MEMORANDUM

To: Fall 2008 Administrative Law Class
From: Professor Virelli
Date: February 16, 2011
Re: Sample Answer and Comments for the Final Exam

Below please find a sample answer for Part I of the fall 2008 final exam. I do not include any answers or comments for Part II of the exam—the short answer portion—because it involved policy arguments that are difficult to make general comments about and because it involved a selection of questions for students to choose from such that no single sample answer will be relevant to the entire class. Since you were not permitted to remove it from the test room, a copy of the exam is attached.

This sample answer is an actual student answer and thus is not meant as a model (i.e. perfect) answer, but instead as an example of a successful answer (as you will see, unedited). I hope it will be helpful in identifying your strengths and weaknesses on this exam in particular and in exam-taking in general.

In addition to the sample, I have included some general comments for each question in Part I based on the exams as a whole. These are not meant to be exhaustive, but should help to fill in many of the gaps in the sample answer. The fact that a particular point is not mentioned in the sample or my comments does not mean that a student including that information in their answer did not receive credit for it; where answers included information that was relevant and instructive in answering the question, credit was awarded accordingly. Finally, as I explained earlier, you are welcome to schedule a meeting with me to discuss your exam, but I strongly encourage you to review this material prior to scheduling such a meeting.

QUESTION 1

Comments for Question 1:

Besides the fact that none of the students identified all of the issues in either part of the question (not a surprise considering the number and complexity of issues present), the biggest problem here was that too many of you did not read the instructions carefully enough. Part A asked only about constitutional issues associated with sections 1-4 of the Act, not the Rule. Due process was thus not a part of this question – it was saved for Question 2.
The issues that could have been addressed are as follows:

§ 2 - Removal (Act limits presidential removal authority) and
Appointment (Can Administrator appoint five regional administrators, i.e. are regional administrators “inferior officers”?)

§ 3 - Delegation (intelligible principle?)
Constitutional adjudication (public or private rights / adjunct doctrine)

§ 4 - Legislative veto (bicameralism, but no presentment)

Part B required an analysis of whether the Final Rule satisfied the APA – again, due process is not yet an issue because we are not talking about whether the Final Rule is constitutional, only whether it meets the APA’s statutory requirements. The issues here were:

- Formal or informal rulemaking (“opportunity for hearing” not enough)
- Was Final Rule fatally different from Notice (logical outgrowth)
- Opportunity to comment denied (child psychology study not disclosed)
- Concise statement requirement met (few facts provided, but probably enough)
- *Ex parte* contacts with Consultants / Congress / President
- Retroactivity of Rule (§ 102 implicates it and Act does not expressly permit it)

**Sample Answer to Question 1:**

**Constitutional Issues**

There appears to be several constitutional Issues with the Act. There may be an issue under the non-delegation doctrine, delegation of Art. III power, an appointments and removal issue, there also may be a due process issue and an issue with the legislative limits. I will deal with each issue accordingly

**Non-Delegation Doctrine**

The non-delegation doctrine describes constitutional limits that apply when Congress invests an agency with power. In determining if there is a delegation problem the court
will ask whether there is a standard (intelligible principle) in the statute that created the agency. The act states that the Administrator shall “enforce the statute with whater course, the administrator deems appropriate. . . .” This is a red flag that there may not be an objective standard or law to apply this statute. The act says “deems appropriate to encourage America’s youth to embody. . .” This looks like an abjective standard to judge the administrative actions against and thus looks like an intelligible prinicple. If the court determines that this looks more like the CIA case where the employee was fired, then this is not intelligible principle. However, the court has not struck down a statute for not having an intelligible principle since the new deal, and after Whitman, the court is very lax find an intellible principle. I think that since the wording of the statute says “whatever he deems appropriate” the court will consider this statute too subject, with no law to apply (like in the CIA case) and because he is not just firing somone, but create rules and orders, there needs to be an intellible principle, so this statute coudl be struck down.

Delegation of Art.III power
There does not appear to be a strong Art. Ill argument, however, it is worth mentioning that, this statute could be struck if the court deems that congress has given too much Art. III power to an agency. The court will first determine if this is a private or public right. A public right is cases against the goverment, where as a private right would be a case of two private entitites against each other. If the court considers this a public right there is not a problem with the statute because agencies can adjuducate public rights. Hovewer, if the court says this looks more like a private right the court will apply one of three test -- Crowel, Thomas, or Schor. The questions will be whether the agency is only acting as an adjunct and the art. If court has some revew power, whther the private right is closed integraed into a complex regalutory scheme….

