

QUESTION 3

You represent Ralph Realtor, a local real estate broker licensed by the state Real Estate Commission. Ralph has just learned from a Commission source that the agency is planning to revoke his license for what it considers to be his violation of a Commission rule. Ralph comes to you with the following questions.

QUESTIONS:

1. What procedures must the agency follow in order to revoke his license?
2. Who will preside at any agency proceeding?
3. What rules of evidence will apply?
4. Upon what basis will the agency decision be rendered?
5. How can Ralph appeal the agency's ruling if it becomes necessary?
6. Upon what basis may a reviewing court overturn the agency's decision?

DISCUSSION FOR QUESTION 3

1. What procedures must the agency follow?

In attempting to revoke an occupational license, an agency must accord the licensee Constitutional due process rights, including those of notice and opportunity to be heard. The notice must recite the legal issues involved and the time, place and nature of the hearing. The Model State Administrative Procedure Act, § 4-206 (1981).

The opportunity to be heard includes the rights to present evidence, to call witnesses in his/her behalf, to confront and cross-examine and to be represented by counsel. 5 U.S.C. Sec. 555 (198) [Federal APA]; Schwartz, Administrative Law Treatise, 2nd Ed. (1984), Sec. 5.1, 6.9, 7.1, 7.7.

2. Who will preside if a hearing is held?

The presiding officer, who conducts the hearing and renders decisions, may be the agency head, one or more members of a collegial body agency head or a hearing examiner/Administrative Law Judge who is subordinate to the agency head. Model State APA, Sec. 4-202.

3. What rules of evidence will apply?

Relaxed rules of evidence apply. While irrelevant evidence is excluded, agencies are not rigidly constrained by all technical rules of evidence and admit evidence liberally, as does a court of equity. Hearsay evidence is typically admitted, for instance. Schwartz, Id. at Sec. 7.2; Model State APA, Sec. 4-212.

4. Upon what basis will the decision be rendered?

The decision will be based on the record of the hearing as made and on matters judicially noticed. It must include written findings of fact and conclusions of law. Model State APA, Sec. 4-215.

5. How can he appeal the agency's ruling?

If the decision is an initial one rendered by a subordinate officer, an aggrieved party can petition for appeal and review by the agency head(s). If the decision is one by the agency head(s), an aggrieved party may file a petition for reconsideration.

Such attempts at intra-agency appeal by the aggrieved party constitute exhaustion of his/her administrative remedies and must be pursued. Model State APA, Sec. 4-215, 4-218; Schwartz, Id. at Sec. 7.2.

A party who has exhausted his/her administrative remedies and has standing to do so and a final agency decision ("final agency action") may petition for judicial review of the agency decision. Schwartz, Id. at Sec. 8.1; Model State APA, Sec. 5102.

6. Upon what basis may a reviewing court overturn an agency decision.

If the agency: (a) action was unconstitutional; (b) acted in excess of its delegated authority; (c) decision was affected by error of law; (d) decision was arbitrary or capricious, or an abuse of the agency's discretion; (e) decision was made upon unlawful procedure; (f) violated a statute or failed to follow its own rules; (g) decision was unsupported by substantial record evidence when viewed as a whole; (h) decision was clearly erroneous. Model State APA, Sec. 5-116.

Examine # _____

Final Score _____

SCORESHEET FOR QUESTION 3
ASSIGN ONE POINT FOR EACH STATEMENT BELOW

SCORE SHEET

1. Ralph Realtor must be provided with proper notice and opportunity for a hearing. 1. _____
2. A Hearing Officer/ALJ may conduct the hearing, or the Real Estate Commission may hear the case itself. 2. _____
3. The administrative proceeding will use relaxed rules of evidence. Irrelevant evidence will be excluded, but agencies are not bound by the technical, rigid rules of evidence. Hearsay is often admissible. 3. _____
4. The administrative decision is based on the record in the proceedings, and burden is by preponderance of evidence. 4. _____
5. If the case is heard by a Hearing Officer/ALJ, an aggrieved party may petition for review by the Commission itself. 5. _____
6. If the case is heard by the Commission, the agency will allow an aggrieved party the opportunity to petition for reconsideration. 6. _____
7. If Realtor has exhausted administrative remedies available to him, and has obtained a final agency decision, he has standing to appeal to a court of law. 7. _____
8. A reviewing court can overturn an agency decision if:
 - 8a. the decision is arbitrary, capricious, or an abuse of discretion; 8a. _____
 - 8b. the decision was unsupported by substantial evidence in the record when viewed as a whole or was clearly erroneous; 8b. _____
 - 8c. the decision violates the constitution, a relevant statute, lawful or required procedures, or is affected by other error of law; or 8c. _____
 - 8d. the decision exceeds the Commission's authority. 8d. _____

QUESTION 5

By statute, the Bureau of Alcohol and Tobacco Control (BATC) is authorized to promulgate rules and regulations for the distribution of alcohol and tobacco products. Additionally, BATC issues licenses for retail sales of alcohol and tobacco. BATC regulations permit the issuance of a liquor license to owners of retail liquor establishments "within the meaning of the Act." The Act defines a retail liquor establishment as "a business devoted exclusively to selling alcoholic beverages directly to the public at retail prices." The regulations also state that "any person aggrieved by a BATC decision may appeal such decision to the BATC Board of Appeals (BOA), and thereafter may file an action in the district court."

John Garcia, the owner of Fiesta discount drug stores, applied to BATC for a retail liquor license to begin selling beer and wine in his stores. BATC granted a provisional license to Garcia conditioned upon Garcia designating an enclosed location within each store where only alcoholic beverages would be sold.

The Association of Liquor Purveyors (ALP), which represents numerous liquor licensees, learned of BATC's action. Concluding that the BOA would take too long to decide the appeal, ALP immediately filed a declaratory judgment action in the federal district court alleging BATC's issuance of the provisional license to Garcia harmed ALP members, was contrary to BATC's own regulations, was an abuse of discretion, and was arbitrary and capricious.

QUESTION:

Discuss the issues counsel for BATC should raise to support a motion to dismiss and the issues counsel for ALP should raise to resist the motion.

DISCUSSION FOR QUESTION 5

This question deals with four administrative law principles, (1) standing, (2) third-party standing, (3) ripeness, and (4) exhaustion of administrative remedies.

The exam takers were asked to discuss the issues counsel for BATC should raise to support a motion to dismiss and the issues counsel for ALP should raise to resist the motion. The issues that exam taker should identify on behalf of BATC in its motion to dismiss are that ALP lacks standing, that ALP failed to exhaust its administrative remedies by not appealing BATC's decision to the BOA prior to filing suit in federal district court, and that ALP's claim is not ripe because the BATC has issued only a provisional license to Garcia. In ALP's defense, exam takers should counter BATC's standing argument, stating that ALP does have standing because its members have suffered an "injury in fact," are within the appropriate "zone of interest," have standing as a "third party" under existing law, and/or constitute "any person aggrieved" under BATC regulations. A more detailed discussion of these legal principles follows.

Standing is central in challenging agency action, assuring or denying access to review. Standing looks first to the party seeking the adjudication and secondly, to the issues involved. Although the Supreme Court has variously described and decided the issue of standing, its central premise remains that one who is adversely affected in fact by governmental action has standing to challenge its legality, and one who is not adversely affected in fact lacks standing. 4 Davis, *Administrative Law Treatise*, § 24.2, at 212 (1983) [hereinafter Davis]. Standing in essence preserves the Article III "case or controversy" requirement that sufficient adverseness is demonstrated and a specific injury, not a generalized wrong, is present. Sierra Club v. Morton, 405 U.S. 727 (1972). The standing principle is preserved in the APA, 5 U.S.C. § 702, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." The statute confers standing to three classes of persons (1) those suffering "legal wrong;" (2) those "adversely affected;" and (3) those "aggrieved." 4 Davis, § 24.3, at 215.

