

Rakoff Clip 4 Transcript

TODD RAKOFF: All right, so let's have our discussion and then I'll ask you to vote. All right, so you can have the benefit of the discussion before you decide which way you want to go. All right, let's just clear away some of the basics.

All right, this is a choice we have because we can choose rule making or adjudication. We're told up in the first paragraph that we have the authority to do both of those things. If we didn't have the authority to do both of those things we couldn't do both of those things. And if the statute said we had to do one of those things, we'd have to do one of those things.

Like the Occupational Safety and Health Act that we read said, basically, there's no occupational safety and health law until the Occupational Safety and Health Administration passes rules. Well, then you've got to do rule making, OK. If we do rule making or we do adjudication what procedures are we going to have to follow? Oh, no, no, no, no, no, no. Zoe?

STUDENT: If we do adjudication we have to follow the process on the board, correct? If we're going to go through the rule making process we would follow the guidelines outlined in APA. And so we would have--

TODD RAKOFF: Just, we're getting closer. APA, I like that. Now, what would we have to do in the APA as regards rule making?

STUDENT: Well, if it was under 553 we'd have to go to the notice and comment period. And so we would--

TODD RAKOFF: But I don't pay you to give me a sentence that says, if it were.

STUDENT: So I think it would be under 553.

TODD RAKOFF: Why do you think that?

STUDENT: Because almost everything goes through 553.

[LAUGHTER]

You said if we guessed--

TODD RAKOFF: Sort of a dartboard answer.

[LAUGHTER]

She's right.

[LAUGHTER]

She's right, but you've got give me a better reason for it. Sharon?

STUDENT: Because it's an informal process and it's not--

TODD RAKOFF: How do you know it's an informal process? Kaye? Microphone is working its way down here. Law of gravity.

STUDENT: The statute doesn't say that you have to have a hearing. So if the statute doesn't specify, you go through notice and comment.

TODD RAKOFF: Right. OK, the default under the APA is 553. The statute tells you you have to have a hearing on a record, then it's formal rule making. If the statute tells you nothing, then it's informal rule making, OK.

And adjudication? If we do the adjudication, what do we have to do? All right. We're got down to the first row here. Brittany?

STUDENT: You have to have an on the record proceeding.

TODD RAKOFF: And you know that?

STUDENT: Because that's what 556 and 557 say.

TODD RAKOFF: How do you know we're in 556 and 557? How do you know it's not informal adjudication?

STUDENT: Well, I thought you said if it was formal adjudication.

TODD RAKOFF: If it was adjudication.

STUDENT: OK Well, you either have to have it on the record or it falls into that top right box where you're following due process considerations. So you at least have to have the opportunity for both sides to be heard. And I guess whether or not it's on the record depends on what box it falls in.

TODD RAKOFF: We can do better than that. What you said was not wrong, just not completely right. Pergeta?

STUDENT: Well, it says that you need to have a hearing on the record.

TODD RAKOFF: Thank you. All right, the problem says you have to have a hearing on the record. It pays to read the problems, aka, exam questions, as to what they say.

So if we do it through adjudication we're going to have to have a trial type hearing. And if we do it through rule making we're going to do informal rule making. And that's the common pattern. That's the most common choice you'd face in an agency like this.

All right, now, what are the differences? That's our choice. What are going to be some of the differences between proceeding through a notice and comment rule making or proceeding through on the record adjudication? Kareem, start us off.