CHAPTER I

AN INTRODUCTION TO ADMINISTRATIVE LAW

SECTION 1. AN INTRODUCTORY EXAMPLE

What follows is a real problem—the legal materials are genuine and the facts are true. It is a real problem in another sense, too—its pieces are hard to solve. Of course, if you are reading this at the beginning of your study of administrative law, you do not know much of what you would need to know to answer the questions posed in the way an experienced lawyer would. (Some of the questions are not so easy even if you do know what there is to know!) So the purpose of the problem is two-fold: first, to show you the kinds of questions administrative law tries to answer; and second, to invite you to use your imagination, along with the information given, to think about what some possible solutions might be.

The Problem of Field Sanitation

Each one of us, each day, needs to drink water and go to the bathroom. If we work full workdays, we probably need to do so during working hours. And we probably expect there to be clean water, a toilet, and a sink for us to use.

Of course, whether any workplace has reasonable sanitary facilities depends in part on what we mean by "reasonable." How far should employees have to walk in order to get to the water fountain or the bathroom? What is an acceptable ratio of workers to toilets? How often, and to what standard, should bathrooms be cleaned?

These questions may sound mundane, but they have important public health consequences. Poor sanitation can cause intestinal and urinary tract infections, ranging from mild bouts to serious parasitic invasions. In many jobs, heat exposure is a serious risk, and the easy availability of pure water an important safeguard. Being able to wash hands and face can help reduce the danger not only of contagion, but also of exposure to chemical residues. And, of course, there are also issues of personal comfort.

Question One: Assuming it were a totally open question, where in the legal universe should we put the law of workplace sanitation? Should it be a matter of tort, requiring an employer to take "reasonable care"? A matter of contract, so that employees get what they, individually or collectively, bargain for? Should we pass statutes, state or federal, specifying, say, the number of bathrooms that have to be provided, and stipulating civil and criminal penalties? Or should we give the matter over to a state or federal administrative agency to consider and regulate? Or, for that matter, should we simply have no law on the subject, and leave the issue to the forces of reputation and social norms?

Whatever is hypothetically the best answer to the questions just put, the actual legal terrain was revolutionized when Congress enacted, and President Nixon signed, the Occupational Safety and Health Act of 1970 (OSH Act). Its declared purpose was to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). In addition to obligating employers to maintain workplaces "free from recognized hazards ... likely to cause death or serious physical harm," the Act said that employers had to comply with "occupational safety and health standards" promulgated according to the Act. 29 U.S.C. § 654(a). These standards were in turn defined to be regulations requiring conditions or practices "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8).

Congress conferred the authority to pass these occupational safety and health standards on the Secretary of Labor. The Secretary of Labor is, of course, a member of the President's Cabinet. Insofar as high political judgment is involved in framing proper regulations, he or she may well be involved. But the Secretary can hardly do the work of, say, inquiring how many toilets there ought to be in a particular type of factory. Most of the work, then, is done by a division of the Department of Labor called, not surprisingly, the Occupational Safety and Health Administration (OSHA) headed by the Assistant Secretary for Occupational Safety and Health. (In the year 2008, OSHA had 2,118 employees.)

As can be seen from its declared purpose, passage of the OSH Act put the federal government firmly into the business of workplace health and safety. This was also evident from the provision of the Act which provided that agency employees could inspect "any factory, plant, establishment,

construction site, or other area, workplace, or environment where work is performed" to see if the law was being obeyed. 29 U.S.C. § 657(a). But it takes time to promulgate sensible regulations. Accordingly, the Act also directed the Secretary, as a starting point, to promulgate as binding standards, immediately and without normal procedures, what it called "national consensus standards": standards already in general use that had been promulgated by recognized professional organizations. 29 U.S.C. § 655(a). Beyond that, the Act said that "[I]n determining the priority for establishing standards ... the Secretary shall give due regard to the urgency of the need for ... standards for particular industries, trades, crafts, occupations, businesses, workplaces, or work environments." 29 U.S.C. § 655(g).

There were some "national consensus standards" for workplace sanitation, notably for permanent workplaces, and they were duly promulgated in April, 1971. 36 Fed. Reg. 10466. But there were no such standards for facilities for agricultural workers out in the field. In September, 1972, El Congreso, an organization speaking on behalf of Hispanic Americans, petitioned the agency to undertake public rulemaking to promulgate a field sanitation standard that would provide for drinking water, handwashing facilities and portable toilets.