To determine whether an individual or organization has standing, the Court asks whether the challenger has suffered an "injury in fact." U.S. Parole Comm'n v. Geraghty, 445 U.S. 388 (1980). That injury may be economic or noneconomic. Sierra Club, 405 U.S. at 717. It may be social, protecting the right of a family to live together, Moore v. City of East Cleveland, 431 U.S. 494 (1977), or associational, protecting the right to interracial association. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972). The injury must be distinct and individuated. "Injury in fact" requires "a nonfrivolous showing of continuing or threatened injury at the hands of the adversary." Warth v. Seldin, 422 U.S. 490, 501 (1975).

While these requirements look to the individuals or associations involved, standing is also circumscribed by concern that the issues raised are appropriate for the court to become involved in. These prudential limitations are expressed in the "zone of interest" inquiry, that the claim asserted falls within the "zone of interest" protected by the statute or constitutional guarantee in question. Assn. of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970). This requirement assures the courts will not hear generalized grievances and observes the separation of powers often triggered by administrative action.

Against this general jurisprudence of standing, the question raises the particular issue of third party standing. The Court in a long series of cases has permitted others, organizations, associations, or groups, to represent the interests of the aggrieved individual. In Doe v. Bolton, 410 U.S. 179, 188 (1973), the Court upheld the standing of physicians to challenge anti-abortion legislation on the grounds the "physicians assert a sufficiently direct threat of personal detriment," although the ground for unconstitutionality rested on rights of patients, not the rights of physicians.

The BATC statute provides that "any person aggrieved" may seek judicial review. The question, therefore, is whether the ALP is a "person" within the meaning of the Act. An environmental organization has been held to be "a person" within the meaning of the APA and enabling legislation. Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978). Nevertheless, the Court's decisions are hardly consistent.

The question also raises the issue of the doctrine of ripeness, whose "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by challenging parties. The problem is best seen in a twofold aspect, requiring evaluation of both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136 (1967).

Finally, the issue of exhaustion of administrative remedies is implicated. Because ALP did not appeal BATC's decision to the BOA, it did not exhaust its administrative remedies. Normally, before a court can have jurisdiction to review the administrative action in whatever form such review takes, the party seeking review must have exhausted the available administrative remedies. Schwartz, Administrative Law, 2d Ed. (1984) §4.13 and §8.1; Stein, Mitchell & Mezines, Administrative Law, §49.01 (1991); Koch, Administrative Law and Procedure §6.71 (1990); Myers v. Bethlehem Ship Building Corp., 303 U.S. 41 (1938).



21551

Essay 5 GradeSheet

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Please use blue or black pen
and write numbers clearly

- 1. Recognition of issue of standing (pertinent to case or controversy requirement). 1. _____
- 2. Standing is conferred to those who, because of agency action, suffer legal wrong or injury. 2. _____
 - 2a. Injury here is potential economic harm because liquor to be sold in discount drug stores. 2a. _____
- 3. Recognition of ALP's potential standing as "third party." 3. _____
 - 3a. Third party must assert a sufficiently direct threat to them. 3a. _____
- 4. Recognition of issue of whether ALP is "person" under regulation. 4. _____
- 5. Recognition of ripeness issue. 5. _____
 - 5a. Ripeness involves fitness of issues for judicial evaluation and hardship to parties of withholding consideration. 5a. _____
- 6. Recognition of ALP's lack of exhaustion of administrative remedies. 6. _____

QUESTION 3

Denver Manufacturing Co. (Denver) is subject to the Occupational Safety and Health Act of 1970 (OSHA). The Act authorizes the Secretary of Labor (Secretary) to promulgate national regulations with which covered employers must comply.

The Secretary promulgated a general regulation requiring that the "point of operation on machines which exposes an employee to injury shall be guarded. The guarding device shall be designed and constructed to prevent the operator from having any body parts in the danger zone during the machine's operating cycle."

The Secretary promulgated a second regulation exempting some press break machines from the guarding requirement, but the regulation does not clearly specify what press break machines are exempted nor is it clear if the exemption applies to press break machines having a potentially dangerous point of operation.

Denver is a covered employer under the act, and uses press break machines in its manufacturing process. Denver does not have a guard at the point of operation on any of its press break machines. Denver's press break machines are potentially dangerous at the point of operation.

Based on an inspection of Denver's plant during late 1999, the Secretary issued a citation charging Denver with failure to provide point of operation guards on its press break machines. The Secretary proposed a penalty of \$5,000. Denver plans to contest the citation and proposed penalty. The citation is being heard by an Administrative Law Judge (ALJ) at the Occupational Safety & Health Review Commission (OSHRC).

QUESTION:

Discuss the arguments that Denver may raise in its defense of the alleged violations of the regulations.

DISCUSSION FOR QUESTION 3

I. Substantive Challenge to the Secretary's Interpretation

Denver might bring a substantive challenge to the Secretary's interpretation of the regulation. In other words, Denver might question whether the Secretary's interpretation is a permissible interpretation, or perhaps the best one, and urge OSHRC to reject the Secretary's interpretation in favor of its own interpretation. The difficulty with a substantive challenge is that OSHRC is likely to be deferential to the Secretary's position. In numerous decisions, the U.S. Supreme Court has articulated a strong presumption of deference to administrative expertise. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Since this case involves an interpretation of an administrative regulation, rather than a statute, the case for deference is stronger. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). In *Thomas Jefferson University v. Shalala*, 114 S. Ct. 2381 (1994), the Supreme Court stated the applicable law as follows:

We must give substantial deference to an agency's interpretation of its own regulations. *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150-151 (1991); *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Ibid.* (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). In other words, we must defer to the Secretary's interpretation unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988). This broad deference is all the more warranted when, as here, the regulation concerns "a complex and highly technical regulatory program," in which the identification and classification of relevant "criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991).

The Secretary's interpretation is not "plainly erroneous or inconsistent with the regulation" and is therefore entitled to deference. Moreover, in *Martin v. Occupational Safety and Health Review Commission*, 111 S. Ct. 1171 (1991), the Court held that OSHRC should defer to the Secretary's interpretations. Based on the deference principle, Denver's substantive challenge is unlikely to succeed. The Secretary's interpretation is likely to be accepted as "the" interpretation of the regulation.

II. Due Process "Vagueness"

Denver might also raise a vagueness challenge. The facts show that the regulation suffered from ambiguity because of the conflicting regulation exempting certain press breaks. In *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), the Court held "that laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." See also *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497-98 (1982).

Under vagueness analysis, judicial review is usually limited. Most regulations implicate only economic activity, and courts tolerate more indefiniteness in economic regulations than in regulations affecting fundamental rights. There are several justifications for this decreased level of scrutiny: many regulatory schemes implicate limited subject areas, and those subject to regulation can be expected to take affirmative steps to resolve ambiguity or uncertainty; those subject to a regulation can resolve uncertainty by seeking interpretive guidance from the responsible agency; economic interests are generally entitled to less protection than fundamental rights; and the penalties attached to violations of economic regulations are deemed to be qualitatively less severe. Moreover, courts tend to evaluate economic regulations under an "as applied" standard. Thus, even though a statute or regulation may be vague on its face, it can withstand a vagueness challenge if it is not vague as applied to the defendant. See *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489; *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952).

In this case, Denver has a good chance of success because the regulations are unclear when read together, and the Secretary is seeking civil penalties. Courts are more likely to invalidate regulations when such penalties are involved. See *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Winters v. New York*, 333 U.S. 507 (1948).

In this case, Denver has a good chance of success because the Secretary seeks to impose penalties. In *Diebold, Inc. v. Marshall*, 585 F.2d 1327 (6th Cir. 1978), the case on which this problem was based, the court accepted a vagueness challenge on very similar facts.

III. Retroactivity

Denver might also challenge the Secretary's interpretation on retroactivity grounds. As already demonstrated, the regulation suffered from vagueness causing Denver to be uncertain about the meaning and application of the regulation. As a result, Denver can argue that it was deprived of an opportunity to conform its conduct to the law, and that the interpretation should not be applied retroactively -- *i.e.*, to conduct that took place before the Secretary announced its interpretation of the regulation and gave regulated entities the opportunity to conform their conduct to the law.

