UNIVERSITY OF KENTUCKY
COLLEGE OF LAW

Examination No. __________

ADMINISTRATIVE LAW (LAW 920-001) Prof. Healy

April 27, 1999 Room 213

FINAL EXAMINATION

INSTRUCTIONS

This final examination consists of four questions that are worth a total of 180 points. You will have three hours to complete this examination.

The examination is open text, open notes, and open student outline. You are not permitted to refer to treatises, horn books, commercially-published outlines, or other secondary materials.

PLEASE WRITE YOUR EXAMINATION NUMBER (AND ONLY YOUR EXAMINATION NUMBER) ON THE FIRST PAGE OF THIS QUESTION SHEET AND ON EACH BLUE BOOK THAT YOU USE. Please number sequentially the blue books that you use. Turn in all materials -- this question sheet and all blue books, including blue books used for scrap paper -- at the end of the examination period or when you have completed the examination, whichever is earlier.

PLEASE READ EACH QUESTION COMPLETELY BEFORE YOU BEGIN TO OUTLINE OR WRITE YOUR RESPONSE. ANSWER THE PARTICULAR QUESTION THAT IS ASKED. WRITE YOUR ANSWERS LEGIBLY: WRITE ONLY ON EVERY OTHER LINE AND WRITE ONLY ON ONE SIDE OF THE BLUE BOOK PAGE. Do not waste your time with wild speculations for which neither the question nor the answer calls.
The WIC Program was established by Congress in 1972 to assist pregnant, postpartum, and breastfeeding women, infants and young children from families with inadequate income whose physical and mental health is in danger because of inadequate nutrition or health care. The Department of Agriculture (the Department) has been delegated authority to administer the Program. The Department therefore designs food packages reflecting the different nutritional needs of women, infants, and children and provides cash grants to state or local agencies, which distribute cash or vouchers to qualifying individuals in accordance with Departmental regulations as to the type and quantity of food.

In 1975 Congress defined for the first time the "supplemental foods" which the program was established to provide. The statute was amended to provide that the term:

shall mean those foods containing nutrients known to be lacking in the diets of populations at nutritional risk and, in particular, those foods and food products containing high-quality protein, iron, calcium, vitamin A, and vitamin C. . . . The contents of the food package shall be made available in such a manner as to provide flexibility, taking into account medical and nutritional objectives and cultural eating patterns.

Pub. L. No. 94-105, § 17(g)(3).

Pursuant to this statutory definition, the Department promulgated new regulations specifying the contents of WIC Program food packages. These regulations specified that flavored milk was an acceptable substitute for fluid whole milk in the food packages for women and children, but not infants. This regulation formalized the
Department's practice of permitting the substitution of flavored milk, a practice observed in the WIC Program since its inception in 1973 as well as in several of the other food programs administered by the Department.

In 1978 Congress redefined the term "supplemental foods" to mean:

those foods containing nutrients determined by nutritional research to be lacking in the diets of pregnant, breastfeeding, and postpartum women, infants, and children, as prescribed by the Secretary.

Pub. L. No. 95-627, § 17(b)(14). Congress provided further that:

The Secretary shall prescribe by regulation supplemental foods to be made available in the program under this section. To the degree possible, the Secretary shall assure that the fat, sugar, and salt content of the prescribed foods is appropriate.

Id. § 17(f)(12).

To comply with this new statutory definition, the Department moved to redraft its regulations specifying the WIC Program food packages. In doing so it relied upon information collected during an extensive investigative effort which had begun in 1977.

In June 1977 the Department held public hearings in seven cities and elicited testimony on the structure and administration of the WIC Program. The Department invited many interested and informed parties to attend these hearings. In addition to information gathered at the public hearings, the Department received periodic reports from the National Advisory Council on Maternal, Infant, and Fetal Nutrition.

Relying on all this information, the Department in November 1979 published for comment a proposed regulation in the Federal Register. Along with the proposed regulation, the Department published a preamble discussing the general purpose of the rule and acknowledging the congressional directive that the Department design food packages containing the requisite nutritional value and appropriate levels of fat, sugar, and salt. Discussing the issue of sugar at length, it noted, for example, that continued inclusion of high sugar cereals may be "contrary to nutrition education principles and may lead to unsound eating practices." It also noted that high sugar foods are more expensive than foods with lower sugar content, and that allowing them would be "inconsistent with the goal of teaching participants economical food buying patterns."

The rule proposed a maximum sugar content specifically for authorized cereals. The preamble also contained a discussion of the sugar content in juice, but the Department did not propose to reduce the allowable amount of sugar in juice because of technical problems involved in any reduction. Neither the rule nor the preamble discussed sugar in relation to flavoring in milk. Under the proposed rule, the food packages for women and children without special dietary needs included milk that could be "flavored or unflavored."