Question Two: The agency has two issues it must address: first, does it make sense to spend time now on this regulation; and second, if it does go forward, what rule should it propose for the subsequent public proceedings. To this may be added a third matter: who should be making these decisions? Presumably there are staff in the agency who know something about workplace sanitation or farm conditions. Should they make the decision? Or should it be the Secretary or another top official? In addition, this particular statute provided two other choices. It established a federal research program relating to occupational safety and health, which is situated in the Department of Health and Human Services and known as the National Institute for Occupational Safety and Health (NIOSH). 29 U.S.C. § 669. Should NIOSH be consulted? And the Act also gave the Secretary the option of establishing an advisory committee to assist in setting standards. Such a committee would be composed of up to 15 people, including some federal government employees, a representative from state government, and "an equal number of persons qualified by experience and affiliation to present the viewpoint of the employers involved, and of persons similarly qualified to present the viewpoint of the workers involved." 29 U.S.C. § 656(b). How should the agency handle El Congreso's petition?

In the event, the petition was sent to a Standards Advisory Committee on Agriculture for factfinding and a recommendation; in December, 1974, that committee sent back a proposed field sanitation standard. The agency now had the following choices: Because the committee was only advisory, the Secretary still had the option of deciding that there was no reason to have a rule—or he could publish the proposed standard to initiate a

rulemaking proceeding in which the public would have a chance to comment on it. And if there were a rulemaking proceeding, at its end the agency could issue the proposed rule, could modify it in light of the comments it received, or could determine that a rule should not be issued. 29 U.S.C. § 655(b)(2–4).

OSHA did none of these things in any meaningful way. For a while it did nothing at all with the Advisory Committee's recommendation. Then, in April, 1976, during the Ford administration, it finally issued a Notice of Proposed Rulemaking, inviting public comment. But after the comment period closed, the agency again sat on its hands. It neither issued a rule nor said it wouldn't issue a rule.

As the agency dithered, El Congreso went to court. The Act, it pointed out, provided that final determinations in rulemakings were to be made within sixty days of the completion of the public proceedings. 29 U.S.C. § 655(b)(4). The court, El Congreso said, should order the Secretary to complete the standard.

Question Three: What should a court do? On the substantive side, the Act promises workers a healthful workplace, but leaves the enunciation of actual standards to the agency. On the process side, the Act tells the Secretary to complete the proceedings, but also gives him discretion as to the priorities of the agency. What is the role of the judiciary in a situation like this?

The actual course of this litigation was too complicated to reiterate here. (If you want to read the detail, see Farmworker Justice Fund, Inc. v. Brock, 811 F.2d 613, 614–19, vacated as moot, 817 F.2d 890 (D.C.Cir.1987).) A key development was that the courts told the Secretary to develop a timetable as to when the rule would be completed. Following on that, in March, 1983—now the Reagan administration—the agency issued an "Advance Notice" of rulemaking, saying it was reconsidering what standard it wanted to propose, and finally in March, 1984, it restarted the rulemaking proceeding.

The newly proposed rule differed from that suggested in 1976 primarily in being limited to farms with 11 or more field employees. This was a response to a stipulation Congress had enacted—not as part of the OSH Act itself, but rather as part of OSHA's funding. In successive years' appropriations bills, Congress had prohibited the agency from spending any funds to "prescribe, issue, administer, or enforce any ... regulation ... applicable to any person ... engaged in a farming operation which ... employs ten or fewer employees."

An extensive rulemaking proceeding ensued. Hundreds of comments were submitted and 243 witnesses testified at five public hearings that were held. And this time the rulemaking actually produced a decision. On April 16, 1985, OSHA issued a "final determination ... that a federal field sanitation standard will not be issued at this time." 50 Fed. Reg. 15,086.

But there is final and there is final. Eight days later, the newly appointed Secretary of Labor, William Brock, stated that he would reconsider the decision. His statement was made as part of his testimony during his Senate confirmation hearing.

Question Four: Congress of course passed the OSH Act. But consider now some of its subsequent actions. Congress limited the reach of the Act by adding language, year after year, to an appropriations bill. Why there rather than by amending the Act itself? And what about Brock's statement? Do you think it is purely coincidental that he promised to reconsider the regulation while he was facing the Senators? Why did he do that if he was appointed by a Republican President and the majority of the Senators were Republican? Note that these events seem to point in different political directions: one aids owners of small farms while the other helps farm workers. Are we witnessing a healthy involvement of politics, seeing the attention of the people's representatives at work to fine-tune regulatory policy? Or does Congress do a better job of representing the public interest when it formally legislates a major statute than it does when it sticks its nose into secondary matters?

