

EXAM ID: _____

**FINAL EXAMINATION
ADMINISTRATIVE LAW
LAW 6400 – Section 12 – Siegel
Spring 2024**

INSTRUCTIONS

1. This is an open book examination. You may use any written materials that you have brought with you to the exam. “Written” materials include materials that are handwritten, typewritten, printed, or published, and, to the extent permitted by the school’s examination procedures, also includes electronic materials stored on your electronic device prior to the start of the exam. You may retype text from written materials into your exam answer. However, during the exam, it is forbidden to access the Internet, to consult any other person directly or indirectly, or to make use of an artificial intelligence program.
2. You have **THREE HOURS** to complete the exam. The exam consists of this instructions page and 6 pages of questions. There are **FIVE QUESTIONS**. All students must answer all questions. Questions 1, 4, and 5 should take about 30 minutes each. Questions 2 and 3 should take about 45 minutes each.
3. Do not put your name anywhere on your answers. Do not write “Thank you for a great class” or anything similar on your exam. If you are writing your answers by hand, remember to *write legibly*.
4. If, with regard to any question, you think additional facts are needed to answer the question, state clearly what facts you think are missing, make a reasonable assumption about the missing facts, and answer the question based on your assumption. Do not change the given facts.
5. Using good judgment, address all the issues presented and assigned by the questions, even if your answers to some issues would, in real life, eliminate the need to address other issues.
6. Unless otherwise specified, assume all events described in the questions occurred in the United States and answer all questions on the basis of current law.
7. Good luck.

QUESTION ONE

The Environmental Protection Agency (EPA) is a federal agency in the executive branch. It is headed by an Administrator who is appointed by the President by and with the advice and consent of the Senate. The Administrator serves at the pleasure of the President.

Congress passes the “EPA Oversight Act” (the “Act”). The Act provides:

§ 1. The Congress finds that there is a need for an agency that can provide independent thinking on environmental issues.

§ 2. There shall be an EPA Oversight Agency, the head of which shall be the Director of EPA Oversight. The Director shall be appointed by the President alone. The Director shall serve a three-year term. The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.

§ 3. The powers and duties of the Director shall be as follows:

a. Whenever the position of Administrator of the EPA is vacant, the Director shall recommend candidates to the President for the position. Whenever, in the Director’s judgment, it is necessary that the incumbent Administrator of the EPA be removed, the Director shall so recommend to the President.

b. Whenever the EPA proposes any rule and invites public comment, the Director shall submit comments on the proposed rule during the public comment period. The EPA shall consider the Director’s comments before adopting a final rule.

The Director is appointed as provided in the Act. The Director is known to believe in vigorous enforcement of the environmental laws.

You are a junior lawyer at a law firm representing an association of automobile manufacturers. The association is unhappy with the new Director. A partner at the firm says, “Is the new EPA Oversight Agency constitutional? Please write me a memorandum in which you identify any potential constitutional flaws in the structure of the new agency, discuss arguments that the government might make to defend the constitutionality of the agency, and reach a conclusion about whether the agency is constitutional. Don’t worry about whether we will be able to construct a lawsuit raising any of the issues you discuss. Just identify the potential challenges and evaluate them.”

Write the requested memorandum.

QUESTION TWO

Following some tragic accidents caused by drunk drivers of commercial vehicles, Congress passes the “Commercial Driver Safety Act” (“CDSA” or “Act”). The Act provides:

§ 1. The Congress finds that alcohol use by drivers of commercial vehicles is endangering public safety on the nation’s highways.

§ 2. The Secretary of Transportation (“the Secretary”) shall require every employer of 10 or more drivers of commercial vehicles to test its drivers for alcohol use. The Secretary shall require that appropriate equipment be used to conduct such tests.

§ 3. The Secretary shall have power to promulgate rules and regulations to enforce this Act.

The House Report accompanying the Act states:

The Secretary shall determine what constitutes “appropriate equipment” under § 2 of the Act. Obviously, breath-testing machines would be appropriate equipment, but Congress does not want to prevent the Secretary from taking advantage of technological developments that might permit testing for alcohol use by equipment that is equally or even more effective. Therefore, the Act simply requires that “appropriate equipment” be used in alcohol testing under the Act.

