

# Administrative Law

Prof. Errol Meidinger

## **Final Examination**

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### **Instructions**

1. This is a **CLOSED BOOK** examination. You may not consult any external source of information between the time you receive the exam and the time you turn it in. After finishing it, you may not discuss the content or nature of the exam with anyone whom you are not absolutely certain has also completed the exam. You are on your honor and are subject to the Law School Honor Code.
2. The exam consists of 12 numbered pages. Make sure none are missing.
3. There are 21 questions, each worth 3 to 20 points, for a total of 104 points.
4. You have 4 hours to complete the exam.
5. You should answer each question based solely on the reading materials, lectures, and discussions in the course. When a question calls for a true-false response, you must choose one or the other and circle it. You can justify or qualify your choice in the explanatory part of your answer.
6. Answer each question within the space provided. Focus on the core of the question and write as legibly as you can. You must hand write the exam unless you have received prior approval to use a keyboard on hardship grounds. Try to work out your answer before you start writing.
7. Good luck!

## Questions

1. “Agency action” subject to judicial review under the APA includes an agency’s “failure to act.” True or false, and explain? (3 points)
2. Congress could, if both houses agreed and the President signed the legislation, vest the appointment of the White House Counsel in the Chief Justice of the Supreme Court. True or false, and why? (3 points)
3. If an agency receives a petition to undertake a rulemaking, considers the petition, and rejects it, all in timely fashion, it need not explain or justify its decision, since it has not promulgated a rule giving rise to the “concise general statement” requirement. True or false, and why? (3 points)
4. Assume that regularly reported health and safety data show a significant increase in work-related repetitive-stress injuries in universities. After reviewing these data, OSHA adopts a new policy providing that all universities will be subjected to at least one thorough inspection per year unless all of their health-and-safety and purchasing officers successfully complete a training program offered free of charge by OSHA. The program covers both mandatory and recommended standards, including computer placement and furniture design. Universities whose employees complete such courses will be subject to far less frequent inspections. For a university the size

of UB, completing such a program would involve several hundred “lost” workdays. OSHA must promulgate the policy through a notice-and-comment rulemaking. True or false, and why? (4 points)

5. What are “legislative facts”? (4 points)

6. Although the text of §553 requires simply that agencies publish “either the terms or the substance of the proposed rule,” most agencies embarking on notice-and-comment rulemaking publish the full text of a proposed rule in their notice of proposed rulemaking. True or false, and why? (3 points)

7. While a rulemaking is underway an agency official receives comments from a powerful senator outside normal communications channels. The senator says that he intends to see that the agency’s funding is cut by 25 percent if the final rule fails to



11. How is a negotiated rulemaking process different from a traditional § 553 rulemaking process? (4 points)

12. The USDA is still considering revisions to the dietary guidelines for school lunch programs that receive federal funds. During the comment period the agency has received an interesting proposal from a group called Parents for Better School Nutrition. The proposal reads as follows:

We respectfully submit that the Department of Agriculture is dealing with this problem in the wrong way. Eating patterns necessarily vary among regions and cultures. Rather than promulgate a new set of detailed, command-and-control, one-size-fits-all rules, the Department should turn the problem over to local oversight committees who can figure out how to achieve national goals of improved nutrition in the context of local communities. We think the system should work as described below.

First, the rule you are making should simply adopt the 1990 Dietary Guidelines as mandatory goals of each funded school lunch program. As you know, the guidelines state simply that all Americans should: (1) eat a variety of foods, (2) maintain a healthy weight, (3) choose a diet low in fat, saturated fat, and cholesterol, (4) choose a diet with plenty of vegetables, fruits, and grain products, (5) use sugars only in moderation, and (6) use salt and sodium only in moderation. The guidelines give some examples, but do not set specific requirements.

Second, the Department should require that each school wishing to receive federal school lunch funds establish a "Healthy Lunch Committee." This would be done in two steps. In step one, the governing body of the school would establish rules for choosing Committee members and replacing them when they resign. In step two, the school would choose members of the Committee. The requirements could be as follows: (1) The Committee should consist of no less than five and no

more than ten parents of school aged children. (2) Each member should have a demonstrated commitment to improving the school. (3) The total membership of the Committee should be balanced to reflect the various viewpoints of parents in the district. (4) All members should commit to the Dietary Guidelines in writing. (5) Once chosen, Committee members could be involuntarily removed only for cause. (6) After the Committee members have been selected, a local Department of Agriculture employee would certify that the Committee meets the above requirements.

Third, the Healthy Lunch Committee should develop standards and criteria for the lunch program at its school. These could include types of food and frequency of provision, total calorie limits, sugar and sodium limits, and whatever other criteria the Committee deems workable and appropriate to the locale. The Committee should be free to use whatever process it believes is most appropriate for developing the standards and criteria in its community, although the Department could require that the Committee consult in some way with parents and other relevant groups, such as cooks, school administrators, food suppliers, and so on. When it has completed its work, and has agreed on standards and criteria by at least a 2/3 majority, the Committee should publish the standards and criteria in the school newsletter, local newspapers, and other places where local people normally obtain such information. Again, a local Department of Agriculture official should certify that the publication meets local standards for communication. Until such time as the standards and criteria have been developed and published, the existing rules governing school lunches should remain in effect. Since the Committee is to be the arbiter of consistency between the Dietary Guidelines and local needs and expectations, the rule should provide that the Committee's standards and criteria are not subject to agency or judicial review, except for Constitutional challenges.

