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Administrative Law Outline

I. Bar Exam

- a. Steps:
 - i. Look for HOW the Admin agency screwed up
 - ii. Determine HOW agency could *defend* its action
- b. Identifying Admin Law Question
 - i. There will always be a state or federal agency
 - 1. board, department, commission taking some action against an individual or entity
 - ii. Has the **Oregon** legislature or US Congress given authority to an agency in a state or act?
 - 1. the statute will give power to agency to write rules, impose penalties, or hear appeals
 - iii. Structure of Bar Question
 - 1. societal problem identified; legislation enacted to solve it
 - 2. agency writes a rule
 - 3. person or business violates the rule; agency investigates and punishes the offender
 - 4. person or entity appeals the agency decision; agency holds administrative hearing (ie, adjudication)
 - 5. person or business loses the administrative hearing; appeal to judicial court (reviewability; standard of review)
- c. If Admin Law question, what law applies?
 - i. Federal constitution (if federal agency)
 - 1. DP clause
 - 2. Standing and Ripeness
 - ii. **Oregon** APA (state agency)
 - 1. how and when can write rules
 - 2. how and when must conduct hearings
 - 3. when courts can review agencies
 - iii. Federal APA (federal agency)
 - 1. same as **Oregon** APA
 - iv. Analyze agency's organic statute and regulations mentioned in question
 - 1. very important; normally required in answer
 - 2. may add to procedures, may add powers, etc
- d. What Agency action are we talking about in the question?
 - i. Rulemaking: acting like a legislature

- ii. Adjudication: acting like a court
- iii. Investigating: acting like the police (Con law only)
- iv. NB: analyze **each agency action** separately

II. RULEMAKING

- a. Agency must be created by legislation
 - i. Law must give guidance as to *scope* of rulemaking powers
 - 1. Ask: can agency do what it did based on the enabling legislation?
 - ii. Enabling legislation: **improper delegation**
 - 1. did the legislature properly delegate authority?
 - 2. did enabling legislation have standards?
 - 3. if no standards, agency action can be arbitrary or abusive?
 - a. Therefore, court has power to set aside the action
 - iii. Defenses to Bad delegation argument
 - 1. courts have only required when reviewing enabling statutes that there only be some
 - a. minimal direction in the statute; or
 - b. minimal direction in the legislative history
- b. **Ultra Vires** actions by the agency
 - i. Ask: has agency gone beyond delegated authority to act?
 - 1. where action is ultra vires, the court should void the action
- c. Agency **Rulemaking Procedures**
 - i. Federal Agencies
 - 1. Can make policy in one of two ways:
 - a. Write rule in advance announcing policy; OR
 - b. Decide policy on case-by-case adjudication
 - 2. However, rulemaking is preferred for policy making
 - 3. Attacking case-by-case adjudication
 - a. Fed courts strike policy-making adjudications IF:
 - i. Party's detrimental reliance on previous adjudications
 - ii. Hardship caused the party was much greater than harm prevented and party was innocent
 - ii. **Oregon** Agencies
 - 1. MUST always put policy in rules; cannot make policy in adjudication
 - iii. Analysis of rulemaking procedure:
 - 1. Did state agency comply with **Oregon** APA rulemaking requirements?
 - 2. Did federal agency comply with Federal APA rulemaking requirements?
 - iv. When must agency make a rule?
 - 1. agencies must
 - a. publish rule in advance, and
 - b. take comments before making final rule
 - 2. **Def of Rule**
 - a. A statement of general applicability and future effect,