Secretary Brock did get confirmed, and did reconsider. But he neither issued a rule nor didn't issue one. Instead, in October, 1985, he announced that promulgation of a national field sanitation standard would be delayed for two years so that the state governments could develop their own standards. If the states failed to provide adequate protection, then a federal standard would be promulgated.

The agency's justification for this decision had two prongs. First, it stated that the "clear evidence" adduced in the rulemaking proceeding showed that currently available facilities placed farmworkers' health at "unacceptable" risk. Regulation was indeed required. But, it went on, the Secretary "continues to believe that state action responsive to the need would be preferable to, and more effective than federal action. He therefore has decided to afford the states an opportunity to take adequate action ..." 50 Fed. Reg. 42,600.

Question Five: Politics again. Secretary Brock was appointed to his position by President Reagan and was part of his Cabinet. Reagan had campaigned, in part, on a platform that favored "returning" power to state government; he was a popular president and in 1985 had recently been reelected by a landslide. Brock (as the agency's statement shows) was willing to take personal responsibility for the "political" judgment to let the states have a last chance at regulating this matter. Do you think that is an adequate justification for what he did?

When the matter again went to court, the D.C. Circuit, rightly or wrongly, did not think the Secretary was justified (811 F.2d at 624–25):

> ... These remarks suggest that the October 21 decision was motivated, in part, by the Secretary's concept about the proper roles of the federal and state governments in our system. ...
>
> To the extent ... that the October decision rests on such a preference, the Secretary acted beyond the scope of his discretion. Although the Secretary might prefer that state governments regulate "public health issues" because they have "traditionally been a primary concern of state and local officials," Congress, in adopting the OSH Act, decided that the federal government would take the lead in regulating the field of occupational health. However much the Secretary might wish to "restore" what he considers to be "an appropriate balance of responsibility between state and federal governments," he is bound to enforce what Congress already determined to be the "appropriate balance ..." in the field of occupational safety and health.

The court ordered the Secretary to issue the regulation that he had admitted was necessary except for his hope for action by the states. This order was rendered moot, however, when the agency, very shortly thereafter, decided to move forward based on its own determination that the states had not done enough to warrant delaying federal action any further. And so, on May 1, 1987, a field sanitation standard was issued. It is still in force, 29 C.F.R. § 1928.110. Here are some of its provisions:

> (a) *Scope.* This Section shall apply to any agricultural establishment where eleven (11) or more employees are engaged on any given day in hand-labor operations in the field. ...
>
> (c) *Requirements.* Agricultural employers shall provide the following for employees engaged in hand-labor operations in the field, without cost to the employee:
>
> (1) *Potable drinking water.* ...
>
> (2) *Toilet and handwashing facilities.*
>
> (i) One toilet facility and one handwashing facility shall be provided for each twenty (20) employees or fraction thereof. ...
>
> (iii) Toilet and handwashing facilities shall be accessibly located and in close proximity to each other. The facilities shall be located within a one-quarter-mile walk of each hand laborer's place of work in the field. ...

> (iv) Where due to terrain it is not feasible to locate facilities as required above, the facilities shall be located at the point of closest vehicular access.
>
> (v) Toilet and handwashing facilities are not required for employees who perform field work for a period of three (3) hours or less ... during the day.
>
> (3) *Maintenance.* Potable drinking water and toilet and handwashing facilities shall be maintained in accordance with appropriate public health sanitation practices. ...
>
> (4) *Reasonable use.* The employer shall notify each employee of the location of the sanitation facilities and water and shall allow each employee reasonable opportunities during the workday to use them. ...

The final rule was accompanied by a statement of its basis and purpose that extended over dozens of pages. 52 Fed. Reg. 16,050. Among other things it said:

- That the rule covered an estimated 471,600 employees, 25–30% of whom were women and about half of whom worked in California, Florida, or North Carolina.

- That according to a survey in the record, in 1984 approximately 37% of farmworkers were not provided toilets; 55% had no handwashing facilities; and 21% had no drinking water.

- That there were many health risks associated with these conditions—for example, that farmworkers had parasitic infestations at rates 7 to 25 times higher than those prevailing in the population at large.

- That the cost of compliance with the rule for the typical agricultural employer would be about $1.09 per worker per day.

