Administrative Law | Fall 1998
Prof. Edmundson | Your exam number: ___

FINAL EXAMINATION

INSTRUCTIONS - PLEASE READ CAREFULLY

1. This is an open-book, open-notebook examination. Remember the Honor Code.

2. The examination is to be answered in the blue books provided for you. What is not in the blue book, or not expressed in complete sentences, cannot be credited.

3. Put your EXAMINATION NUMBER ONLY in the space provided at the top of this sheet and on each blue book. DO NOT PUT YOUR NAME ON YOUR EXAM PAPERS.

4. When you have finished the examination, number your blue books to show how many you used and in which order (e.g. "1 of 2" and then "2 of 2"). Then please put the examination questions inside your first blue book, put any additional blue books inside the first, and then put the exam and blue books, so arranged, on the table at the front of the room. You must return the exam.

5. You will have three hours to work on the examination.

6. If more facts are needed to answer any part of a question, state what they are and why they are needed. Organization will be counted in determining your grade. Think BEFORE you begin to write. Illegible responses cannot be credited. Concise answers are welcomed.

EXAMINATION

Question I.

The Grady County Director of Public Health determines, by regulation, who may be a member of the "medical staff" of a hospital in the County. By state statute, only medical staff members have authority to admit patients and prescribe treatment. In 1977 the Director issued a regulation stating that a hospital's medical staff consists of:

> individuals granted the privilege by the governing authority of the hospital to practice in the hospital. Any of the following who are granted practice privileges by a hospital shall be placed on a hospital's medical staff: persons who are currently licensed by the Director as a Doctor of Medicine, M.D., Doctor of Dental Surgery, D.D.S., or doctor of Podiatric Medicine, D.P.M.

The statute further provides that the Director may revoke the license of a hospital that violates these provisions.

Until recently, the Director had never interpreted the regulation. But ever since 1977 the informal understanding of County hospitals and the Director's staff has been as follows: A person who has one of the three named degrees and is given practice privileges by a hospital is automatically a member of its medical staff. In addition, a hospital has discretion to admit to its medical staff licensed health care professionals with other degrees to whom it has been given practice privileges. In accordance with this understanding, many hospitals admitted psychologists (who do not have an M.D.) as members of their medical staffs.

After intense lobbying from psychiatrists (who do have an M.D.), the new Director (who is an M.D. with a background in family practice) recently issued a statement interpreting the regulation to mean that only persons with one of the three professional degrees specified in the regulation may be members of hospital medical staffs. Shortly thereafter, County Hospitals dropped all psychologists from their medical staffs. As a result, psychologists no longer have the authority to admit patients or prescribe treatment, and must work under the supervision of psychiatrists who do have such authority.

Two psychologists, who have recently been dropped from the medical staff of a private hospital in the County, wish to challenge the Director's interpretation and obtain reinstatement. What claims may they assert and what relief should they obtain?

Question II.

The Federal Pesticide Control Act of 1981 provides the following:

> Section 7: It is unlawful to transport in interstate commerce pesticides that are not registered with the Environmental Protection Agency or which are misbranded.
>
> Section 9: The EPA Administrator shall register a pesticide if adequate scientific data show that it will not harm the environment.
>
> Section 11: A pesticide is misbranded if, when used in a manner consistent with the labeling instructions, it will harm the environment.
>
> Section 14: The EPA Administrator may withdraw a registration only after providing the pesticide's manufacturer with prior notice and an opportunity for a hearing.

When the Act first became effective, the EPA automatically registered all commonly used pesticides, about 1,500 altogether, for it did not have time to check the scientific credentials of each. It then asked the National Academy of Sciences ("NAS") for help. The NAS surveyed its members, established panels of willing scientists, and divided up the pesticides for review. A panel, after surveying the literature and using its own contacts in the scientific and industrial world, would decide whether a particular registered pesticide might hurt an important plant or animal species. If so, the panel would go on to estimate the need for the product. The panel would reach an overall conclusion, based in part on its estimate of need for the product, about whether, on balance, the product "might harm" the environment. It would inform the EPA of its conclusions. The EPA then sought to withdraw the registration of any pesticide the panel concluded "might harm" the environment.