Finally, after the standards and criteria have been published, the Committee should take over responsibility for enforcing them. This responsibility could be exercised quite simply. At the beginning of each month, each school should report to its Committee on how it complied with the standards and criteria in the prior month, and how it intends to meet them in the coming month. If the Committee has any doubts about the school's compliance, it can conduct its own investigation into compliance, including review of school records, inspection of kitchens and cafeterias, and any other methods it deems appropriate. After finding to its satisfaction that the criteria have been satisfied, either unanimously or at least by a majority vote, the Committee can direct the responsible office of the Department of Agriculture to make payment of the appropriate funds to the school. If a majority of Committee members conclude that the school has not met its obligations, it can direct the Department not to pay. The Department should be bound by the Committee's directives, and again, Committee decisions should not be subject to administrative or judicial review, unless a complainant makes a prima facie case that the Committee has violated the Constitution, committed fraud, or misappropriated funds. This arrangement will create the necessary incentives for the school to meet the criteria and standards.

The incoming Secretary of Agriculture thinks the proposal merits consideration, and has asked the General Counsel to review it for legal problems. She has passed the problem to you. Briefly note any legal problems the proposal raises and how they might be resolved. In answering this question focus on administrative law issues that fairly arise from the materials we read. Any additional issues you might see can be noted briefly at the end of your answer. Also remember that this question concerns what legal problems the proposal might face, not whether it is a good idea (20 points)

13. As a practical matter, and putting aside legal issues, would the above proposal for Healthy Lunch Committees be a good idea? Yes or No. If your answer is yes, list the five greatest strengths you see in the proposal. If your answer is no, list the five greatest weaknesses. (10 points)

14. A computer file containing an appointment calendar maintained by a government official on a government owned laptop to keep track of his daily schedule would be a record subject to disclosure under FOIA. True or false, and why? (3 points)
15. All federal agency personnel are classified as either principal or inferior officers. True or false, and why? (3 points)
16. A statute providing as follows would be unconstitutional: “No major rule [as defined elsewhere in the statute] shall be effective unless and until approved by a joint resolution of Congress.” True or false, and why? (3points)

17. Shortly before the Clinton Administration left office, the Forest Service concluded a year-long notice-and-comment process by promulgating a final rule prohibiting logging and road building on “inventoried roadless areas” in the National Forests. The protected areas total approximately 60,000,000 acres, which is over a quarter of the land managed by the Forest Service, and would be about the size of Wyoming if all the areas were contiguous. The agency explained that it was taking the action to further its statutory mission of protecting threatened watersheds and ecosystem health. The rule was to be effective on March 19, 2001, but upon taking office the Bush Administration announced in the Federal Register that it was delaying the effective date by 60 days until May 12, 2001. Assume that on May 12 the Forest Service publishes a notice of proposed rulemaking to rescind the new rule and return to the rules previously governing roadless areas. The notice states that the agency is taking the action because it “does not believe that the logging and road construction ban is necessary or appropriate to protect watersheds and ecosystem health on National Forest lands.” The notice explains that since the new rule was developed through a § 553 notice-and-comment procedure, it will be rescinded through the same kind of procedure. It allows thirty days for written comments. The notice also provides that “important land management activities will go forward in roadless areas while the rescission is pending.”

A local district of the Forest Service immediately offers for sale the merchantable timber in a small roadless area that it planned but did not manage have logged before the new rule became effective. The notice gives potential buyers two weeks to submit bids on the timber and indicates that the agency hopes to have the logging completed before the fire season begins in July. Your client is quite attached to the area, and often hikes in it. She also draws her drinking water from a stream which flows through it to her land lower in the watershed. She asks you immediately to seek invalidation of the offer of sale in court, before any bid can be accepted or contract signed by the Forest Service, on grounds that the sale would violate binding regulations. Is the action reviewable under the APA at this time? Why or why not? (10 points)

18. To invalidate an adjudication on judicial review a challenger must show either that the decision is not consistent with the facts adduced in the adjudication or that the decision is inconsistent with the governing statute. True or false, and why? (3 points)

19. The APA bans *ex parte* contacts in formal adjudications covered by the Act. In addition, the Due Process clause may ban *ex parte* communications in other adjudications where valuable interests are at stake. True or false, and why? (3 points)

20. Although APA § 554 indicates that formal procedures are required when the governing statute mandates an adjudication “on the record after an opportunity for an agency hearing,” most courts construe the provision liberally, and are likely to require a formal adjudication whenever a statute creates a “right to hearing” or a “right to a public hearing.” True or false, and why? (3 points)

21. When an agency makes a rule, what are the five most important things it should do to survive a challenge under the arbitrary and capricious standard? (10 points)

**End of Exam**