Appointments

Administrator
The act states that the adminstrator shall be appointed by the president with the advice and consent of the senate. Based on this language in appears that the administrator is a Principal officer becasue prinicple officers are appointed in this way; hoever, this is not
determinative and we still have to consider the factors under Olson to determine whether, this is a principal officer or an inferior officer. This is important because this will determine the President’s removal power. If this is a principal officer then the President should be able to remove the administrator at the President’s pleasure, if this is an inferior officer the president can only remove the administrator for cause.

To determine whether the administrator is a principle or inferior officer the court will likely apply the factors in Olson. It appears that the administrator is a principle officer because he cannot be removed by a higher executive branch official, he has a broad range of duties, he is not closely supervised by a principle officer, his office does not seem to be limited in tenure or jurisdiction; therefore, he is a principle officer.

There is a major issue in this statute under the president’s removal power, because even though it says the administrator will serve at the president pleasure, the act still creates a limitation on that power by saying “provided the administrator continues to demonstrate . . .” this looks like the president can only remove for some cause. Morrison v. Olson, modified the test of whether congress can restrict the president's power to remove by asking whether the restriction on the president impedes the president's ability to perform his constitutional duty. There appears to be some impesion, because the administrator is creating law, acting as the executor, and his power is not limited in jurisdiction, tenure or duties, additionally it looks like he answers to only one person -- the president; therefore this restriction impedes on the president’s power, and is unconstitutional.

There is also a problem with the language “the administrator must be removed.” This is congress telling the president, that if the Administrator does something congress does not like, the administrator is no longer serving at the president’s pleasure but based on what congress states. This is basically congress trying to hold some power of removal over the administrator, even though the administrator has executive and judicial power, which under Bowscher v. Synar has been held unconstititonal.
The appointments of the directors is constitutional because they are inferior officers (they answer to, and are supervised by the administrator) and under the constitution, congress can vest the power to appoint to either the president or heads of departments (the administrator).

**Legislative Limits**

There is a problem with the process by which congress can rescind a new standard. Standard are considered rules, that have the force and effect of law as stated in the Act. Under *Chadha*, when congress in doing something legisllative, it must follow the bi-cameralism and presentment clause. Under this Act, there appears to be bi-camerlism because both houses have to vote, and there has to be a majority vote; however, congress will only consult the president, it does not say that it will be presented to the president for him to veto or make some decision on it. Therefore, under Chadha, this is a legislative act that does not comply with the constitution.

**Validity of Rule Under the APA**

**Standard of Review**

**Notice**

There is a problem with whether the agency gave adequate notice. There are only two reasons that the rulemaking process can be exempted from proper notice. (1) If this is an interpretative rule or general policy statement, which it isnn’t under ATAA v, FAA because this rule carries the force and affect of law which creates new rights and duties. (2) If for good cause the notice is impracticle, uncessary, or contrary to public interest, none of which fits in here. Therfore, there has to be proper notice.

There was initial notice, but when the final rule was announced in change the age from 7 to 5. The court expects that there will be some diference between the proposed rule and final rule, however, the final rule must be a logical outgrowth of the propsed rule. The essentuial question is whether interested parties could have anticipate the frinal rule from the proposed rule. Interested parties could not have anitcipate an age change, since
this was not mentioned in the proposed rule; therefore, an additional round of notice and comment should have happened.

**Comment**

Interested parties should be given an opportunity to participate in the rulemaking by making comments; however, there is a problem here because if the public is not aware of critical information that the agency is relying on to make this rule, the public cannot have a chance to make meaningful comments. (Nova Scotia). It is clear that the information for the child experts was critical because that is what the agency relied its final rule on. It is not clear whether the public knew that the agency was relying on child experts, therefore, the public did not have a chance to rebut this information. Therefore, the notice was faulty, the comment was not sufficient, and the agency could not have considered all the relevant matters required under sec 553.

**Concise General Statement**

Additionally the Concise General Statement is not sufficient. All we have is information that the agency relied on the experts and that is limited to the experts concluded the appropriate age was 5, we do not know why, or whether 5 was actually better than 7. Additionally, considering the purpose of the agency “to instill in our school children the values . . . “we do not know if this regulation will serve the purpose under the act. The court will more than likely apply the “arbitrary and capricious” standard when review this agency decision (mainly because under sec 706 and Overton Park, through the process of elimination this is the only standard that will suffice. And under the State Farm hard look review, this general statement will not be enough to persuade the court that the agency considered all the alternatives, and made a reasonable decision. So the rule should be either be remanded, so the agency can give a better explanation, or vacated.

