EXAMINATION

ADMINISTRATIVE LAW – LAW 6400

Section 12 – Siegel

Spring 2012

INSTRUCTIONS

1. This is an open book examination. You may use any written materials that you have brought with you (including handwritten, typewritten, printed, or published materials). The use of computers to type answers is permitted.

2. You have THREE HOURS to complete the exam.

3. The exam consists of this cover page plus 5 exam pages numbered 1 through 5.

4. There are four questions. All students must answer all questions. Questions 1 and 2 should take about 50 minutes each; Questions 3 and 4 should take about 40 minutes each. The weights of the questions are proportional to the time allocations.

5. Do not put your name anywhere on your answers. Do not indicate whether you are taking the class pass/fail. Do not write “Thank you for a great class” or anything similar on your exam.

6. If you are writing your answers by hand, remember to write legibly.

7. If, with regard to any question, you think additional facts are needed to answer the question, state clearly what facts you think are missing. Then make a reasonable assumption about the missing facts and answer the question based on your assumption. Do not change the given facts.

8. 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.

9. Good luck.
The Supplemental Nutrition Assistance Program (SNAP, previously known as the Food Stamp program) provides financial assistance to needy households for the purpose of buying food. The program is run by the Food and Nutrition Service (FNS), an agency within the Department of Agriculture.

The organic statute creating SNAP provides income limits for recipients. The income limits were last fixed by statute in 1985, but the statute provides that FNS “shall annually adjust the income limits for inflation.” The organic statute empowers FNS to promulgate rules to implement the statute.

In 1986, when FNS first adjusted the limits for inflation, it determined, in a notice-and-comment rulemaking proceeding, that it would measure inflation by changes in the Consumer Price Index (CPI). FNS stated that it would use the CPI because the purpose of the program was to assist needy consumers to buy food, so, within the context of the program, inflation was best measured by changes in consumer prices, which would best reflect how much money consumers had available for food. FNS has used the CPI to measure inflation ever since.

The organic statute provides that if any person applies for SNAP benefits and is found ineligible, the person may appeal to an ALJ within FNS, that the ALJ shall make a final determination of the person’s eligibility “on the record after opportunity for a hearing” and that “the determination of eligibility shall be made on the basis of the evidence presented at the hearing.”

In 2013, the FNS conducts a notice-and-comment rulemaking proceeding to determine the 2013 income limits for the SNAP program. In its notice of proposed rulemaking, FNS proposes to change its measure of inflation to the “Gross Domestic Product (GDP) deflator,” which is a broader measure of inflation that looks to changes in all prices in the economy, not just the prices of consumer goods. The GDP deflator typically provides a lower value for inflation than the CPI, so its use would result in less generous income limits for the SNAP program. After receiving comments, FNS adopts the GDP deflator. FNS states, “we realize that the agency has traditionally used the CPI to measure inflation, but we believe that the statutory term ‘inflation’ is best understood as referring to inflation in the total economy.” FNS calculates the program’s income limits for 2013 using the GDP deflator. For persons living alone, the income limit is $1100 per month.

Thereafter, Paul Potter, who lives alone, applies for SNAP benefits. His application is denied and he appeals to an ALJ at FNS, who holds a hearing. At the hearing, Potter presents his own affidavit, his pay stubs, and testimony from his employer, all of which show that he earns $1150 per month. The agency presents testimony from a bartender who works at a bar in Potter’s neighborhood, who testifies that a neighbor of Potter’s told him that Potter earns $2000 per month. Potter objects to this testimony on the ground that it is hearsay, but the ALJ overrules his objection and admits the testimony.
Potter also offers to present evidence that would show that the CPI is the correct measure of inflation for the purposes of the program, and that, had the agency used the CPI for its 2013 adjustments, the income limit for him would be $1200 per month. The ALJ refuses to admit any evidence regarding the proper income limit for the program.

At the conclusion of the hearing, the ALJ states that he disbelieves Potter’s evidence, believes the testimony of the bartender, and that he determines that Potter’s income is $2000 per month and that the income limit for Potter is $1100 per month. On that basis, the ALJ determines that Potter is ineligible for SNAP benefits.

Potter seeks judicial review in federal district court. He raises such claims as one might expect on the above facts, and the government raises such defenses as one might expect. Both sides make all appropriate arguments. (The SNAP organic statute says nothing about judicial review.)

You are the law clerk to the district judge. The judge asks for a memorandum discussing the issues raised by the case and making a recommendation as to how to rule on each issue and on the overall case. In giving you the assignment, the judge says, “it sure seems to me that it makes more sense to use the CPI as the measure of inflation for the SNAP program.”

**Write the memorandum.**

(In case you missed them, be sure to read instructions 5-8 on the cover page.)
QUESTION TWO  
(50 minutes)

The Federal Aviation Administration (FAA) is a federal agency. It is headed by David Devious, the Administrator, who is appointed by the President with Senate confirmation and who serves at the pleasure of the President.

The FAA’s organic statute, among other things, provides that the FAA may “prohibit the construction of, or compel the removal of, any obstacle that poses a hazard to aviation.” The Act empowers the FAA to promulgate rules to enforce the Act, and the FAA has promulgated numerous rules defining what constitutes a “hazard to aviation.”