Despite popular opinion to the contrary, retroactivity is not *per se* illegal. See *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (*Chenery II*). In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), the Court also rejected a retroactivity challenge, but indicated that courts could and should prohibit retroactivity in some instances:

The possible reliance of industry on the Board's past decisions with respect to buyers does not require a different result. It has not been shown that the adverse consequences ensuing from such reliance are so substantial that the Board should be precluded from reconsidering the issue in an adjudicative proceeding. Furthermore, this is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements. Nor are fines or damages involved here. In any event, concern about such consequences is largely speculative, for the Board has not yet finally determined whether these buyers are 'managerial.'

Although Denver did not rely on prior board pronouncements, this case does involve fines. Given the strength of the vagueness claim, the retroactivity challenge is likely to be useful to Denver, and should help it prevent the application of civil or criminal penalties.



21382

Essay 3 GradeSheet

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Please use blue or black pen
and write numbers clearly

1. Recognition that there can be a challenge on grounds that procedural requirements for promulgating rules were not followed. 1. _____
2. Recognition of potential of ultra vires challenge. 2. _____
3. Denver could make a substantive challenge to the Secretary's interpretation of the regulations. 3. _____
4. Recognition of "deference" principles. 4. _____
5. Deference is appropriate here because the Secretary is interpreting his own regulation. 5. _____
6. Denver could challenge the regulation itself on vagueness grounds. 6. _____
7. Regulation is vague because it is ambiguous. 7. _____
8. Recognition that vagueness challenges are problematic for regulated entities like Denver which have an affirmative obligation to ascertain regulatory requirements. 8. _____
9. Courts are more likely to invalidate regulations when civil penalties are sought. 9. _____
10. Denver could challenge the Secretary's interpretation because it did not have an opportunity to make its conduct conform to the law (retroactivity doctrine). 10. _____

QUESTION 8

Roberta Restaurateur arrived at work one morning and discovered that the town's Administrative Agency of Aesthetics (the AAOA) had issued a citation to her restaurant for a violation of the town ordinance prohibiting neon signs. The citation informed Roberta that, under the ordinance, no action could be taken until she had an opportunity to contest the citation at a hearing before the AAOA. Before a hearing could be held, however, the AAOA removed the offending sign.

When Roberta contacted the AAOA, she was informed that the sign was so ugly that the agency decided to ignore normal AAOA rules and find a violation without conducting a hearing. The members of the AAOA told Roberta that her only course of action was to appeal the decision to the Mayor.

The next day, Roberta received a letter from the Mayor informing her that, if she appealed, he planned to affirm the AAOA's decision because the sign was an eyesore. Roberta then filed suit in a court of proper jurisdiction seeking judicial review of the AAOA's actions.

QUESTION:

Discuss whether Roberta can obtain judicial review. If she is successful in obtaining review, what claim(s) can she raise and what is(are) the appropriate remedy(ies)?

DISCUSSION FOR QUESTION 8

Normally, a plaintiff must exhaust administrative remedies before seeking judicial review of an agency action. However, in this case, an exception to that rule applies because the AAOA and the Mayor predetermined the issue and made it clear that exhaustion of administrative remedies would be a futile exercise. Phu Chan Hoang v. Comfort, 282 F.3d 1247 (10th Cir. 2002) (exhaustion of administrative remedies not required where Board of Immigration Appeals had, in another case, already decided that it was not authorized to grant the type of relief sought by petitioner). The other prerequisites to judicial review are also satisfied. As the property owner, Roberta has standing to bring suit. Sierra Club v. Morton, 405 U.S. 727, 739, 92 S.Ct. 1361, 31 L. Ed. 2d 636 (1972) (in order to obtain review of agency action a party must be able to demonstrate concrete and demonstrable injury). Because the AAOA confiscated Roberta's sign and made a final decision finding a violation, the matter is now ripe for review. See Abbott Laboratories v. Gardner, 387 U.S. 136, 148, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967) (the ripeness requirement prevents a court from entangling itself in abstract disagreements over matters that are premature for review because the injury is merely speculative and may never occur, depending on the final administrative resolution).

Roberta has a constitutional due process right to a hearing before the government can deprive an individual of a property interest. Goldberg v. Kelly, 397 U.S. 254 (1970). Roberta has a property interest in her sign. Traverso v. People ex rel. Dept. of Transportation, 6 Cal. 4th 1152, 864 P.2d 488 (1993) (for purposes of due process doctrine, a commercial sign constitutes a protectible property interest). Once it is established that the interest involved is protected by due process, the form and timing of hearing must be determined. Morrissey v. Brewer, 408 U.S. 471 (1972).

Roberta has a claim for violation of her rights of due process because she was deprived of her property without an opportunity to be heard at a meaningful time and in a meaningful manner. Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). In determining the constitutional requirements for the hearing the courts balance three factors: (i) the private interest affected by the action, (ii) the risk of erroneous deprivation through the procedures used and (iii) the government's interest including administrative costs for providing the procedure. Goldberg v. Kelly, 397 U.S. 254 (1970).

When immediate adverse effects may result from government action, the issue is whether the affected party must receive a hearing before the government acts or if a post-action hearing is sufficient. There are cases in which important government interests outweigh the need for a hearing prior to the government's action. In these cases a post deprivation hearing is deemed sufficient. See North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (protection of public health permits seizure of spoiled food), Dixon v. Love, 431 U.S. 105 (1977) (protection of public safety permits the suspension of driver's license with a post hearing after such action). With respect to Roberta's sign, the AAOA did not have an important governmental interest, such as an immediate threat to public health and safety, sufficient to justify seizing it prior to giving Roberta notice and a hearing. United States v. All Assets of Statewide Auto Parts, 971 F.2d 896

DISCUSSION FOR QUESTION 8
Page Two

(2d Cir. 1992) (ex parte pre-notice seizure of auto parts business was erroneous because the seizure was not necessary to secure an important governmental interest).

In this case there is also a statutory right to a hearing. Thus, not only could Roberta argue that she has been denied a constitutional due process right, the statute was violated. The statute does not set forth the requirements for a hearing, but it must be meaningful and not predetermined. In this case the AAOA's suspension of its rules would be an abuse of discretion, arbitrary and capricious, and not in accordance with law. See also 5 U.S.C. § 706(2)(A) (under the Administrative Procedures Act, a court may set aside the agency's findings, conclusions, or actions only if they were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law). As a remedy, the court will likely compel the AAOA to conduct a proper hearing to determine whether Roberta's illuminated sign is in fact a prohibited sign. Angstman v. City of Boise, 128 Idaho 575, 917 P.2d 409 (Ct. App. 1996) (where it is shown that a hearing was not conducted in accordance with the Administrative Procedures Act, the appropriate remedy is a new hearing).



21686

Essay 8 GradeSheet

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Please use blue or black pen
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1. Individuals have a constitutional due process right to a hearing before the government can deprive them of a property interest. 1. _____

2. Unless there is an important governmental interest with immediate adverse effects to public health or safety to allow deprivation of a property interest before a hearing. 2. _____

3. The AAOA violated its own statutory requirement for a hearing. 3. _____

4. A plaintiff must exhaust administrative remedies before seeking judicial review of an agency action. 4. _____
 - 4a. Exception to exhaustion of administrative remedies when it would be futile. 4a. _____

5. Must have proper standing to bring suit. 5. _____
 - 5a. There must be concrete and demonstrable injury. 5a. _____

6. The matter must also be ripe for review, 6. _____
 - 6a. Which requires injury or hardship to plaintiff. 6a. _____

7. The court may set aside the AAOA's decision as being arbitrary, capricious and an abuse of discretion. 7. _____

8. The court will likely require a proper hearing on the merits. 8. _____

QUESTION 7

A state statute created the “Safe Signs Agency” (SSA). The statute allows SSA to promulgate rules relating to highway signs in order to “promote the safe operation of motor vehicles and advance the greater public good.”

At a meeting that was unannounced and not open to the public, the SSA promulgated “Regulation A” which provides:

No new houses shall be constructed in this state until the state’s accidental highway death rate decreases for at least two consecutive years.

The members of the SSA did not keep any meeting notes or other record of their discussions at the meeting. “Regulation A” did not set out any process for a challenge or variance.

