

# Spring 2000 Administrative Law Exam

## 8-HOUR OPEN-BOOK TAKE-HOME

This is a 8-hour take-home open-book examination, with length limits on the answers. Certain special rules about citation apply if you rely on, or make reference to, materials other than the casebook and class notes. Please remember to use your blind grading number on the exam. “Open book,” defined. This exam is “open world”: you may consult any reference source except other human beings. The exam has, however, been designed so that excellent answers can be crafted without reference to any source other than the casebook and class notes. Your instructor believes that reference to external sources is unnecessary, and bordering on unwise (if only as a waste of your limited time). The use of sources other than the casebook and class notes will probably require that you apply the special citation rule below. For obvious reasons, you are expected to refrain from discussing the contents of the exam with anyone from the time you pick up the exam until the end of the examination period.

Citation rules. Citations to cases and materials in the book may be in any short form that is understandable, e.g. Overton Park. In citing materials other than cases, clarity is usually achieved by including a page reference as part of the citation.

While you are free to consult other materials, it is neither necessary nor recommended. if you do so, and if you rely on those materials for any material part of your answer, you are required to provide a full citation to the source, just as if you were writing an academic paper (no penalties for improper Blue Book style will be levied). This rule applies whether or not you are quoting from the source. Failure to give proper citations will, if detected, be considered a serious Honor Code violation.

Length Limits. Each question on this exam has a length limit. I will not read beyond the length limit. If you type (please type!), the following safe harbor rule will apply: each typed page with 1” margins on all four sides, which is printed in Courier 10cpi, Times Roman 12pt or Helvetica 12pt, with double-spaced text, will be presumed to have 250 words so long as there are no excessive textual footnotes.

Remember to use your blind grading number.

### Special Directions

Please start each answer on a new page. if you do not submit a typed exam, please retain a copy of the handwritten version and submit a typed copy as soon as you can.

Read the questions carefully and think about your answer before beginning to write. Organization will count in your favor. Unless the question directs otherwise, don’t forget to explain why you reject seemingly sensible options as well as why you select them.

Do NOT make up facts. *if* you would need additional facts to resolve an issue, state what facts you would need (and, if relevant, how you might get them), and how those facts would affect the result of your analysis.

Material failure to comply with these instructions will result in deductions from your exam score.

## **You have choices:**

Choose either Plan A or Plan B

Plan A: Answer question one ONLY. The length limit for question one is 2000 words (8 standard pages).

Plan B: Answer question one and ONE other question. The length limit for each question is 1000 words (4 standard pages). The questions will be weighed equally in your grade, except that I will give extra weight to truly exceptional answers (bad or good) to either question.

## **Question ONE**

Concerned with reports that the workers of America were being denied the clean air they need to maximize their productivity, minimize the burden on the national healthcare system, and reduce claims on workers' compensation, Congress passed the (fictional) Workplace Ambient Air Quality Act of 1997 ("the Act"). The Act created the Workplace Ambient Air Quality Executive ("WAAQE").

The Act defines "Workplace" to exclude factories involved in "industrial, mechanical, or chemical operations" but includes the "corporate offices located adjacent to such facilities so long as they are separated by a distinguishable ambient airshed." An "airshed" (which is like a watershed, but for air rather than water) is defined in the statute as "the line that divides two adjacent but distinguishable air systems". The Act specifically permits WAAQE to regulate air quality in restaurants, and "other similar places of public accommodation." However, WAAQE "shall make no rule regulating the home," and the legislative history makes it clear that this prohibition is intended to extend to home-based businesses. The Act instructs OSHA to defer to WAAQE in any case where the two have overlapping jurisdiction.

The Act instructs WAAQE to make rules "requiring clean air in the workplace when required to protect the health of workers to the maximum extent compatible with current technology and economic rationality, giving due regard to the consequences for the United States' international competitiveness, human health, and the consequences for productivity." In addition to giving it informal rulemaking power, the Act creates a Division of Enforcement in WAAQE, empowered both to inspect workplaces subject to the Act for air quality violations. Inspections may be in response to complaints by workers, or initiated by the Department of Enforcement. If the inspector believes she has found a violation, she is authorized to write up a notice of violation which can lead to fines up to \$500 per day per violation. Employers who wish to contest a notice of violation must first appeal to the Director of the Division of Enforcement, and then if still unsatisfied may take their appeal to the appropriate district court. The statute is silent on the subject of standard of review.