KMTV, a local television station in Omaha, Nebraska, builds a transmission tower on the outskirts of Omaha. Peter Harris (who never flies in airplanes as he is afraid of flying) lives near the new tower and the tower disrupts the scenic view that he previously enjoyed from the windows of his home. After investigation, Harris decides that the new tower is a hazard to aviation under the FAA’s rules. He writes to the FAA and asks it to compel the removal of the tower. Noting that David Devious owns 5% of KMTV, he asks that Devious be recused from deciding his request.

A month later, Harris receives a letter from Devious, which reads: “Dear Mr. Harris, I have received your request that the FAA compel the removal of the KMTV tower. Your request that I recuse myself from this matter is denied. In light of competing enforcement priorities, the agency is unable to take the action you request at this time. Sincerely, David Devious.”

A rule of the FAA provides, “The decision of the Administrator on any matter shall be the final decision of the agency, except that, within ten days of the decision, any party may ask that the Administrator reconsider the decision. A party desiring to seek judicial review of any decision by the Administrator must first seek such reconsideration. During the pendency of the request for reconsideration, the Administrator’s decision shall be inoperative.”

Without seeking reconsideration by the Administrator, Harris brings suit in federal district court seeking judicial review of the FAA’s decision on his request. He does not request that the court order the agency to compel removal of the tower, but he does ask that the court order the agency to reconsider the matter with the Administrator recused. The government raises such defenses as might be expected on the above facts, and both sides make all appropriate arguments.

You are the law clerk to the district judge considering the case. The judge asks you to write a memorandum discussing the issues presented and making a recommendation as to how to rule on each issue and on the overall case. The judge also says, “Do you have a copy of 5 U.S.C. § 704 handy? I want to read it very carefully.”

Write the memorandum.
QUESTION THREE  
(40 minutes)

Following an embarrassing incident in which members of the United States Secret Service detail protecting the President engaged in improper behavior, the Secret Service, a federal agency within the Department of Homeland Security, determines to strengthen its rules regarding its employees’ behavior. On June 1, 2012, the Secret Service issues a Notice of Proposed Rulemaking for a rule that would establish a code of behavior for Secret Service agents.

Among other things, the proposed rule provides that no Secret Service agent shall drink alcohol while on duty or within four hours before going on duty. It also provides that whenever a supervisor, based on observation of an agent, determines that there is a reasonable basis to suspect that the agent has violated the alcohol rule, the supervisor shall order the agent to be tested using a breath testing device.

The proposed rule provides that only breath testing devices that have been determined to be of sufficient reliability that their results would be admissible in evidence in criminal proceedings for crimes involving alcohol (e.g., driving under the influence) may be used for such a test. The device must be operated by a trained operator. The rule also requires that, if an agent tests positive for alcohol consumption, the operator must check the device for proper calibration and then give the agent a second, confirmation test. On the second test, the device must produce a written report of the test results. If the confirmation test shows that the agent has violated the alcohol rule, the rule provides that the agent shall immediately be discharged from the Secret Service. The rule makes no provision for a hearing at which the agent can challenge the results of a test.

Secret Service agents are protected by the federal civil service statutes, which provide that, once they have served a two-year probationary period, they can be discharged only for good cause.

On June 2, 2012, Elise Chan, a Secret Service agent, files a suit seeking judicial review of the proposed rule. The suit challenges the proposed rule on such grounds as one would expect based on the above facts. The government raises such defenses as one would expect, and each side makes all appropriate arguments.

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.

[Note: Do not discuss Fourth Amendment issues. Discuss issues related to what we studied in this course.]
The “Regulations from the Executive In Need of Scrutiny Act,” or REINS Act, passed the U.S. House of Representatives in December 2011. If it became law, the Act would provide that no “major rule” promulgated by any federal agency would be effective unless it is approved by an Act of Congress. The term “major rule” would have the same definition as the definition given to the term “significant regulatory action” in Executive Order 12866. (The federal agencies together adopt a total of about 60 to 75 “major rules,” by this definition, per year.)

Under the proposed REINS Act, following promulgation of a major rule by a federal agency, Congress could choose to pass an “approval bill” approving the agency rule. If Congress passed an approval bill within 70 days of the rule’s promulgation (counting only days when Congress is in session), the agency rule would take effect. If Congress did not pass an approval bill within that time, the agency rule would have no effect. Approval bills would be subject to special procedural rules in each house of Congress, so that they would be guaranteed floor time for debate and would be guaranteed a vote (in particular, they would not be subject to a filibuster in the Senate). However, as with any other bill, approval bills, if passed by both houses of Congress, would be effective only if signed by the President, or if the President’s veto were overridden.

The REINS Act is now under consideration in the U.S. Senate, and you are the Legislative Director for Senator Valerie Virtue. Senator Virtue asks you to write her a memorandum that evaluates the REINS Act. Your memorandum should explain what the likely effects of the Act would be, discuss how courts might respond to it (including whether the Act would be constitutional), and evaluate whether the Act is a good or a bad idea. If you think the Act could be improved by any relevant amendments that Senator Virtue could offer to it, you should mention those, or you may recommend that she support it as is or that she just oppose the whole thing. Senator Virtue is not an expert on administrative law and could therefore benefit from a brief explanation of what the Act is all about, but the main focus of your memorandum should be your evaluation of the Act from a constitutional and policy perspective.

Write the memorandum.

(Note: The above facts are basically true, but a couple of details of the REINS Act have been changed for exam purposes. Please ignore any outside knowledge you may have about the REINS Act and accept the facts as stated above.)