Bob Benefactor wants to construct several new houses for low-income families. He is prohibited from doing so by “Regulation A” because the state’s rate of accidental highway deaths has yet to decrease.

QUESTION:

Discuss challenges to “Regulation A” that Benefactor may bring.

DISCUSSION FOR QUESTION 7

Because Bob wishes to build houses, he is an aggrieved party with standing to challenge Regulation A. Lot Thirty-Four Venture, L.L.C. v. Town of Telluride, 976 P.2d 303 (Colo.App.1998), aff'd on other grounds, Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30 (Colo. 2000). A plaintiff has standing to challenge an administrative regulation if: 1) the plaintiff suffered an actual or threatened injury in fact (the injury in fact may be economic, competitive, aesthetic or recreational); 2) the injury can be fairly traced to the challenged action; and 3) the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision. See generally, Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982). Bob has suffered injury in fact in that before the passage of Regulation A he could build houses and now he is restricted from building.

Bob must also show that his challenge is ripe for review. The ripeness doctrine is designed to avoid litigating in the abstract, thus the regulation must be a final agency action. See generally, FTC v. Standard Oil Co., 449 U.S. 232 (1980). In this case there was no other agency action required before the regulation became applicable. The case is ripe for review because Regulation A will be applied to Bob if he tries to build. Bob may challenge the Regulation A in district court as there is no administrative appeal process.

Under the Administrative Procedure Act, Bob can file a declaratory judgment action in court challenging Regulation A. Mile High Greyhound Park, Inc. v. Colorado Racing Com'n, 2 P.3d 351, 352 (Colo. App. 2000); § 24-4-106, C.R.S. 2002. A declaratory judgment is appropriate when the rights asserted are present and cognizable. See Farmers Insurance Exchange v. District Court, 862 P.2d 944 (Colo. 1993). Bob will need to show that this is not merely an anticipatory issue, but that in fact he is going to build the houses.

A court may set aside an agency action if it concludes that the agency action: (1) is arbitrary or capricious; (2) is not properly promulgated in accord with the procedures or procedural limitations of the Administrative Procedure Act, or (3) is unsupported by substantial evidence when the record is considered as a whole. Studor, Inc. v. Examining Bd. of Plumbers of Div. of Registrations, Department of Regulatory Agencies, 929 P.2d 46, 50 (Colo. App. 1996).

Here, Bob can challenge Regulation A by arguing that a regulation concerning housing construction does not bear any relation to the safety of highway signs and is, therefore, arbitrary and capricious. He can also challenge Regulation A on the ground that the SSA did not comply with the APA when it promulgated the rule. To satisfy the requirements of the Administrative Procedure Act when performing rule making functions an agency must provide: (1) public notice; (2) an opportunity for, and full consideration of, any comments; and (3) a complete rule-making record. Sections 24-4-103(2), 24-4-103(4), & 24-4-103(8), C.R.S. 2002. Studor, Inc. v. Examining Bd. of Plumbers of Div. of Registrations, Department of Regulatory Agencies, supra. Bob must show that the agency, when

promulgating the rule, did not "substantially comply" with the rule making procedures. Charnes v. Robinson, 772 P.2d 62 (Colo. 1984). Substantial compliance is defined as more than minimal compliance but less than strict or absolute compliance. Here, the SSA failed to fulfill any of the rule making requirements.

Finally, Bob can challenge Regulation A on the ground that the SSA exceeded its statutory authority. Adams v. Department of Social Services, 824 P.2d 83 (Colo.App.1991). Administrative agencies are legally required to comply strictly with their enabling statutes. Sherrered v. Johnson, 32 Colo.App. 367, 311 P.2d 923 (1973). In doing so, the courts can consider the legislative intent and ends that the statute was designed to accomplish. In this case, Bob would argue that the purpose and intent of the enabling statute was to address safe roads and prevent traffic deaths, but not to regulate the construction of new housing.



42345

Essay 7 GradeSheet

Seat

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Score

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Please use blue or black pen
and write numbers clearly

1. A plaintiff must have standing to challenge an administrative regulation, which requires:
 - 1a. injury in fact (which may be economic);
 - 1b. the injury can be fairly traced to the challenged action;
 - 1c. the injury can be redressed by a favorable decision.
2. The challenge to the regulation also must be ripe for review.
 - 2a. The regulation must be a final agency action or all remedies must be exhausted.
3. Bob must show that this is not merely an anticipatory issue, that he is going to build houses if allowed and therefore may seek a declaratory judgment.
4. A court may set aside an agency action if it is:
 - 4a. arbitrary or capricious;
 - 4b. not properly promulgated by agency procedures;
 - 4c. unsupported by the record.
5. Bob can argue that the regulation is arbitrary in that it bears no relationship to highway signs.
6. Bob can also argue that the agency substantially failed to comply with the APA or due process by not:
 - 6a. providing public notice;
 - 6b. giving opportunity for and consideration of comments;
 - 6c. having a complete record of the proceedings.
7. Additionally, Bob could argue that the agency exceeded its enabling statutory authority (*ultra vires*).
8. Bob could argue that there is a regulatory taking.

QUESTION 8

Hapless Hal operates a small environmental consulting business which assists agricultural feed lot operators in testing for emissions of methane and other hydrocarbon compounds. Hal inevitably deals with various federal agencies, and he must comply with many government regulations and programs.

Recently, Hal sought to use new and different testing equipment. A government agency representative told Hal he could use the new equipment and that the equipment had been approved for the particular purpose Hal had in mind. Hal thus purchased the equipment.

Unbeknownst to Hal, the applicable federal regulations did not allow the equipment to be used in the way in which Hal intended; consequently, the agency ordered Hal not to use it. Hal protested that he had relied upon the agency representative's assurances and that not being able to use the equipment will cause him substantial economic harm. The agency's position is that its regulations prohibit the equipment and its use, and that it is not bound by an employee's error.

Hal appealed the agency decision according to the agency's initial appeal policy and again was denied relief. The agency's policies provide a second review by the agency's director, but that review is not mandatory. Hal chose not to exercise the optional review because he didn't trust the agency after his recent experience.

QUESTION:

Discuss what avenues may be available for Hal to challenge the agency's decision, the legal basis for such a challenge, and what showing Hal must make to try to set aside or reverse the agency's action.

DISCUSSION QUESTION 8

This question raises issues of administrative law and remedies for improper or unlawful administrative action pursuant to the Administrative Procedures Act, 5 U.S.C. §701 et seq. Initially, there is likely to be a defense by the agency of failure to exhaust administrative remedies. A person who seeks judicial review of an agency action must have extinguished the agency's appeal procedure. 5 U.S.C. §704. The person must also have suffered a legal wrong. See 5 U.S.C. §702; and see *Duba v. Schuetzle* 303 F.2d 570, 574 (8th Cir. 1962). The facts indicate that in this situation, although there is an in-house agency appeal procedure, the first step was not successful and the second step is optional rather than mandatory. Therefore, the exhaustion of administrative remedies issue is not likely to bar relief to Hapless Hal.

Review of administrative agency decisions will normally be in the federal district courts, which have original jurisdiction of all civil actions under the Constitution or laws of the United States. 28 U.S.C. §1331. This of course presupposes that administrative remedies have been exhausted, and that there is no conflicting statutory provision. The United States or an agency thereof can be a party. 5 U.S.C. §702.

Generally, administrative agency actions are reviewed under the Administrative Procedures Act, 5 U.S.C. §701, et seq. There is a strong presumption that all agency actions are reviewable under the APA. *Woodsmall v. Lyng*, 816 F.2d 1241, 1243 (8th Cir. 1987); and see 5 U.S.C. §702.

In general, the scope of judicial review of agency actions is to determine all relevant questions of law, interpretation of the Constitution or statutes, and determining the meaning or applicability of an agency action. Under 5 U.S.C. §706, "the reviewing court shall...

- (1) compel agency action unlawfully withheld or unreasonably delayed, and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be -
 - (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (b) contrary to constitutional right, power, privilege, or immunity;
 - (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (d) without observance of procedure required by law
 - (e) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute;
 - (f) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court...