**Ex Parte Communications**

President

In the absence of any explicit statutory prohibition, it is OK to discuss policy issues with the president, as long as the final rule is based on information in the record. The fact that
the President persuaded the agency to change the age is not a problem in itself, the problem is that there is concern that the president may have unduly influenced the decision. The essential inquiry is why did the agency change the age from 7 to 5, if it is supported by the record there is not a problem. All we have is the information about the experts, and as I already discussed, the decision is not supported by the record, so there is a strong argument that the agency was influenced unduly by the president

Congress
Under Sangoman, ACT v. FCC, and Sierra Club, it is not a major problem that members of congress spoke to the agency on the issues, the question is whether the ex-parte communication was about extraneous and irrelevant issues (i.e., threats). We have to prove that there was such a conversation, all we have is congress telling the agency why this regulation is better. Additionally, we would have to prove that the ex-parte communication affected the agency decision. Based on the fact, that the decision is not really supported by the record this is a strong argument. However, I we can show this was restricted ex-parte communication because the first prongs fails.

Retractive
This rule is retroactive because even though the final rule is announced in June 2008, it says the the rule will have affect on conduct at the beginning of the 2007-2008 school year (September 2007 - August 2008). This is is unconstitutional, unless congress specifically states that it wanted the agency to create a retroactive rule.

QUESTION 2

Comments for Question 2:

Question 2 dealt with the issues implicated by Davey’s petition for review of both disciplinary actions. I organized the potential issues as follows, but did not require your answers to follow this approach. You should also note that this list of issues is designed to be exhaustive; it was not expected that each of you (or any of you, for that matter) would be able to identify and analyze all of these issues in your exam.
A. Issues pertaining to both actions that could be relevant to Davey’s challenge:
   - Standing
   - D Ct jurisdiction (§ 5 of Act)
   - Did hearing officer have unalterably closed mind?
   - Was adjudication constitutional? (public rights)
   - Formal or informal adjudication? (“after opportunity for hearing”)
     - Chevron deference to Agency interpretation of Act
   - Were adequate findings made by Agency under 555(e)?
   - Is issue ripe for adjudication?
   - Was Davey required to exhaust his administrative remedies?
   - Is judicial review precluded under § 701(a)(2)?
   - Did hearing officer engage in improper ex parte contacts with:
     - Values R’ Us and/or
     - The Regional Director?

B. Issues pertaining to the First Disciplinary Action
   - Due process:
     - Whether (liberty interest - stigma)
     - What (pre-discipline hearing (Ingraham))
   - Adjudicative decision:
     - Is “a-hole” a violation?
     - Arbitrary and capricious review

C. Issues pertaining to the Second Disciplinary Action
   - Is interpretation of Final Rule in YDA Memo valid?
     - Fairly encompassed?
     - If not, do the actual notice or good cause exceptions apply?
   - Due process
     - Whether (liberty interest - detention)
     - What (pre-discipline hearing)
• Adjudicative decision
  o Factual decision re: intent to offend
  o Was conduct a violation?
  o Standard of Review: Both of these decisions are reviewed under an arbitrary and capricious standard if this was an informal adjudication (the better analysis), and a substantial evidence standard if a formal adjudication (see Part 2A above).

[Note: Many of you said that the YDA Memo must be reviewed under the deferential standard established in Skidmore. This is not correct because the Memo was not interpreting the Act, but only the Final Rule. The appropriate standard of review for the YDA Memo is that for interpretive regulations.]

**Sample Answer to Question 2:**

There are several issues with the disciplinary hearings first is the Policy Memo should have when through notice and comment, whether Davey was given adequate Due Process, whether there was detrimental Ex-parte communicaations by the decision maker, whether the decision maker gave an adequate decision.

**IS THIS REVIEWABLE**

Review is not exempted because it was not committed to agency discretion under 701 -- there is law to apply in this case (the rule). According to *Abbot Labs* there is a presumption of review unless there is clear and convincing evidence to show otherwise.

**STANDING**

There is standing because Davey suffered an injury that was caused by agency action; therefore, it can be redressed by an injunction or some other form or civil remedy.

**RIPENESS**

This is ripe because under *Abbot Labs*, this issue is fit for judicial decision. This is based
on a final decision made by the hearing officer, and it is a mixed legal factual issue that the court is equipped to handle.

Additionally, there will be hardship if the court refuses to hear this case because Davey will have face his detention time. It may not be serious hardship, but reviewing now rather than later will not make a difference in the how the court will rule, so rather than wait for him to serve his detention, now is the best time to review.