Following passage of the Act, the Secretary initiates a rule-making process to make a rule to enforce § 2 of the Act. The notice of proposed rulemaking proposes to require covered employers to select drivers at random and to use a breath-testing machine to test them for alcohol use.

The Secretary receives numerous comments on the proposed rule. Among them is a comment from Senator Jones, who has many bus and trucking companies in her state, and who is the Chair of the Senate Appropriations Committee and who therefore has great influence over agency budgets. Senator Jones states in her letter that the requirement for the use of breath-testing machines will entail excessive costs in relation to the degree of safety provided and she urges the Secretary to adopt a less costly rule.

After the close of the comment period, the Secretary issues a final rule that is different from the proposed rule. The final rule requires that each employer of commercial drivers appoint one or more employees as “CDSA Compliance Officers.” The rule requires that drivers be selected at random for alcohol testing, and that the test shall consist of the driver presenting himself or herself for inspection by a CDSA Compliance Officer. The Compliance Officer shall look the driver over, smell the driver’s breath, engage the driver in conversation, and, on the basis of this inspection, determine whether the driver is likely to be under the influence of alcohol. The Compliance Officer shall, the rule provides, carry a pen and pad to note down the Compliance Officer’s observations of the driver.

Following adoption of the final rule, two parties who commented on the rule seek judicial review. One party is Pamela, a self-employed traveling sales agent who spends hundreds of hours per year driving on interstate highways, and the other is the Association of Breath-Testing Machine Manufacturers, which, as you might guess, is an association made up of manufacturers of breath-testing machines.

Both parties seeking judicial review raise such challenges to the validity of the Secretary's final rule as might be expected on the above facts. The government raises such defenses as might be expected. All parties make all appropriate arguments.

You are the law clerk to the district judge hearing the case. Write the judge a memorandum discussing the issues raised by the case and making a recommendation as to how the judge should rule on each issue and on the overall case.

QUESTION THREE

Paul is a tenured professor of English at Indiana State University, which is owned and operated by the state of Indiana. The University's employment manual states: "A tenured professor may be discharged only for good cause; provided, that in a discharge proceeding, the professor's procedural protections shall be limited to those specified in this manual."

The manual provides that before discharging a tenured professor, the university must provide the professor with notice of the reasons for the proposed discharge and a hearing before a panel of University administrators at which each side can present evidence. The manual also states that "In cases where the reason for the proposed discharge is sexual harassment, the University may protect complainants from embarrassment and/or retaliation by not revealing their identities." The manual defines "sexual harassment" to include both "quid pro quo" harassment (such as soliciting sex in exchange for grades) and harassment by creating a hostile environment.

The University informs Paul that it proposes to discharge him for sexual harassment. The University provides Paul with a written statement explaining that a student identified only as "Student 1" asserted that Paul, as part of teaching a literature course with 50 students, assigned a novel in which a female student has an affair with a male professor, and that Paul remarked during class discussion, "any women in the class who would like to get a deeper understanding of this character's experience can meet me in my office." The written statement also states that a female student in the same course, identified only as "Student 2," asserted that when she was alone with Paul in his office to discuss her performance on the midterm exam, he hinted that she could improve her grade by having sex with him.

The University holds a hearing as required by its manual. The only evidence introduced by the University is the written statement described in the previous paragraph. Paul admits making the in-class statement described by Student 1, but says that he made it in a joking way and that everyone would have understood that he was kidding. Paul denies the allegations made by Student 2 and says that Student 2 must have completely misunderstood him. Paul says that he discussed the midterm exam with each student individually and he has no idea which student complained or what he said that could have been so wholly misconstrued. Paul demands to know the identities of Students 1 and 2 and to be permitted to cross-examine them. The University refuses to identify the students or to allow the cross-examination, citing the University's manual provision.