The standard of review of agency action by a district court is rather narrow, and while the court reviews the entire record, it must defer to the agency's interpretation of its regulations. *Chevron U.S.A. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984). Reversal can only occur when the agency action is without a rational basis. *Baltimore Gas & Elec. Co. v. National Resources Defense Council*, 462 U.S. 87, 105-06 (1963).

In making a determination whether agency action is arbitrary, capricious, abuse of discretion, or not in accordance with law, the reviewing court must not substitute its judgment for the agency; the test is whether the agency decision was based on consideration of relevant factors, or whether the agency has made a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). However, if an agency fails to follow its own regulations then that is an abuse of discretion. *Carter v. Sullivan*, 909 F.2d 1201, 1202 (8th Cir. 1990). The burden is always on the appellant to show that the agency acted improperly. *Department of State v. Ray*, 502 U.S. 164, 179 (1991).

The reviewing court examines an agency's conclusions of law de novo, but it must uphold the agency's factual findings if they are supported by "substantial evidence." That is defined as "more than a mere scintilla but less than a preponderance." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).

The facts of this case raise questions of promissory estoppel, or other estoppel of the government agency based upon the actions or statements of its employee. However, any promises that violate or exceed terms of statutes or regulations usually will not bind the federal government unless the official acted within the scope of his authority. *McCauley v. Thygerson*, 732 F.2d 978, 981 (D.C. Cir. 1984). Normally, public policy will deny an estoppel against a government agency based upon statements of its employee. *Israel v. U.S. Department of Agriculture*, 135 F.Supp.2d 945, 952-54 (W.D. Wis. 2001). In fact, it has been held that

[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." (quoting *FDIC v. Merrill*, 332 U.S. 380, 384 (1947)).
Parmenter v. FDIC, 925 F.2d 1088, 1095 (8th Cir. 1991).

As applied to the instant case, these legal principles do not offer much hope for Hapless Hal. The great weight of authority is that he cannot work an estoppel against the sovereign, even though its based upon statements made by an employee. Since the employee had no authority to bind the government agency, Hal cannot rely upon the employee's statements or assurances. There is no indication that the agency has violated its regulations, or has acted arbitrarily, capriciously, or illegally. Hal apparently has exhausted administrative remedies, since the second level of agency appeal was optional rather than mandatory. Although the U.S. District Court would have jurisdiction of a proper action in this sort of case, it does not appear that Hal has any substantial argument to find the agency action was unlawful, or that it was arbitrary, capricious or an abuse of discretion, or that it was contrary to law or proper authority. Therefore, Hal is unlikely to achieve any relief through judicial review of the agency action denying his claim.

ESSAY Q8

SEAT

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ISSUE

- | | YES | NO |
|--|---------------------------|-----------------------|
| 1. A person who seeks judicial review on agency action must exhaust administrative remedies. | 1. <input type="radio"/> | <input type="radio"/> |
| 2. Since the second agency review is optional, Hal is probably not barred from further relief because he exhausted all mandatory administrative remedies. | 2. <input type="radio"/> | <input type="radio"/> |
| 3. Hal has standing to challenge the agency action because he had injury in fact (economic injury). | 3. <input type="radio"/> | <input type="radio"/> |
| 4. Administrative agency actions are reviewable under the APA. | 4. <input type="radio"/> | <input type="radio"/> |
| 5. Jurisdiction for review of a federal regulation lies with the federal district court. | 5. <input type="radio"/> | <input type="radio"/> |
| 6. The scope of judicial review of agency actions is: | | |
| 6a. to determine all relevant questions of law, | 6a. <input type="radio"/> | <input type="radio"/> |
| 6b. interpret the constitution or federal statutes, and | 6b. <input type="radio"/> | <input type="radio"/> |
| 6c. determine the applicability of an agency action. | 6c. <input type="radio"/> | <input type="radio"/> |
| 7. In interpreting an agency's regulation, the court will defer to the agency's interpretation. | 7. <input type="radio"/> | <input type="radio"/> |
| 8. To reverse the agency there must be a showing that the agency action was an arbitrary and capricious abuse of discretion or not in accordance with the law. | 8. <input type="radio"/> | <input type="radio"/> |
| 9. The appellant has the burden to show the agency acted improperly. | 9. <input type="radio"/> | <input type="radio"/> |
| 10. Failure of an agency to follow its own regulations is an abuse of discretion. | 10. <input type="radio"/> | <input type="radio"/> |
| 11. The reviewing court must uphold an agency's factual findings if it is supported by "substantial evidence" in the record. | 11. <input type="radio"/> | <input type="radio"/> |
| 12. Hal may raise promissory estoppel against the government as a result of its employee's actions or statements. | 12. <input type="radio"/> | <input type="radio"/> |
| 13. Public policy generally denies estoppel against a government agency based upon statements of its employees. | 13. <input type="radio"/> | <input type="radio"/> |

QUESTION 8

Stop Pollution Now (STOP), a public interest organization, wants to challenge recent actions of the Internal Revenue Service (IRS) granting special tax relief to the oil and gas industries. STOP filed a complaint alleging that unless the IRS is enjoined from granting special tax relief to such industries, drilling activity in the national forests will increase and recreational users of the forests, as well as the forests themselves, will suffer harm from such increased activity. STOP also argued that it should be allowed to bring the action because it has "a special interest and expertise in the conservation, appropriate recreational use, and sound maintenance of the national forests."

QUESTION:

Discuss whether the IRS action complained about by STOP is reviewable by the courts and whether STOP has standing to sue the IRS. Do not discuss jurisdiction or venue. Assume that the Federal Administrative Procedures Act is applicable.

DISCUSSION FOR QUESTION 8

The purpose of this question is to test the examinees on certain procedural obstacles to judicial review of agency actions other than jurisdictional matters, specifically the reviewability of agency actions and standing.

Reviewability

Sections 703 and 704 of the Administrative Procedures Act (APA) provide for judicial review of final agency actions. There is a **presumption of reviewability** of agency actions unless there is clear evidence of Congressional intent to preclude review or where agency action is committed to agency discretion by law. APA, Section 701(a); See also Briscoe v. Bell, 432 U.S. 404 (1977). Here, examinees are not given any language from IRS statutes or rules and regulations that indicates that review of agency actions is specifically precluded or that agency action is committed to agency discretion by law. Accordingly, examinees should discuss the likelihood that the agency action in question is reviewable by the courts.

Although examinees have been given no facts about whether administrative remedies were available to STOP within the IRS, they should recognize the general principle concerning **exhaustion of administrative remedies prior to seeking judicial review**. See, e.g., Meyers v. Bethlehem Shipping Corp., 303 U.S. 41 (1938) (judicial review not appropriate until administrative remedies have been exhausted); Darby v. Cisneros, 509 U.S. 137 (1993) (APA requires exhaustion only where the relevant statute or rules mandate it.) Two additional closely related concepts also may come into play in determining whether STOP resorted to the courts prematurely, the **final order rule** and **ripeness**. Section 704 of the APA provides that only **final** agency orders or actions are reviewable. The requirement of ripeness also ensures that courts are deciding only actual “cases and controversies.” See Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) (balancing test should be employed weighing the fitness of the issues for review against the hardship to the parties of delaying consideration.)

Standing

Standing concerns whether a particular plaintiff can obtain judicial review. The courts currently use a three-part test for determining whether a party has standing to challenge government action. The first question is whether the plaintiff alleges that the challenged action has caused it **injury in fact**. See Association of Data Processing Serv. Organs. (ADAPSO) v. Camp, 392 U.S. 150, 152 (1970). Such injury can be economic, recreational, environmental, aesthetic, etc. See, e.g., United States v. Students Challenging Regulatory Agency Procedure (SCRAP), 412 U.S. 669, 686 (1973); Sierra Club v. Morton, 405 U.S. 727, 734 (1972). Even where an organization such as STOP has recognized expertise in conservation, however, standing will not be granted absent allegations of injury to the organization or its members. See id. at 739. As a practical matter, this requires that STOP allege that some of its members actually use the affected area for their activities. See id. at 740 n.15.