In its first year, WAAQE issued almost two dozen rules relating to various airborne pollutants and contaminants. Notable among these was Rule 18, that prohibited smoking anywhere in the workplace except “designated smoking areas that are designed in a manner that prevents substantial leakage of second hand smoke into other parts of the office.” Rule 22, designed to prevent outbreaks of Legionnaires Disease sets various performance criteria for office heating and air-conditioning systems.

One of the major issues to interest WAAQE since it was founded has been ozone levels in offices. Much, but not all, of this ozone is due to emissions from laser printers. Studies found by WAAQE (and duly placed in the rulemaking record) showed that in typical offices which print more than 15 pages per hour with any of the four most popular brands of laser printer, the ozone level vastly exceeded the levels tolerated by OSHA for factory workers lacking protective breathing apparatus. In Feb. 1999, WAAQE therefore duly promulgated Rule 29, requiring that permissible ozone levels in offices be kept at a “safe” level. The rules exempt offices with fewer than three employees, and do not apply to home offices. The notice of final rulemaking included an extensive discussion of the costs and benefits of the rule, concluding that, Like most pollutants, ozone imposes a continuum of health impacts, with more sensitive populations (including children, the elderly, and the infirm) affected at lower levels of exposure than the general population. There may be effects to some sensitive individuals even at background levels. Both benefits and costs of ambient air regulations are notoriously difficult to quantify. Costs are frequently overstated as a result of assuming static technologies, or understated by narrowly defining the impacts of the action under consideration. Benefits are extremely difficult to measure, given the scientific uncertainties involved in epidemiology, and difficult to value even where impacts can be correctly identified: lives saved, illnesses avoided, etc. are benefits in more than a monetary sense; monetizing them raises ethical questions, as well.

We have decided that at least as an initial matter, office workers should be as well protected as factory workers and commuters and other ordinary citizens. We have therefore fashioned our ozone standard after the standards applied by OSHA to factories, and by EPA to airborne particulate regulation for attainment areas. Both of these agencies set a 0.08 parts per million standard, measured over eight hours, and we therefore adopt that standard also.<sup>[1]</sup>

In July 1999, the Director of the Division of Enforcement issued a revised version of the Division’s “Guide to Practices and Procedures,” one of the basic manuals issued to all inspectors in the Division. The Guide, which is also available on WAAQE’s web site, noted that Rule 29 defined 0.08 ppm as the safe level of ozone measured over an eight-hour period, but noted that Rule 29 failed to deal with the difficult problem of “spikes” in ozone levels. The studies which were part of the Rule 29 record noted that “spikes” of over 1.2 ppm for periods as short as 5 minutes constituted an independent health risk. The Director therefore advised inspectors that they should “use their enforcement discretion to encourage the acquisition of laser printers which

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1 Note: this statement is not in fact true about the OSHA and EPA standards which are both different and more complicated. However, please pretend it is true for the purposes of this question. In fact, as far as I know, none of the scientific assertions in this problem are accurate, so don’t panic about your printer.

have emission profiles least likely to cause spikes during sustained use. One way to do this would be to avoid bringing enforcement actions for ozone levels in the 0.08-0.10 range over an eight-hour period if the office has a plan in place to replace high-spike machines with low-spike machines within the next 12 months.” The document further notes that the laser printers available on the market change all the time, so inspectors should periodically check the WAAQE web site for updated information as to which machines are “low spike” and which are “high spike”. In the absence of “high spike” equipment, the revised Guide also urges inspectors to use their enforcement discretion not to bring actions against offices without “major” violations if the office has two or more of the following “healthy employee policies” in place:

- A policy creating financial or other similar incentives to encourage workers to stop smoking.
- A policy creating financial or other similar incentives to encourage workers to exercise regularly.
- A policy creating financial or other incentives to encourage overweight workers to diet regularly.