The panel concludes that Paul committed sexual harassment and Paul is discharged. Paul sues the University and its trustees in federal court. He asserts that his discharge violated the federal Constitution. He and the defendants each make such arguments, related to issues we studied in this course, as might be expected on the above facts.

You are the law clerk to the district judge considering the case. Write a memorandum addressing the issues presented by the case and advising the judge as to how to rule on each issue and on the overall case.

QUESTION FOUR

The National Oceanic and Atmospheric Administration (NOAA) is a federal government agency headed by an Administrator. Among other things, NOAA promulgates and enforces the federal Turtle Excluder (“TE”) Regulations, which require commercial boats that catch shrimp in coastal waters to use a NOAA-approved TE device designed to prevent the boat from accidentally catching turtles. Failure to comply with these regulations is punishable by a fine of up to \$15,000.

Carla owns a commercial boat that she uses to catch shrimp in coastal waters. NOAA receives a report from one of Carla’s customers saying that it found a dead turtle among the shrimp that Carla delivered one day. NOAA charges Carla with violating the TE regulations.

The TE regulations provide that a person charged with violating the regulations may request a hearing before an ALJ at NOAA. Carla requests such a hearing. At the hearing, Carla testifies that her boat has always been equipped with a NOAA-approved TE device. Two members of her boat crew testify and corroborate this. An employee of the company that provided and installed Carla’s TE device testifies that the device, which carries a unique serial number, was installed prior to the date the turtle was found among Carla’s shrimp and was still on the boat as of the date of the ALJ hearing. Carla presents photographs showing the TE device on her boat. Finally, she presents an expert witness who testifies that even boats using a NOAA-approved TE device will, on rare occasions, catch turtles accidentally. NOAA presents evidence of the dead turtle found among Carla’s shrimp. In addition, a NOAA investigator testifies that a bartender at “The Rusty Nail,” a bar frequented by members of shrimp boat crews, told him, “Oh yeah, I heard that Carla doesn’t use a TE device because they’re too expensive.” Carla objects to this testimony as hearsay, but her objection is overruled. (NOAA’s organic statute and its regulations provide no rules of evidence for its ALJ hearings.) No other evidence is presented. All testimony at the hearing is given under oath.

The ALJ enters a decision determining that Carla violated the TE regulations and imposing a fine of \$10,000. NOAA’s regulations provide: “Any person found by an ALJ to have violated the TE regulations may, within 30 days, appeal the ALJ’s decision to the Administrator of NOAA. The Administrator’s determination on such an appeal shall be NOAA’s final determination in the matter. During the pendency of such an appeal, any penalty imposed by the ALJ shall be inoperative.”

Carla does nothing. She does not pay the fine, she does not appeal to the NOAA Administrator, and she does not seek judicial review. (NOAA’s governing statute says nothing about judicial review.) Six months later, the United States brings an action against Carla in federal district court to collect the \$10,000 fine imposed by the NOAA ALJ. Carla resists the action based on such arguments as might be expected on the above facts. The United States makes such arguments as might be expected in reply. Each side moves for summary judgment.

How should the district court rule? Explain.

QUESTION FIVE

You are the Legislative Director for Senator Gus Goodman. Another Senator introduces a bill called the “Judicial Review Improvement Act,” which would amend section 702 of the APA by striking the first sentence of the section and replacing it with:

Any person who believes that an agency action should be held unlawful and set aside for any of the reasons specified in 5 U.S.C. § 706 is entitled to judicial review of the agency action.

Senator Goodman asks you to write him a memorandum that evaluates this bill. Your memorandum should explain what the likely effects of this bill would be, discuss how courts might respond to it, and evaluate whether the bill is a good or a bad idea. If you think the bill could be improved by any relevant amendments that Senator Goodman could offer to it, you should mention those, or you may recommend that he support it as is or that he just oppose the whole thing. Senator Goodman is not an expert on administrative law and could therefore benefit from a brief explanation of what the bill is all about, but the main focus of your memorandum should be your evaluation of the bill from a policy perspective.

Write the memorandum.

END OF EXAM