The second question is "whether the interest sought to be protected by the complainant is arguably **within the zone of interests** to be protected or regulated by the statute or constitutional guarantee in question." ADAPSO, supra, at 153. In this case, standing, if it is to exist, must be based on § 10 of the Federal Administrative Procedures Act (APA), 5 U.S.C. § 702 (1982), which provides that "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

The third part of the test is whether **causation** exists between any "injury in fact" that could be claimed by STOP and the government action challenged. The "case or controversy" limitation of Article III still requires that a "federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41-42 (1976). Thus, to establish standing, causation must be reasonably clear in that STOP's injury could be remedied by favorable judicial review of the IRS actions at issue. See id. at 45 (plaintiff must establish "that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.")

Given the fact pattern, there is no right or wrong answer as to whether STOP will be able to establish standing. Examinees should identify the specific principles involved and discuss whether STOP has met its burden with regard to each aspect of the test.

ESSAY Q8

SEAT

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<u>ISSUE</u>	POINTS AWARDED
1. Recognition of principle that agency actions are <i>presumptively reviewable</i> .	1. ○
2. Presumption of reviewability defeated only where congressional intent to preclude review <u>or</u> where agency action is committed to agency discretion by law.	2. ○
3. Plaintiff is generally required to <i>exhaust available administrative remedies</i> .	3. ○
4. Agency action must be <i>final</i> to be reviewable ("final order rule").	4. ○
5. Issue must be <i>ripe</i> for review in that it must present an actual case or controversy.	5. ○
6. Standing test – recognition of principle of "injury in fact."	6. ○
7. Injuries other than economic harm are cognizable (aesthetic, environmental, recreational, etc.)	7. ○
8. General statement of injury insufficient; there is a requirement of specific allegations of harm to members of group or group itself.	8. ○
9. Standing test – recognition of principle of "within the zone of interests" to be protected.	9. ○
10. Standing test – recognition of principle of "causation."	10. ○
11. Causation must be reasonably clear in that asserted injury was a consequence of agency action <u>or</u> that requested relief will remove the harm.	11. ○
12. Recognition of issue of <i>associational</i> or <i>organizational standing</i> .	12. ○
13. Three part test for associational standing: (a) individual members would have right to sue on their own behalf, and (b) injury to members must be related to organization's purpose, and (c) no participation of individual members required for relief (only injunctive relief sought).	13. ○

QUESTION 5

Bob worked as a delivery driver for ShipFast, a package delivery company located in the state of Scenic. One day, Bob became involved in a verbal altercation with Jack, an independent contractor who ShipFast had hired for a two-week period to update its computer system. As a result of the altercation, ShipFast fired Bob. Bob then filed a claim for unemployment compensation benefits with the Scenic Division of Labor & Employment.

At a hearing on Bob's claim for benefits, Bob's former supervisor and Jack both testified that Bob cursed at Jack and threatened him. However, Bob testified that it was Jack who used profanity and made threatening statements. Bob testified that he did not respond to Jack's statements and threats and tried to walk away from the incident.

In a written decision, the hearing officer found that Bob used profanity and verbally threatened Jack. The hearing officer then concluded that Bob's claim for benefits should be denied based upon Scenic Code § 317.6 which provides as follows:

A claim for unemployment benefits shall be denied in cases where the employee was terminated because of rude, insolent, or offensive behavior towards a co-worker.

Bob filed an appeal with the Scenic Board of Unemployment Compensation Appeals in which he argued that the hearing officer's factual findings were erroneous and that Scenic Code § 317.6 did not apply because Jack was not a co-worker within the meaning of the statute. The Board affirmed the hearing officer's decision.

Bob filed an action in the Scenic District Court seeking judicial review of the decisions of the hearing officer and the Board.

QUESTIONS:

Discuss Bob's chances of success

1. in challenging the hearing officer's factual findings about the altercation; and
2. in challenging the conclusions of the hearing officer and the Scenic Board's decision that § 317.6 applies.

DISCUSSION FOR QUESTION 5

1. Challenge to Hearing Officer's Factual Findings

Bob will probably not succeed in his challenge of the hearing officer's factual findings. For quasi-judicial/record-based administrative proceedings such as the unemployment compensation hearing at issue here, the factual findings of the administrative body will be sustained on judicial review if there is "substantial evidence" in the record as a whole to support those findings. See Federal Administrative Procedure Act, 5 U.S.C. §706(2)(e)(providing that reviewing court shall set aside agency findings found to be unsupported by substantial evidence); Goetz v. United States, 99 F.Supp.2d 1308 (D. Kan. 2000)(an agency's findings of fact are conclusive when they are supported by substantial evidence in the record); see also Speedy Messenger & Delivery Serv. v. Indus. Claim Appeals Office, 129 P.3d 1094 (Colo. App. 2005)(in unemployment compensation proceedings, hearing officer's factual findings are binding on judicial review if supported by substantial evidence). "Substantial evidence" means such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion... it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." Durango Transp., Inc. v. Colo. Pub. Utilities Comm'n, 122 P.3d 244 (Colo. 2005). "Substantial evidence" means more than a mere scintilla of evidence. See Olenhouse v. Commodity Credit Corp., 42 F.3d 1560 (10th Cir. 1994).

In determining whether there is substantial evidence sufficient to support a finding, the reviewing court should consider the entire record, not just those parts that could support the finding. See On-Line Careline, Inc. v. Am. Online, Inc., 229 F.3d 1080 (Fed. Cir. 2000)(review for substantial evidence involves examination of the record as a whole, taking into account evidence that both justifies and detracts from an agency's decision).

Some jurisdictions may apply a slightly different deferential standard of review such as "clearly erroneous," "arbitrary and capricious," or "without any basis in fact." Here, although there was conflicting testimony at the hearing concerning the workplace altercation, the testimony of both Bob's supervisor and Jack (indicating that Bob cursed at and threatened Jack) probably are sufficient to constitute substantial evidence to support the hearing officer's factual findings. Thus, it would be unlikely that a reviewing court would disturb those findings and Bob's challenge will fail.

2. Challenge to Conclusions of Hearing Officer and Board

Bob probably also will fail in his challenge of the conclusions of the hearing officer and the Board that Scenic Code § 317.6 applies to the altercation with Jack. Whether the statute applies to temporary independent contractors (i.e. whether a temporary independent contractor is considered a "co-worker" under the statute) is an issue of statutory interpretation and, therefore, a question of law.

DISCUSSION FOR QUESTION 5

Generally, judicial review of a legal determination made by an administrative agency is de novo. Thus, the reviewing court is free to substitute its judgment for that of the administrative decision making body. See Koch v. United States Dept. of Interior, 47 F.3d 1015 (10th Cir. 1995). However, on legal issues closely related to the agency's expertise, including the interpretation of ambiguous statutory provisions the agency is responsible for administering and enforcing, a court should give some deference to the agency's interpretation. See G & T Terminal Packaging Co. v. U.S. Dept. of Agric., 468 F.3d 86 (2nd Cir. 2006) citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); see also Williams v. Kuna, 147 P.3d 33 (Colo. 2006)(court will extend deference to agency's interpretation of its own statutes but is not bound by that interpretation). Under this deferential standard, the agency's interpretation will be upheld if it is a permissible construction of the statute (not unreasonable, arbitrary, capricious, or manifestly contrary to the statute). See G & T Terminal Packaging Co. v. U.S. Dept. of Agric., supra.

Here, Scenic Code § 317.6 is within the Division of Labor & Employment's area of expertise and administration. Moreover, that statute does not define the term "co-worker" and it is unclear whether that term includes temporary independent contractors such as Jack. Under these circumstances, a reviewing court would likely give some deference to the agency's construction. Moreover, because the agency's interpretation that the statute does apply to independent contractors appears to be a reasonable and permissible construction, a reviewing court would be inclined to accept that construction. Consequently, Bob would likely fail in this challenge.