The Guide explains that WAAQE believes that encouraging employees to quit smoking is a more effective way of minimizing the risk from second-hand smoke than Regulation 18, since smokers sometimes violate company rules. Furthermore, to the extent that employees are generally healthy, they will have increased resistance to ambient pollutants, and therefore reduce the health consequences of pollutants which in turn will reduce the need for stricter regulation.

You work for the Shrub Organization, a founder member of the vast right-wing conspiracy. President Clinton has been going around the country touting Regulation 29 as a triumph for government regulation. Your task is to identify whether, given the facts above, WAAQE’s Regulation 29 and/or its enforcement could successfully be challenged in court. As the Shrub Organization itself may not have standing to bring a claim — it uses only the best, low-ozone copiers -- you should be sure to note in your memo what sort of plaintiff(s) you would need to recruit to bring the claim. Plaintiffs, however, can always be found, so the main issue is what legal theories if any could be deployed to stop WAAQE.

## Question TWO

In 1984, the (fictional) Computer Research Support Act (“the CRS Act”) established the Computer Support Corporation (CSC). The CSC is chartered in the District of Columbia as a private, non-membership, non-profit body, with the purpose of providing financial support for research into the use of computers for the betterment of humanity”. 99 U.S.C. § 2.

The CSC has a Board of Directors of eleven persons, nine of whom are appointed by the President by and with the advice and consent of the Senate, “no more five of whom shall be of the same political party.” Two members of the Board are elected by dues-paying members of the organization. 99 USC § 5(a).

According to 99 U.S.C. § 8(b),

“Each member of the Board shall serve for a term of three years. The members of the Board shall not, by reason of such membership, be deemed officers or employees of the

United States.. Each member shall continue to serve until the successor to such member has been appointed and qualified.”

On Dec. 1, 1999, the three-year term of Presidentially appointed Director Mike Roberts expired. The Senate rejected the President’s first nominee to fill the post, Esther Dyson, last October. The Senate rejected the President’s second nominee, Jeff Williams, on December 8, 1999, just before the Congress adjourned. Meanwhile Mike Roberts remained in office under the holdover provision of § 8(b). On December 12, 1999, while Congress was adjourned, the President issued a recess appointment to Ellen Rony to serve on the Board, and she took office replacing Mike Roberts. Mike Roberts immediately commenced suit in the District Court for the District of the Columbia, the appropriate tribunal, claiming that the President had no authority to make recess appointments to the CSC because the CSC was not part of the executive or judicial branches of the federal government. In January 2000, the President sent his nomination of Vint Cerf to the Senate. The new Senate has yet to act on the President’s third nominee.

Dennis Lynch has served as the General Counsel of the CSC since January, 1990. The General Counsel has a two-year contract, which is renewable by the Board. On Dec. 10, 1999, the motion to again renew Dennis Lynch’s contract failed to carry on a tie vote of 5-5. (One Board member, a cousin of Lynch’s, had recused himself from the vote). Under the Board’s rules, a motion fails on a tie vote. Mike Roberts was among the five Directors who voted against renewing Lynch’s contract.

Dennis Lynch sued the CSC in the District Court for the District of Columbia, which is the appropriate court, claiming that Robert’s participation in the vote was unconstitutional. Lynch alleges that Roberts held office only because the Senate refused to confirm one of the people nominated to be his successor; Lynch argues that allowing Roberts to remain in office and to participate in the decision regarding Lynch’s continued employment, violates the *Chadha* principle that Congress may only affect the rights duties and responsibilities of persons outside the legislative branch by legislation with bicameralism and presentment.

Write a memo evaluating the likelihood of success of Roberts’s and Lynch’s claims.

## Question THREE

Answer the question on page 151 of your supplement: “How would *you* advise the NSA on ‘Soft Landing’ ?

## Question FOUR

“At least in the Supreme Court, and probably in the Courts of Appeal, all that matters is *Chevron* step one. If plaintiff does not prevail on step one, losing step two is all but a foregone conclusion. This proves that *Chevron* changes very little, for once one accepts .as a consistent majority of the Supreme Court has done .that step one is to be conducted in a traditional way, *Chevron* has almost no doctrinal legal significance, for all that it may well signal a small psychological shift in the judicial use of traditional powers.” Agree or disagree, taking nothing on faith. Give specific examples from the cases considered in our casebook. Avoid both mush and long case summaries.