resulted in losses to her of some \$750 in professional fees. What due process claims might she assert in a §1983 lawsuit, and how should they be decided?