- And that the new rule could be expected to produce a substantial decrease in many health risks. While the data supporting this last point are hard to summarize, perhaps this paragraph from the statement gives the general picture:

> Where facilities are unavailable or inadequate, farmworkers are faced with alternatives that threaten their health because they cannot take care of their most basic physiological needs. Working in hot environments, if they minimize their fluid intake to try to limit their need to urinate, they risk dehydration and

> heat stress. If they drink water from irrigation pipes or ditches to quench their thirst, as some do, they risk being poisoned by agrichemicals or infected by pathogens from solid waste eliminated into the soil or ground water. They can try to retain their urine, but thereby, for women especially, risk getting urinary tract infections. Or they can simply urinate and defecate in the fields, subjecting their co-workers to exposure to communicable diseases.

Question Six: The OSH Act and OSHA are often mocked as an example of regulation gone haywire. Admittedly there is more in the record, but given what you know do you think that it is proper that the federal government has adopted this regulation? That it has imposed costs of this amount on private employers? That it has specified compliance to the degree of detail it has?

Of course, it is one thing to pass a regulation, and another to see that it is enforced. The OSH Act empowers the agency to inspect workplaces, and if the agency's inspector finds a violation of one of its standards, "he shall with reasonable promptness issue a citation to the employer." 29 U.S.C. § 658(a). The Act also provides for penalties that the agency may assess for serious or repeated violations of the standards. 29 U.S.C. § 666.

If the employer chooses to contest the citation or the proposed penalty, the case is heard, not by OSHA, but by a separate agency called the Occupational Safety and Health Review Commission (OSHRC). OSHRC is set up as what is sometimes called an "independent" agency. It is headed by a three-member Commission whose members serve for staggered six-year terms and can be removed only for "inefficiency, neglect of duty, or malfeasance in office." 29 U.S.C. § 661(b). (The Secretary of Labor, by contrast, serves at the President's pleasure.) Cases that go to OSHRC are heard in the first instance by internal hearing officers known as administrative law judges, and are then subject to review by the Commissioners themselves. From there, decisions are subject to judicial review in the Courts of Appeals.

Many contested cases will, of course, turn simply on establishing the facts. But the interpretation of the field sanitation standard may also be at issue. For example, consider a case that arose early in the George W. Bush administration, concerning workers who "detassel" hybrid seed-corn crops—who, that is, move down the rows of the cornfield denuding the plants of their tassels (and thereby their pollen) so that the plants in the field can be purposefully pollinated according to the specific requirements of a hybridizing protocol. The rows may be a mile long. Will it do to transport portable toilets to the end of the rows, even though the workers will thereby often be more than one-quarter mile away from a toilet? Or do toilets have to be put in the middle of the fields? And does it make a difference if these workers' tasks move them down the rows quickly, so that even when they are in the middle of a row they will move to the end in another half-hour?

The solution to this case requires interpretation of the regulations the agency issued. What is the relationship between the basic requirement of toilets within one-quarter mile (29 C.F.R. § 1928.110(c)(2)(iii)) and the exceptions for infeasible terrain (c)(2)(iv) and for part-time workers (c)(2)(v)? All of these provisions are reprinted above; how do you put them together?

Question Seven (the last): This determination will be made in the first place by OSHA, when its field inspector decides whether or not to issue a citation. If he does, and if the employer contests the citation, it will then go for a hearing before OSHRC. Assuming the citation is sustained after that hearing, the matter then comes to court. What stance should the court adopt? Should it interpret the regulation by its own lights, or should it defer to the interpretation that OSHA reached? Does it matter if the agency has consistently interpreted the regulations to apply to this situation or if, instead, the citation at hand represents a new, more employee-focused approach? What should the court do if it concludes that the regulations technically apply but that enforcement flies in the face of what the court considers to be common sense? Congress provided that the agency was to enforce the statute but that the federal courts were to review the determinations of violation: where does the role of the agency stop and the role of the court begin? (For a specific answer to the hypothetical just discussed, you can look at Advanta USA, Inc. v. Chao, 350 F.3d 726 (2003); for a broader answer to the very last question posed, you can look at virtually this entire casebook.)

SECTION 2. THE BASICS

Frequently Asked Questions

If you were to log on to a hypothetical website—www.adlaw.gov—to find some fundamental background for understanding administrative law in general—or the preceding problem in particular—you might find something like the following. As with most sets of Frequently Asked Questions, the responses to these FAQs are only initial entry points for more sophisticated questions and answers which will arise throughout this book.

FREQUENTLY ASKED QUESTIONS

- What is administrative law?
- What are administrative agencies?
- Is everything the government does considered agency action?