ESSAY Q5

SEAT

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ISSUE

POINTS
AWARDED

Procedural Hurdles for Judicial Review (any mention or discussion)

- | | | |
|--|----|-----------------------|
| 1. Standing (injury in fact/causation/zone of interest). | 1. | <input type="radio"/> |
| 2. Exhaustion of administrative remedies. | 2. | <input type="radio"/> |
| 3. Final administrative order. | 3. | <input type="radio"/> |
| 4. Ripeness. | 4. | <input type="radio"/> |

Hearing Officer's Factual Findings

- | | | |
|---|----|-----------------------|
| 5. Recognition of deferential standard for factual findings. | 5. | <input type="radio"/> |
| 6. Identification of "substantial evidence" or related standard (arbitrary & capricious/clearly erroneous/without basis in fact). | 6. | <input type="radio"/> |
| 7. Based upon review of entire record/record as a whole. | 7. | <input type="radio"/> |
| 8. Standard satisfied here based on testimony of witnesses. | 8. | <input type="radio"/> |
| 9. Bob will fail in factual challenge. | 9. | <input type="radio"/> |

Legal Conclusions of Hearing Officer and Board

- | | | |
|--|-----|-----------------------|
| 10. Recognition of less deferential standard for factual findings. | 10. | <input type="radio"/> |
| 11. Identification of general standard (de novo/substitute own judgment). | 11. | <input type="radio"/> |
| 12. Court may defer to agency's legal conclusion because within agency expertise or involves ambiguous statutes agency enforces. | 12. | <input type="radio"/> |
| 13. Division's interpretation is reasonable/not arbitrary or capricious. | 13. | <input type="radio"/> |
| 14. Bob will fail in legal challenge. | 14. | <input type="radio"/> |

QUESTION 1

The General Assembly of the State of Bliss created a Department of Transportation under the following statute:

There is hereby created a Department of Transportation. It is authorized to enact all regulations it deems necessary. Such regulations will be deemed to have been validly promulgated unless either chamber of the General Assembly objects by a vote of the majority within 90 days of their publication.

Several months after its creation, the Department of Transportation released its first set of regulations. The regulations prohibit the transportation of toxic chemicals through Capitol City, the capitol of Bliss, on the two main interstate highways which cross Capitol City. However, the regulations specifically allow the chemicals to be transported on Capitol's residential streets.

QUESTION:

Discuss any available grounds that might be used to invalidate the regulations and whether the regulations will withstand judicial review. Assume that a statute similar to the federal Administrative Procedure Act has been adopted in Bliss.

DISCUSSION FOR QUESTION 1

Although this is a state agency, basic administrative law principles set out in the federal Administrative Procedure Act often apply by analogy to state and local agencies.

Delegated authority. The first question to be addressed is whether the General Assembly properly delegated authority to the Department of Transportation. The traditional rule is that a legislative body may not totally delegate all of its functions to an administrative agency and that the legislative body has to establish adequate standards to guide the agency action and limit its discretion. See *Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935). Most modern case law upholds broad delegation to agencies, including those with vague or extremely broad standards. See, e.g., *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001). (A statute directing the EPA to set air quality standards to protect the public health with an adequate margin of safety was sufficiently lawful.)

Here, there are no standards to guide the agency's action. In fact, the delegation of authority is not limited in terms of subject matter in any way. It appears under either view, the traditional or more modern rule, the delegation of authority may have been improper because both regulations require at least minimal standards.

Notice. The second question is whether the Department of Transportation properly promulgated the regulations. Although there is no constitutional right to notice and hearing in agency rule-making, see *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), the Administrative Procedure Act (APA) provides by statute for notice by publication of proposed rule-making in the Federal Register, and the right by interested parties to participate in the rule-making process by submitting written data or arguments. See, e.g., 5 U.S.C. § 553(b) and (c) respectively. There is generally, with limited exception, no right to an oral or evidentiary hearing. Note there are exceptions in the APA to the rule-making procedures: military or foreign functions; rules internal to the agency; certain matters relating to public property, loans, grants, benefits or contracts and interpretive and other policy statements. The agency is excused from the requirements if it finds for “good cause” such procedures are impractical, unnecessary or contrary to the public interest.

There does not appear to have been notice of anything in this case, except that regulations had been promulgated. Neither does it appear that there was any chance for public participation. Therefore, the DOT improperly failed to follow APA procedure in releasing the regulations.

Judicial review. The third question is whether the regulations can withstand judicial review. Section 704 of the APA provides that all final agency action shall be judicially reviewable whether made reviewable by statute or not (unless statutes preclude review of agency action committed by law to agency discretion). (Section 701(a)). **Also, there is a well-established presumption of reviewability with clear evidence of congressional intent to preclude review.**

Under the APA, 5 U.S.C. § 706(2) (A), a court is permitted to hold unlawful and set aside agency action which it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." A reviewing court may substitute its judgment in reviewing agency decisions as to law, including jurisdiction (authority), procedure and policy. Section 706 provides that the reviewing court, to the extent necessary, shall decide all relevant questions of law, "shall... (2) hold unlawful and set aside agency action, findings and conclusions found to be... (d) without observance of procedure required by law..." Accordingly, because procedures under the APA were not followed, there is substantial doubt that the regulations would withstand judicial review.

ESSAY Q1

SEAT

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ISSUE

POINTS
AWARDED

- | | | | |
|----|--|-----|-----------------------|
| 1. | A legislative body may not totally delegate its functions to an administrative agency unless at least minimum standards ("intelligible principles") are present. | 1. | <input type="radio"/> |
| 2. | Adequate standards were not present. | 2. | <input type="radio"/> |
| 3. | The APA provides for notice by publication and the right by interested parties to participate in the rule making process. | 3. | <input type="radio"/> |
| 4. | The DOT did not properly promulgate the regulations because there was: | | |
| | 4a. no notice; | 4a. | <input type="radio"/> |
| | 4b. no opportunity for interested persons to participate in the rule-making process. | 4b. | <input type="radio"/> |
| 5. | Participation in the rule-making process may be by written statements. | 5. | <input type="radio"/> |
| 6. | There is no right to a hearing | 6. | <input type="radio"/> |
| | 6a. except in limited circumstances. | 6a. | <input type="radio"/> |
| 7. | Judicial review of agency action is permitted | | |
| | 7a. unless precluded by statute or | 7a. | <input type="radio"/> |
| | 7b. committed by law to agency discretion. | 7b. | <input type="radio"/> |
| 8. | The Court may set aside agency action where arbitrary and capricious, | 8. | <input type="radio"/> |
| | 8a. or without observance of proper procedure. | 8a. | <input type="radio"/> |

QUESTION 1

Fred Farmer participates in a federal program which pays him to let certain parts of his farm lie fallow. The agency that administers the federal program failed to act when Farmer requested a change in the way his payments are calculated. Oddly enough, Farmer's request would actually correct a problem that has existed because the agency has failed to follow its own regulations. The agency claims its regulations are merely guidelines and it is not required to follow them. The regulations, on their face, are mandatory and mirror the controlling statute. Both the regulations and the statute provide that payments to farmers shall be calculated in the manner that Farmer has requested.

Farmer demanded, in writing, that the agency make the requested change. The agency failed to respond to Farmer's request. Farmer then threatened to take the matter to court. The agency countered by saying it has not made a final decision and therefore, court action is unavailable. Farmer has gone through all available levels of agency review including a request for reconsideration, without success. At no time during this process has the agency given any substantial justification for its failure or refusal to act.

QUESTION:

Discuss the remedies available to Farmer and the standards that he will have to meet to obtain relief from a court.

DISCUSSION FOR QUESTION 1

This question raises issues of administrative law and remedies for lack of action, or improper or unlawful administrative action, pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 et seq.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704.

A person who seeks judicial review of an agency action must have exhausted the agency's appeal procedure(s). *See* APA § 704. In addition, the prerequisites to judicial review of agency action, in the absence of other statutory provisions, are final agency action and the absence of any other adequate remedy. *Klein v. Commissioner of Patents of U.S.*, 474 F. 2d 821, (C.A. Va.) The person must also have suffered a legal wrong. *See* 5 U.S.C. § 702; and *see Duba v. Shuetzle* 303 F.2d 570, 574 (8th Cir. 1962). The facts indicate that in this situation, Farmer has utilized the in-house agency appeal procedure. Therefore, exhaustion of administrative remedies is not an issue.