- b. Prescribing or interpreting law, policy, or procedure
 - 3. EXCLUDED from definition of Rule:
 - a. Statements of internal agency policy
 - b. Interpretive and policy statement
 - c. Permissible construction of statute or prior rule
 - d. Rule has no practical impact on any client
 - 4. Check
 - a. Failure to comply with rulemaking requirements: void
 - b. Stepping over rulemaking authority: ultra vires
- v. FEDERAL AGENCY RULEMAKING REQUIREMENTS
 - 1. Formal Rulemaking
 - a. “on the record” after a hearing (← magic words in statute)
 - b. requires trial-like procedures
 - i. same as adjudication requirements
 - 2. Informal Rulemaking (the default)
 - a. Notice
 - i. Published in Federal Register: contains
 - 1. terms of the proposed rule; and
 - 2. description of the subjects and issue of rule
 - b. Comment
 - i. Public right to comment in writing only
 - c. Publication of Final Rule
 - i. In Federal Register, alone with a
 - ii. Concise statement of rule and its purpose
 - 3. Hybrid Rulemaking
 - a. Combination of formal and informal
 - b. Not in federal APA
 - c. Only required if specific authorizing statute that expressly creates a different rulemaking procedure
- vi. **OREGON** AGENCY RULEMAKING
 - 1. a single method: Informal Rulemaking
 - 2. Requirements:
 - a. Notice to public
 - i. Published in Secretary of State Bulletin
 - ii. At least 21 days before effective date of rule
 - iii. Calculated to apprise general public of the proposed rule
 - b. Content of notice:
 - i. Subject matter and purpose of the proposed rule
 - ii. Statutory authority for proposed rule
 - iii. The name for the rule
 - iv. A fiscal impact statement
 - v. Time, place, and manner for public comment in writing
 - vi. A request for public comment on possible alternative options for achieving the rule’s goals

- c. Public comment
 - i. Must be in writing, not oral
 - ii. BUT, if 10 or more people request, the agency must provide oral testimony at public hearing
 - d. File the final rule with Secretary of State
 - 3. EXCEPTION to OAPA requirements:
 - a. Temporary Rules (last only 180 days)
 - i. Skip notice and comment if
 - 1. an emergency and failure to act quickly will result in
 - 2. serious prejudice to public
- vii. CHALLENGE TO AN OREGON AGENCY RULEMAKING PROCEDURE
 - 1. Who has standing?
 - a. Any *person*
 - b. Any *organization* that was
 - i. Adversely affected by the rule;
 - ii. Party to agency proceeding; OR
 - iii. Specific statute grants organizational standing
 - 2. Where to file challenge?
 - a. Directly to Oregon Court of Appeals
 - 3. Record on appeal
 - a. Enabling statute
 - b. Rule itself
 - c. Documents showing
 - i. Procedural compliance with OAPA
 - 4. Timing of challenge
 - a. 2 year sol from *effective date* of rule
 - 5. Other challenges to rule
 - a. Ultra vires
 - b. Unconstitutional
 - c. Failure to comply with OAPA procedures
- viii. Agency Defenses for failure to follow APA
 - 1. it was a temporary rule in an emergency
 - 2. federal formal rulemaking not required b/c no magic words
 - 3. it was an internal agency policy
 - 4. challenge beyond time limited by s.o.l.

III. ADJUDICATION

- a. Overview
 - i. Agency acts like a court; holding hearing at specific request of party that disagrees with how agency treated him/it.
 - ii. Issues:
 - 1. does client in problem have a right to hearing at all?
 - 2. if yes, did agency hearing have enough Process to be fair?
 - iii. Hearing
 - 1. neither FAPA or OAPA grants right to direct hearing

