Introduction to Administrative Process

Final Examination

Professor Field Spring 2008

General Instructions

This is a three-hour, open-book exam; you may consult any written materials.

Use the answer sheet provided; be sure to include your exam number.

References to, e.g., "Agency" or "Statute" are to a *specific* entity or document; "agency" or "statute" are not. Federal law applies to action by state or local agencies.

In Parts I and II, only the first 20 answers to any of 24 questions count.

Part I: Multiple Choice

[80 points]

Choose the best concluding phrase or statement for **any 20** of the following questions.

1. Longstanding differences between the standards applied by the PTO and the courts were often explained by:
   A. disparities in the information available to respective decision makers.
   B. the tendency in collateral review to ignore Supreme Court decisions.
   C. lack of agency deference to courts that reviewed directly.
   D. inadequate judicial deference to agency expertise.

2. Courts that cannot discern whether there is support for informal agency action:
   A. do not affirm.
   B. should affirm if the probable bases are apparent.
   C. often require testimony from agency principals.
   D. must credit acceptable bases when provided by agency counsel.

3. Parties in clear violation of Rule should be able to evade sanctions if:
   A. Rule is based on information known only to the agency.
   B. Rule is based on expertise dubious in fact.
   C. Both A and B are untrue.
   D. Both A and B are true.

4. Agency Head lacks substantive rulemaking authority, but she may designate three or more members of a Board that has final authority to hear intramural appeals. Should a panel on which she did not sit make an unacceptable ruling on an issue of law, she has solid grounds to:
   A. publish a notice effectively negating that ruling.
   B. reverse the panel's decision upon further appeal.
   C. require its members to issue an opinion more to her liking.
   D. appoint a sympathetic panel upon the first opportunity to reverse the ruling.

5. If Bob did not file a timely appeal to a final adverse agency order, he can probably:
   A. challenge its legal bases in a collateral enforcement proceeding.
   B. challenge its factual bases on de novo review.
   C. Neither A nor B is true.
   D. Both A and B are true.

6. Once the deadline for seeking intramural review of agency orders has passed, courts can:
   A. remand for further consideration.
   B. not review because the orders are not final.
   C. review unless a statute or rule requires exhaustion.
   D. not review unless a statute or rule waives the need to exhaust.

7. A court is likely to require compliance with Agency's cease and desist order if:
   A. the underlying opinion is supported by clear and convincing record evidence.
   B. the underlying opinion is supported by substantial evidence.
   C. the underlying opinion survives de novo review.
   D. if Agency followed APA §§ 556 and 557.

8. If Agency's 1949 enabling statute provides no process guidance:
   A. the APA governs by default.
   B. the APA need not be followed but is likely to be.
   C. under APA § 559, courts may require any reasonable process.
   D. courts must attempt to discern what Congress probably intended.

9. If a court believes that the scope of an adjudicative agency order is overbroad, it:
   A. should remand and direct the agency to use additional process.
   B. must nevertheless uphold the agency's decision.
   C. must amend the order as seems appropriate.
   D. may remand for additional explanation.

10. Interagency squabbles over jurisdiction have been resolved by:
   A. all means listed below.
   B. memoranda of understanding.
   C. proceedings within the Department of Justice.
   D. application of the principle that specific provisions trump general ones.

11. Administrative heads who disagree with particular decisions of ALJs:
   A. may insist that the offending ALJs reverse themselves.
   B. can usually reverse after de novo review.
   C. must seek review in the courts.
   D. can demote such ALJs.

12. Courts reviewing adjudications under APA § 706(2)(E):
   A. must reverse orders based only on incompetent evidence.
   B. use the same standard applied in reviewing jury decisions.
   C. apply the same standard as set out in F.R.C.P. Rule 52(a).
   D. reverse orders that conflict with a scintilla of competent record evidence.

13. Agency issues 5-year operators' licenses that can be revoked only "for cause" after a "hearing on the record." If new Agency rules impose additional conditions for renewal:
   A. courts may modify those rules as needed to make the conditions reasonable.
   B. their promulgation via APA § 553 would satisfy APA § 706(2)(D).
   C. those rules will satisfy APA § 706 despite clear retroactive effects.
   D. their retroactivity will run afoul of APA § 706(2)(B).

14. Company stock that Manager bought at $10 now trades at $20. If, in a case of first impression, Agency orders Manager to sell it back at $12, its order is most likely to be:

A. affirmed if it explains why Agency so interprets Statute.
B. reversed because no preexisting rule put Manager on notice.
C. affirmed if it is based on common law rules governing insider trading.
D. reversed if it is at odds with common law rules governing insider trading.

15. While Manager's case was pending (Q 14), Agency Head gave several speeches stressing the evils of insider trading. To refuse to uphold the aforesaid order, a court would need:

A. clear and convincing evidence that Head had prejudged Manager's case.
B. to find that Head's speeches pose a risk of case-specific predisposition.
C. to focus on the need for adjudicators without strong policy biases.
D. to review based on standards applicable to Article III judges.

16. As is well known, Agency rules liberally construe duties imposed by Statute. If Agency intends to enforce more strictly, that new approach is most apt to be upheld if it:

A. is adopted after informal rule making.
B. follows election of a literalist president.
C. is inspired by hard Congressional questioning.
D. follows a Federal Register notice of revised interpretation.