Review of an administrative agency decision involving a federal program, if available, will normally be in the federal district courts, which have original jurisdiction of all civil actions under the constitution or laws of the United States. 28 U.S.C. § 1331. There is a strong presumption that all agency actions are reviewable under the APA. *Woodsmall v. Lyng*, 816 F.2d 1241, 1243 (8th Cir. 1987); and *see* 5 U.S.C. § 702. The central purpose for judicial review under the Administrative Procedure Act is to provide "a broad spectrum of judicial review of agency action." *Bowen v. Massachusetts*, 108 S.Ct. 2722, 487 U.S. 879 (1988).

With regard to these facts, under the APA § 706, the reviewing court may:

1. compel agency action unlawfully withheld or unreasonably delayed; and
2. hold unlawful and set aside agency action, findings, and conclusions found to be
 - a. arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - b. contrary to constitutional right, power, privilege, or immunity;

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- c. in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- d. without observance of procedure required by law;
- e. unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
- f. unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

The standard of review of agency action by a district court is rather narrow, and while the court reviews the entire record, it must defer to the agency's interpretation of its regulations. *Chevron U.S.A. v. Natural Resources Def. Council, Inc.*, 467 U.S. 873 (1984). Reversal can only occur when the agency action is without a rational basis. *Baltimore Gas & Elec. Co. v. National Resources Defense Council*, 462 U.S. 87, 105-06 (1963). The reviewing court examines an agency's conclusions of law de novo, but it must uphold the agency's factual findings if they are supported by "substantial evidence." That is defined as "more than a mere scintilla but less than a preponderance." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).

Administrative agencies are limited in their powers by the congressional acts which grant them authority. *Garvey v. Freeman*, 397 F. 2d 600, (C.A. 10. Colo. 1968). In order to determine whether an agency acts within the scope of its authority, the court must review the scope of the agency's authority and whether the agency is acting within that range. *Olenhouse v. Commodity Credit Corp.*, 42 F. 3d 1560 (C.A. 10. Kan., 1994). A reviewing court must examine the relevant statutes to determine whether an agency has acted within the scope of its authority. *Lodge Tower Condominium Ass'n v. Lodge Properties, Inc.*, 880 F. Supp. 1370 (D. Colo., 1995). Here, the agency has not acted within its authority nor has it complied with regulatory requirements. If an agency fails to follow its own regulations that is an abuse of discretion. *Carter v. Sullivan*, 909 F.2d 1201, 1202 (8th Cir. 1990).

The agency here contends that its action was not "final agency action." Federal courts have considered questions of finality in many cases, including in the case of *Coalition for Sustainable Resources, Inc. v. United States Forest Service*, 259 F. 3d 1244, 1249 (10th Cir. 2001). In that case, the court principally considered issues of "ripeness" to determine whether there was final agency action. Although cases of an agency's failure to act are somewhat problematic, the court in *Coalition, id.*, stated that an examination must include not only fitness of the issues for a decision but also hardship of the parties if the court withholds action. "An agency cannot preclude judicial review by casting its decision in the form of inaction rather than in a form of an order denying relief." *Id. at* 1251. An action may be final when an agency either refuses to act, unreasonably delays, or fails to act before a deadline. *Id.* In a case where an agency refused to consider a fee application under EAJA, that was a final determination and reviewable by the Court. *Lane v. US Dept. of Agriculture*, 629 F. Supp. 1290, D.N.D. 1996, affirmed in part and reversed in part, 120 F. 3d 106.

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"Finality" generally refers to the conclusion of agency activity. *Bethlehem Steel Corp. v. E.P.A.*, 669 F. 2d 903 (C.A. 3rd 1982). 5 USC §706 provides for compelling of agency action which has been unlawfully withheld or unreasonably delayed. That has apparently happened in this case. The agency cannot be allowed to simply refuse or neglect to act, and then contend as a result of such refusal or neglect that final action has not occurred. Under 5 USC §706, if action is unlawfully withheld or unreasonably delayed, the agency has presumably not "finalized" its action. However, that is not an excuse nor is it a justification to deny judicial review and enforcement under the APA. *See also, Coalition for Sustainable Resources, supra* at 1250, citing *Sierra Club v. Yeutter*, 911 F. 2d 1405, 1410 (10th Cir. 1990).

The agency's failure and refusal to follow its own rules and statutes may constitute a violation of Farmer's property and due process rights. When questions of due process are the subject of appeal from an agency final decision, the District Court must conduct a plenary review of the facts and the agency's decision making process. *Olenhouse v. Commodity Credit Corp.*, 42 F. 3d 1560, 1565 (10th Cir. Kan. 1994). The District Court "must find and identify substantial evidence to support the agency's action...agency action must be set aside if it fails to meet statutory, procedural or constitutional requirements or if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Olenhouse, supra*, at page 1565, 1574, citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28, L.Ed.2d 136 (1971). Agency action will also be set aside if the administrative process employed violated "basic concepts of fair play." *Olenhouse, supra*, at 1583. The same theory applies where the agency has failed or refused to act, especially where the agency "failed to take a discrete agency action that it is required to take." *Norton v. Southern Utah Wilderness Alliance*, 124 S.Ct. 2373 (2004) at pg 2380.

As applied to this case, Farmer is likely to be successful in obtaining judicial review of the agency's action, or more properly, the agency's failure to act. The agency appears to have clearly violated or ignored its own regulations and has taken action which is contrary to those regulations. Not only is this potentially unlawful, or arbitrary and capricious, but it may also be in excess of statutory authority or limitations, and without observance of procedure that is required by law. (5 U.S.C. § 706). Even though the agency's interpretation of its regulations is entitled to deference, this is probably a case of a clear error of judgment or an abuse of discretion by failure to follow its own regulations. *Citizens to Preserve Overton Park, Inc., supra*, and *Carter v. Sullivan, supra*. Farmer is therefore, likely entitled to judicial review of the administrative action and relief which either compels agency action or sets aside unlawful action.

ESSAY Q1

SEAT

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<u>ISSUE</u>	POINTS AWARDED
1. There is a general rule requiring the exhaustion of administrative remedies before a court will consider judicial review of an administrative agency decision.	1. <input type="radio"/>
2. In order to bring an action for judicial review, Fred must have standing.	2. <input type="radio"/>
3. For standing, Fred must be within the zone of interest ("person injured or affected").	3. <input type="radio"/>
4. Prerequisites for judicial review of agency action are:	
4a. "final" agency action;	4a. <input type="radio"/>
4b. the absence of any other adequate remedy ("redressible"); and	4b. <input type="radio"/>
4c. person must have suffered a legal wrong ("harmed").	4c. <input type="radio"/>
5. In this case, Fred has already utilized the agency appeal procedures and therefore exhausted administrative remedies.	5. <input type="radio"/>
6. Review of federal administrative agency decisions would be in federal district court.	6. <input type="radio"/>
7. A reviewing court may compel agency action unlawfully withheld or set aside agency action found to be:	
7a. arbitrary, capricious or abuse of discretion;	7a. <input type="radio"/>
7b. contrary to a constitutional right, power, privilege or immunity;	7b. <input type="radio"/>
7c. in excess of statutory jurisdiction or authority;	7c. <input type="radio"/>
7d. without observance of procedure required by law;	7d. <input type="radio"/>
7e. unsupported by substantial evidence in the case or hearing; or	7e. <input type="radio"/>
7f. unwarranted by facts in an applicable de novo hearing.	7f. <input type="radio"/>
8. Under the standard of review of agency action by the court, it must defer to the agency's interpretation of its regulation.	8. <input type="radio"/>
9. A review court must uphold an agency's factual findings if supported by substantial evidence.	9. <input type="radio"/>
10. In this case, Fred has a strong argument that the agency was not acting within its authority prescribed by the federal statutes and the mandatory regulations.	10. <input type="radio"/>
11. In this case, Fred could claim that failure by the agency to follow its own regulations.	11. <input type="radio"/>
12. Even though the agency is claiming that it has not taken "final" action, an action may be final when an agency refuses to act, unreasonably delays, or fails to act before a deadline ("futility").	12. <input type="radio"/>
13. Fred may bring a claim for violation of his due process rights.	13. <input type="radio"/>