**STANDARD of REVIEW**

There are a few possible review standards the court can use. By applying *Overton Parks*, process of elimination test, we see that sufficient evidence does not apply because this was not formal adjudication. We could ask whether formal adjudication should have been require (that is a due process argument as well), but by looking at the enabling statute, section 4 only says “opportunity for hearing” that is not the magic language required under *Dominion* for formal adjudication, additionally, it is not clear that congress wanted formal adjudication. Additionally, after *Chevron*, the court will defer to the agency’s reasonable interpretation of the statute, and since the act does not explicitly require formal adjudication, it is a reasonable interpretation of the act). So, substantial evidence is not the standard of review; however, this is could be de novo review because facts finding might be considered inadequate, there is also a possible due process argument, so there could be constitutional review, and finally this is a situation where the agency was applying facts to law and made a decision; therefore, arbitrary and capricious may be used. I will deal the each possible argument in the situation and determine if anyone of these standards of review will be applicable.

**Policy Memo**

Under *Skidmore*, this policy letter would be given little deference and would be relied on only to the extent that it is reliable. There is another serious question, is this really a policy or interpretative rule or does this have the force and affect of law. It appears that it does have the force and affect of law, because any one that violated this interpretation is subject to some form of punishment, additionally, this policy letter has the effect of being
binding on parties, because this is what the hearing officer, is using to decide the case. Basically, he is applying the facts of the case to what this policy memo says, and then decided the case; therefore, this letter looks more like a rule. If the court determines that his policy letter looks more like a rule, the procedures used to promulgate the rule is inadequate because it should have went through (at least) notice and comment rulemaking. If the court decided that the letter merely spells out duties and rights already encompassed within the regulation, then there is not a problem. I think that because this letter is being used by the hearing officer like a “rule” it should have went through notice and comments. In which case that standard of review is 706(2)(d)

**Due Process**

There is a due process argument, but it may be very weak. The court would apply the *Mathews* due process test.

Frist, is there a protect interest at stake. We could argue that by putting his name on the bulletin board his was ruining Davey’s reputation and creating a stigma, however, this will probably fail because the stigma was not really affected Davey for “pursuing happiness” his life would not be ruined, he could still get a job in the future, so in this situation, a protected interest is not at stake.

When, he is held in detention, we could argue that literally, this was a liberty interest at stake.

However, if we apply the mathew test:

1. The private interest at stake
2. The risk of error under the present procedures and the likely reduction of risk
3. The government’s interest in using the required procedure.

It appears the governmental interests totally outweigh the private interest at stake. Yes, he was held in detention but this was only 8 hours (he was not imprisoned or severely beaten). And the government has a legitimate interests in using this procedure, the government wants to instill values in the children, and the procedures are not at a high risk of error. There is the argument that the decision maker is relying on what other
children are saying then there is a high risk of error. But when Davey got his detention, the hearing officer was relying on a report from the principal (she should be unbiased). However, if the principle is relying on children that might be biased, we have a strong argument that the procedures are very risky. With that in mind, we cannot require a full blown trial, because this is a child and it is only detention, so the government need outweighs the interest at stake, and Davey probably would not get more due process (additionally based on the child beating case, the court probably would say that if more due process was not required when children were being beating, there shouldn’t be more due process for mere detention).

**Biased Decision Maker**

We have evidence that the decision maker in this process might be biased and made ex parte communications. Proving that the decision maker was biased to the point that he had an unalterable closed mind is hard to prove. We have to show by clear and convincing evidence, *C&W Fish*, that he had this ex parte communications and he had a will to win. The speech he made is ex-parte but it does not prove by clear and convincing evidence that he had an unalterable closed mind. Additionally, this may only apply to rulemaking, so we may not be able to argue this.

**Ex-parte**

In a adjudicatory proceeding, 554 and 557 provide that inside and outside ex-parte communication is not allowed. There appears to be inside ex-parte communication involved here because the hearing officer spoke with the director of the YDA of the purpose of meaning of the YDA memo, this means that 554 applies. Under 554, the hearing officer cannot contact a party about a fact in issue. The discussion was not about a fact in issue, it was about the “law in issue” (what does memo mean) and, the YDA director is not a party therefore, this provision will not apply.

Additionally, when he spoke to Values R Us, this looks like outside ex-parte communication, which means 557 will apply. Values R us is an “interested person”, and it looks like the officer was answering questions that were relevant to the merits of the
proceeding (the importance of including non-verbal communication in the differentiation of profanity). So this is prohibited under 557, but before a reviewing court will find this detrimental, the court will consider the gravity of such communication.

The Officer Decision

The officer finding might be inadequate, because it does not show his findings of fact, and his reasoning and this is required under the APA