17. Senator Swat, the principal sponsor of Statute (Q 16), was long been distressed by Agency's rules. She could most effectively have pointed Agency down its current path by:

A. threatening to withhold funding if Agency did not enforce more aggressively.
B. bringing suit to compel literal enforcement under APA § 706(1).
C. petitioning under APA § 553(e).
D. championing a Senate veto.

18. Sam challenged application of longstanding procedural Rule under APA § 706(2)(A) and the Rule itself under APA § 706(2)(B) and (C). If Agency gives Sam what he wants and moves to dismiss the action, a court:

A. assuming jurisdiction, must uphold the Rule.
B. lacks jurisdiction because the case is now moot.
C. lacks jurisdiction unless Sam filed a class action.
D. assuming jurisdiction, is unlikely to entertain a facial challenge.

19. Under Statute, consumers do appear before Utility Commission (UC). Only utilities, however, are explicitly afforded review in Appellate Court — following full intramural consideration. If Consumer seeks review of an initial decision in that Court:

A. she should succeed because the statute does not deny her the right to review.
B. she may do so because no exhaustion requirement applies to her.
C. it will lack jurisdiction until the initial decision becomes final.
D. it will lack jurisdiction.

20. Statute that allows Agency to grant and revoke operators' licenses as "Head sees fit":

A. is sure to be constitutional if the APA governs.
B. is hard to view as containing an intelligible principle.
C. can easily be construed so as to avoid a charge of excessive delegation.
D. is likely to be constitutional if Head serves at the pleasure of the legislature.

21. Agency initiated APA § 553 rule making after People-Furst (PF) petitioned to have additional obligations imposed on industry. After a hearing was scheduled, however, Chair privately negotiated most of what PF sought. If Agency then cancels further proceedings, a court would be apt to:

A. view any grounds given under APA § 555(e) as "arbitrary, capricious...."
B. view PF as an "interested person," not a "party" entitled to sue.
C. rule that PF was entitled to participate in negotiations.
D. allow Agency to terminate the APA § 553 process.

22. Statute directs Agency to set vehicle standards by issuing "orders" that must be supported by "substantial evidence on the record considered as a whole." If Agency repeals a rule previously adopted, a court is most likely to review its decision:

A. under APA § 706(2)(C).
B. under APA § 706(2)(E).
C. under APA § 706(2)(A), (D) and (E).
D. under APA § 706(2)(A) as if Agency had initially declined to initiate rule making.

23. If Agency concludes that it need not provide FOIA-requested documents, its:

A. interpretation of FOIA is likely to receive *Chevron* deference.
B. interpretation of FOIA must receive *Chevron* deference.
C. response is likely to be based petitioner's need.
D. response is likely to be based on § 552(b).

24. Agency was created to interpret and enforce a consumer protection Statute. If Agency chooses not to pursue arguable infractions, parties who would benefit usually:

A. have only political recourse.
B. can get courts to compel Agency enforcement.
C. have implied rights to enforce as private attorneys general.
D. can get courts to require Agency to provide detailed reasons.

Part II: Matching
[20 points]

Please match the best description to any (and only) **20** of the numbered cases.

1. Sallen
2. Duracell
3. Rydeen
4. Christianson
5. PHC
6. SOCAL
7. WATCH
8. Morgan v. Daniels
9. Winner
10. Siegel
11. Decker
12. Butterworth
13. Brooks
14. Am. Cyanamid
15. DEC v. Diamond
16. MPAA
17. Florida E. C. Ry.
18. Sun Ray
19. Abbott Labs.
20. Earth Island II
21. Public Citizen v. Young
22. Goyan
23. Merck v. Kessler
24. NLRB v. Sears

A. Cabinet officers may be unable to overrule adjudicatory decisions of subsidiary agencies.
B. Review under the Constitution or APA § 706(2)(B) is not limited to the agency record.
C. As to rule making, statues that require only "hearings" do not mandate formal process.
D. An early opinion stressing differences between court-court and court-agency review.
E. Prevailing parties may sometimes recover attorney fees from the U.S. government.
F. Overlapping agency jurisdiction was considered but did not affect the outcome.
G. The Copyright Office was not an "executive" entity under 18 U.S.C. § 1001.
H. Intellectual property suits sometimes present primary jurisdiction issues.
I. Judges rarely consider issues that were not raised in agency proceedings.
J. The Federal Circuit lacks jurisdiction to review vetoes of ITC decisions.
K. Frowns on reciprocal transfers between courts under 28 U.S.C. § 1631.
L. The PTO's substantive views are entitled to only *Skidmore* deference.
K. Opinions concerning refusals to enforce were available through FOIA.
M. Legislation explicitly forbade the specific agency action proposed.
O. Earlier involvement of its Chair led to vacating an FTC order.
P. The agency doubted its authority for retroactive rule making.
Q. Deference to agency fact finding may relate to its expertise.
R. A decision to initiate adjudication was not final action.
S. Questioned whether the FTC's order was justified.
T. A state agency was ordered to promulgate rules.
U. Assuming ripeness, final rules can be challenged.
V. Some "agencies" are not governed by the APA.
W. Witnesses do not testify before PTO Boards.
X. Disapproves an agency's use of its budget.

Examination No. _____

Answer Sheet

Part I — 80%
*Answer **only** 20 of 24* (4% each)

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Part II — 20%
*Answer **only** 20 of 24* (1% each)

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