2. Such right comes from:
 - a. Language of enabling statute; or
 - b. Procedural DP in 5th and 14th Amends
- b. Right to an Administrative Hearing
 - i. Federal APA
 1. if magic words “on the record after opportunity for hearing”,
 - a. then everyone gets formal adjudication
 2. if not statutory authorization,
 - a. then, does Const require a hearing under DP?
 - b. TEST: Did agency action
 - i. Deny a life, liberty or property interest;
 - ii. Is the action based on *adjudicative facts*¹?; AND
 - iii. There is no emergency
 - ii. Oregon APA
 1. enabling statute will say “contested case hearing” or “trial type hearing” is required
 - a. then everyone gets formal adjudication
 2. if no magic words, then
 - a. check Const DP
- c. What Type of Hearing: How much process is due? (tested a lot)
 - i. Federal Agencies
 1. Do you get a formal or informal hearing?
 - a. Formal if “on the record” words in statute
 2. Formal hearing requires:
 - a. *Written* notice of
 - i. Time, place, and nature of hearing
 - ii. Authority and jurisdiction
 - iii. Matters of fact and law asserted at hearing
 - b. Proof/Evidence
 - i. Admissible Evidence: any reliable, probative, and substantial evidence
 - ii. Rules of evidence
 1. not applicable
 2. **hearsay** permitted if
 - a. probative and not unfair to other party
 3. inadmissible if:
 - a. privileged, irrelevant, immaterial or reptition
 - iii. Right to
 1. examine and cross examine witnesses
 2. present testimony
 3. argue orally
 4. admit documents, etc
 - iv. No **ex parte** communications with decisionmaker

¹ Specific facts about individuals

1. prohibition: off the record comments regarding the *merits* of the case
2. ex parte re: procedural matter is permissible
3. REMEDY:
 - a. Judge can disclose the comment on the record and
 - b. Give an opportunity to respond
- v. Decisionmaker
 1. ALJ
 2. Deference required by agency head to ALJ
 - a. Generally NONE,
 - b. Except for credibility determinations
 3. Bias and prejudgment
 - a. Views on law/policy are ok
 - b. Error: made up mind on adjudicative facts before hearing
 - c. NB: rule of necessity
- vi. Findings and reasons:
 1. final order must be in writing
 2. must be detailed enough to permit review by Art III courts
- ii. **Oregon** Agencies
 1. formal hearing if: “contested case” or “trial type” hearing
 2. OAPA generally gives same rights as FAPA
 3. Differences:
 - a. Admissibility of **evidence** standard: “allowed if relied upon by reasonably prudent persons in the conduct of their serious affairs”
 - i. **Hearsay**: admissible, but if it is the **ONLY** evidence, then it may not qualify as *substantial evidence*
 1. If consequences of decision great, then less likely to meet the standard
 - b. Emergency suspension of business license
 - i. Allows for *pre-hearing suspension* **ONLY** where it would be
 1. a “danger to public health or safety”
 - ii. emergency suspension order must be served
 1. personally or
 2. by register or certified mail
- d. Constitutional DP requirements for Admin Hearings
 - i. If no statute requiring formal adjudication, look to Const
 - ii. Hearing must meet 5th and 14th Amend minimum requirements of:
 1. reasonable notice to parties of hearing;
 2. opportunity to be heard; and
 3. an impartial decisionmaker

- iii. Reasonable Notice
 - 1. was there enough time given to parties of time, place, and contents of the hearing
- iv. Opportunity to be Heard
 - 1. Balance
 - a. Importance of individual interest at stake in hearing
 - b. Risk of erroneous deprivation of that interest by using current procedure
 - c. Against burden on government and governmental interest (ie, cost and efficiency) in providing a more formal hearing process
 - 2. The higher the stakes are,
 - a. The more formal the procedures should be.
- v. Impartial decisionmaker
- vi. When is pre-deprivation hearing required?
 - 1. Balancing test: the more critical the benefit being taken away is to *survival*, the more likely the court is to require a pre-termination hearing.
 - a. Eg, welfare benefits, municipal utility shut off
- vii. What if neither the Const nor statute requires hearing?
 - 1. agency can give whatever sort of hearing it wants