In July 1995, Weevil Kneivel, Inc., the manufacturer of a pesticide called BugOff, heard a rumor that an NAS panel was looking into the environmental effects of its product. It wrote to the panel chairman, requesting an opportunity to appear before the panel and argue its case. The chairman replied that appearances were not permitted.

In September 1995, the panel found that BugOff "might harm" the environment in light of its potentially adverse effects upon tree frogs and the fact that it did not kill many bugs. It so informed the EPA.

In February 1997, a Congressional committee held hearings focusing upon 'unreasonable administrative delay' at the EPA. The committee chairman repeatedly asked the Administrator why no action had been taken against BugOff. The Administrator replied that he intended to withdraw its registration very soon.

In July 1997, the EPA promulgated what it called an "interpretive and procedural rule." That rule, called "procedural rule 17 (c)," says:

> The EPA interprets the words 'adequate scientific studies' (as they appear in Sections 9 and 14 of the Act), to mean detailed studies, meeting scientific standards of reliability, showing to a scientific degree of certainty, a lack of any harmful effect on the environment. The manufacturer shall bear the burden of producing such studies.

In September 1987, the EPA sent Weevil Kneivel, Inc. formal notice that it intended to withdraw the registration for BugOff. Weevil Kneivel, Inc., Immediately requested a hearing. It conceded, however, that it lacked detailed scientific studies or scientific reliability and certainty proving that BugOff did not injure tree frogs. It added in its letter:

> Scientific studies of this type must be conducted under carefully controlled conditions; they are expensive; they are time consuming; and often they lead to no conclusive scientific result. None of the many pesticides now registered could meet such standards. In fact, we believe you have enunciated a standard of scientific certainty that no one can meet; you then remove from the list, not those products that fail to meet the standard, but those products that your NAS panel tells you, on the basis of its members' own impressions, might be harmful. We think the NAS panel is completely wrong in the case of BugOff. We would like an opportunity to prove it.

The EPA responded as follows:

> *Your request for a hearing is denied. Since you admit that you d not meet the standard of proof contained in procedural rule 17 (c), there is nothing to have a hearing about. BugOff's registration is withdrawn, effective 180 days from today, and, as of that time, you must remove it from the market.*

Weevil Kneivel, Inc., is convinced that BugOff is safe, perhaps safer than many other pesticides still on the list. It has come to you for legal advice. You are to write a legal memo evaluating possible legal arguments you might make to a court in an effort to set aside the EPA's action withdrawing BugOff's registration.

Question III.

Assume all the facts contained in Question II. Having heard of your legal efforts, EPA sends Weevil Kneivel, Inc., another letter which says the following:

> *Whether or not your product is registered will not control EPA's efforts to remove your product from the market. If it is not removed within 180 days, we shall consider it 'misbranded' within the meaning of that term in Section 7 of the Act. Unless you change the label to reflect clearly that it harms the environment we shall bring an action in court under Section 7 to remove it from the market.*

You are confident you will win the court action, for you see EPA's method of calling a registered product 'misbranded' and going directly to court to remove it as no more than a sneaky way around the safeguards that the Act provides in respect to the 'withdrawal of registration' procedure. Assume you have a very good percent chance of winning this purely legal argument.

Weevil Kneivel, Inc., says it is still worried. If it changes the label now, its sales will fall by 50 percent. If it waits until the EPA brings the "misbranding" enforcement action, then if EPA wins, seizure of already manufactured pesticides will treble its financial loss and, in any case, the adverse publicity will hurt it severely. You would like a court to review the legality of EPA's proposed enforcement procedure now, before the 180 days is up. Can you obtain court review?

Good luck!

End of Examination