The notice allowed sixty days for comment and specifically invited comment on the entire scope of the proposed rules: "The public is invited to submit written comments in favor of or in objection to the proposed regulations or to make recommendations for alternatives not considered in the proposed regulations." Over 1,000 comments were received from state and local agencies, congressional offices, interest groups, and WIC Program participants and others. One of these commenters was Martha Mother, a continuing recipient of WIC benefits. In her comments, Ms. Mother objected to the Department's decision to regulate sweetened cereals and requested that the Department provide a public hearing on its proposal. The Department declined to schedule a public hearing.

Seventy-eight commenters, mostly local WIC administrators, recommended that the Department delete flavored
milk from the list of approved supplemental foods. In promulgating the final rule, the Department, responding
to these public comments, deleted flavored milk from the list. The Department included the following
information in the preamble:

In the previous regulations, women and children were allowed to receive flavored or unflavored milk. No
change in this provision was proposed by the Department. However, 78 commenters requested the deletion of
flavored milk from the food packages since flavored milk has a higher sugar content than unflavored milk.
They indicated that providing flavored milk contradicts nutrition education and the Department's proposal to limit sugar in the food packages. Furthermore, flavored milk is more expensive than unflavored milk. The Department agrees with these concerns. There are significant differences in the sugar content of fluid whole milk and low fat chocolate milk. Fluid whole milk supplies 12.0 grams of carbohydrate per cup compared to 27.3 grams of carbohydrate per cup provided by low fat chocolate milk. If we assume that the major portion of carbohydrate in milk is in the form of simple sugar, fluid whole milk contains 4.9% sugar contrasted with 10.9% sugar in low fat chocolate milk. Therefore, to reinforce nutrition education, for consistency with the Department's philosophy about sugar in the food packages, and to maintain food package costs at economic levels, the Department is deleting flavored milk, including chocolate milk, from the food packages for women and children.

(A) You are an experienced administrative lawyer and you have been contacted by the Chocolate Makers
Association (CMA), a trade association whose members process and sell chocolate products. CMA did not
submit any comments on the proposed regulation and did not otherwise participate in the development of the
final regulation. CMA is very concerned about the regulation promulgated by the Department and has
approached you for legal advice. Please present your analysis of whether CMA may bring an immediate
challenge to the regulation in federal court. Please include in your analysis your opinion of the strengths and
weaknesses of CMA's position.

Assume now that, rather than having been approached by CMA, you were approached by Martha Mother, a
continuing recipient of WIC benefits. Ms. Mother and her eligible young child enjoy drinking chocolate milk. As
the facts mentioned, Ms. Mother had submitted comments to the Department on the proposed regulations in
which she had objected to its decision to regulate sweetened cereals. Please present your analysis of whether Ms.
Mother may bring an immediate challenge to the regulation in federal court. Please include in your analysis
your opinion of the strengths and weaknesses of her position.

In presenting your analyses, please try to avoid repetition if possible. (35 POINTS)

(B) Assume that these plaintiffs may assert their claims in court immediately. Please present your analysis of the
legality of the final regulations promulgated by the Department. (25 POINTS)
QUESTION 2

(40 POINTS)

The year is 2002. Once again, the nation finds itself in a situation where the President is a member of one political party, and the Congress is under the control of the country's other political party. This split has led to policy gridlock and to worsening relations between the President and Congress. Opposition Members of Congress are particularly upset that the Office of Management and Budget (OMB) has begun close substantive review of regulations and has apparently encouraged agencies to implement legislation in ways that were not intended by Congress.

You are employed as the principal aid to a Member of Congress who has inquired whether Congress can loosen the President's grip over key officials in the government by limiting the President's authority to remove these officials. Your employer anticipates that the majority party in Congress has enough votes to override any presidential veto of such reform legislation. Your employer has several questions for you concerning the constitutionality of actions that Congress might take. Please prepare a response to each of the following questions.