IV. AGENCY ACTION: INVESTIGATIONS

- a. Legality determined by Constitution
- b. RECORDS: requirement to keep, make reports to agency
 - i. Agencies can generally require business keep records and make reports to agency
 - ii. Records required to be kept by businesses by law are *public records*, and so 5th Amend self-incrimination privilege does NOT apply
 - iii. However, 5th can bar recording requirement if:
 - 1. no statute requiring records be kept
 - 2. no public aspects to the information demanded by agency
 - 3. agency only requires of selected businesses inherently suspected of crime
- c. SEARCHES AND INSPECTIONS without warrant
 - i. 4th Amend may require a warrant prior to search by agency, BUT ONLY FOR
 - 1. private, non-public areas of the business, but lesser standard than PC required
 - 2. Agency must also so: reason to inspect this category of business
 - ii. Exception to warrant requirement
 - 1. heavily regulated business (gun shop, massage parlor, liquor store);
 - 2. search is in a public area of the business; OR
 - 3. it's a non-intrusive inspection
 - iii. Even illegally seized evidence may be admitted in admin hearing if
 - 1. benefits of admitting it outweigh
 - 2. the benefits of excluding it

d. SUBPOENAS

- i. 4th Amend does not bar subpoena power if:
 - 1. inquiry is within agency's area
 - 2. subpoena is specific and not excessively vague
 - 3. it is reasonably relevant to the matter investigated
 - 4. not an undue burden on person or business

e. OBTAINING INFO FROM AGENCIES

- i. Freedom of Information Act
 - 1. agency must supply identifiable documents promptly to any requesting person
 - 2. exceptions:
 - a. personnel records, confidential business info, law enforcement investigation, work product
- ii. Sunshine Act
 - 1. agencies with 2 or more members
 - 2. announce meeting one week in advance and have them open to the public

V. JUDICIAL REVIEW OF AGENCY ACTION

- a. Exceptions to Right of Judicial Review
 - i. Person appealing lacks standing
 - ii. Has missed s.o.l. for filing
 - iii. Does not have final agency decision to appeal
 - iv. Hasn't exhausted administrative remedies
 - v. Not ripe for review
- b. Standing
 - i. Federal Agencies
 - 1. Const standard: injury-in-fact, causation, redressability
 - ii. Oregon Agencies
 - 1. "any person adversely affected or aggrieved" or
 - 2. any party to an agency proceeding
 - a. for organizations, no representational standing
- c. Timeliness
 - i. OAPA s.o.l.
 - 1. rulemaking: 2 years for procedural errors
 - 2. adjudication: 60 days from written final decision
 - ii. Finality
 - 1. must be appeal from final written order
 - a. thus, oral order not appealable
 - iii. Exhaustion
 - 1. must use all internal agency review procedures, *before* going to court
 - 2. Exceptions: The administrative remedy is
 - a. Inadequate or futile; or
 - b. Will result in irreparable harm
 - 3. a *motion for reconsideration* of an agency final order is NOT required UNLESS there is a specific agency rule saying so

- iv. Ripeness
 - 1. Judicial review of rules allowed only if issue is ripe
 - 2. Test: must be genuine controversy, not abstract of hypothetical
 - a. Ie, can only challenge a rule if it has been applied against you
- d. In which court do you file?
 - i. Federal
 - 1. if statute says, follow statute
 - 2. if not, FAPA says
 - a. final order: court of appeals
 - b. not final: district court for declaratory or injunctive relief
 - ii. **Oregon**
 - 1. contested case: court of appeals
 - 2. other than a contested case or no need to exhaust: circuit court
- e. Standards/Scope of Review
 - i. **Review of Factual Findings** (OAPA and FAPA)
 - 1. in formal rulemaking or adjudication, findings of fact must be supported by:
 - a. substantial evidence in the hearing record
 - i. TEST: record as a whole would permit a reasonable person to make the finding
 - b. difficult for court to overturn
 - 2. in FAPA informal proceeding,
 - a. abuse of discretion test
 - ii. **Review of Legal Conclusions**
 - 1. Agency is interpreting its own statute
 - a. Agency gets deference if and only if
 - i. Congressional intent is clear (ie, has spoken on the issue); or
 - ii. Interpretation is permissible or reasonable
 - b. Otherwise, no deference: Error of Law Standard
 - i. Reviewing court decides de novo

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