(A) Can Congress make the Secretary of Agriculture removable by itself instead of the President? The Secretary of Agriculture is charged with the final authority to adjudicate disputes and to promulgate rules under several statutes administered by the Department. (13 POINTS)

(B) As an alternative to the proposal described in Part A, can Congress restrict the authority of the President to remove the Secretary of Agriculture to situations involving "inefficient, neglect of duty, or malfeasance"? (13 POINTS)

(C) Can Congress restrict the authority of the President to remove the Administrator of the Environmental Protection Agency to situations involving "inefficiency, neglect of duty, or malfeasance"? The EPA is an "independent agency" within the Executive Branch but not a cabinet department. (14 POINTS)
(A) Please describe briefly the difference that arguably is present between the degree of judicial deference that is owed to an agency interpretation of law included in a legislative rule and that is owed to an agency interpretation of law included in an interpretive rule or policy statement. (10 POINTS)

(B) Please assume that the difference you described under Part A exists and has a determinative effect on the legality of an agency interpretation in a particular case. Please provide a total of at least two arguments in support of and/or in opposition to the proposition that it is appropriate for courts to apply different degrees of judicial deference in reviewing the two different types of agency interpretations. (20 POINTS)

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QUESTION 4

(50 POINTS)

John is a second-semester, first-year student at the University of Massachusetts School of Law (a fictional public institution for purposes of this problem). The school charged him with plagiarism, an Honor Code violation, based on an appellate brief he had written in the legal writing course. Specifically, he was charged with (a) the failure to indicate by quotation marks six sentences quoted verbatim from judicial decisions and four sentences quoted verbatim from law review articles, although all the documents were cited generically, and (b) the general appropriation of the three legal arguments in the brief from three actual appellate briefs on file in the library that were paraphrased and were not cited.

The legal writing instructor, a former attorney with the U.S. Department of Justice, had originally recognized the appropriation of other work, but as she said one day in the faculty lounge, "In the Justice Department we learned that, because most of the litigation involved issues that had been considered and briefed before, unless you were plagiarizing someone else's work, you were wasting time." She thought it was interesting that a student had learned this so early in law school. It did not occur to her that this might be an Honor Code violation.

Word of this discussion in the Faculty Lounge got back to the Dean, who asked the instructor if it was true. The Dean then informed the instructor that such action was a clear violation of the school's Honor Code, which defined plagiarism as including: "copying another person's exact language without placing quotation marks around that language and citing to the source (it is not sufficient merely to cite to the source)" and "paraphrasing of another person's work to an extent or degree that you are in effect using the other person's writing." The instructor, who was hired on a year-to-year contract without tenure, then reported the student pursuant to the school's Honor Code procedures.

The Honor Code procedures provide that a teacher who discovers an Honor Code offense shall report it to the Honor Committee, which consists of the Associate Dean for Students (a non-faculty administrator, who is hired by and serves at the pleasure of the Dean) as chair, one tenured faculty member chosen by the Dean, and one student elected annually by the student body. The Committee investigates the alleged violation and determines whether a violation has occurred. It reports its findings and conclusions to the Dean, and if it determines that a
violation has occurred, it includes a recommended sanction to the Dean, who imposes the sanction he deems appropriate. The Honor Code does not specify much procedure, stating only that the student shall be given an opportunity to address the Committee and provide his or her side of the story.

John was in fact given notice of the charge (and was told by the Legal Writing instructor the background to the charge) and was invited to address the Committee, which he did. He asked to be accompanied by counsel, but that request was denied. He pleaded ignorance of the rule, although he admitted that he had been provided a copy of the Honor Code at orientation (along with a lot of other material) and that the initial lecture in Legal Writing had stressed the importance of not plagiarizing, but the lecture had not defined the term. He also told the Committee that his older sister is a lawyer with the Public Defender, and he had often heard her tell how she uses other people's briefs in her own. He asked to call other students to testify as to their understanding and to call practicing lawyers as to what is appropriate behavior in "the real world." These requests were denied.

The Committee unanimously found that John had committed plagiarism, a violation of the Honor Code, and by a two-to-one vote (the student dissenting) recommended that John be suspended for one year. The two Committee members explained that they did not believe that John had used the other work in the innocent belief that it was appropriate behavior, but rather in an attempt to reduce his own workload, and that he had tried to conceal this attempt by omitting the citation.

Neither the finding nor recommendation were provided to John before the Dean decided to impose the sanction of expulsion. In the letter to John explaining his decision, the Dean stated: "From Watergate to Whitewater the honesty and integrity of lawyers have been found wanting. A law school must set an example for its students that honesty and integrity in the law are of the utmost importance and cannot be compromised. Any sanction less than the ultimate sanction would suggest that dishonesty and duplicity can be forgiven. This is not a message I wish this school to send."

John's transcript now includes the notation: "Expelled for Honor Code violation." Federal law generally protects the privacy of educational records from transmission to third parties without the written permission of the person whose records are involved.

John and his parents have now come to you for legal advice on this matter. Accordingly, you are asked to prepare a memorandum that analyzes the strengths and weaknesses of a claim by John that the law school's action has violated the Due Process Clause of the U.S. Constitution.