ESSAY QUESTION NO. 1

Answer this question in booklet No. 1

The education department at the State University, Alaska's public university, wants to increase the enrollment of students from rural areas in Alaska in its graduate teaching credential program because rural school districts have not been able to find enough qualified teachers. Even offering substantially higher salaries has not alleviated the teacher shortage. The lack of qualified teachers has resulted in lower standardized test scores for school children from rural areas. Studies have shown that education students from rural areas are more likely to return to and remain at rural school districts as teachers after they graduate. The professors have persuaded the admission officers to admit rural applicants to the graduate teaching credential program over urban applicants if all other factors are equal.

John Smith is a student from Anchorage at State University. Smith wants to enter the teaching credential program at State University because he wants to become a teacher in Anchorage. He will not be able to get a teaching job in Alaska without a credential.

Smith works as a disc jockey at the campus radio station. The station is staffed entirely by student and community volunteers. Smith has a three hour show on Thursday night during which he plays whatever music he chooses and rambles about whatever topical issue he likes. Frequently, he chooses to talk about political issues and he castigates politicians with intemperate language. The university finances the radio station and maintains control over its operations, including assigning the disc jockeys to the various time slots. Over the years the university has taken a hands off approach to the content of the broadcasts, allowing the disc jockeys to broadcast their personal opinions regarding controversial subjects. The university did reprimand one disc jockey for identifying a student by name during a show about asking stupid questions in class.

Smith applied to enter the teaching credential program but was denied admission because of the preference for students from rural areas. Smith found out about his rejection two weeks before finals. He was upset and during his radio program the next day he railed against the admissions policy and the university administration.

A week before finals, the Dean of Students, who had not actually heard the broadcast, e-mailed Smith and asked why he had engaged in unprofessional conduct. The Dean accused Smith of using inappropriate language. Smith replied by e-mail, explaining that he was expressing his opinion on the validity of the admissions policy and the competence of the president. Smith also objected to the Dean's characterization of his broadcast. He further wrote that

the Dean should talk to the other volunteers who were working at the station that night because they would confirm that nothing in his broadcast was inappropriate. The Dean then sent Smith an e-mail suspending Smith from all classes and university activities for three weeks effective immediately. Smith will miss all of his finals if he misses the next three weeks of school. As a result, he will flunk all of his classes and will not be able to get into any teaching credential program.

1. Discuss any claims under the Alaska constitution that Smith might have challenging the rural preference.

2. Discuss any claims under the Alaska constitution that Smith might have challenging his suspension from the university.

GRADER'S GUIDE

***** QUESTION NO. 1 *****

SUBJECT: CONSTITUTIONAL LAW

I. The Rural Preference – Equal Protection (40%)

A. Introduction

John Smith may have a claim that the admissions process violates equal protection. Since State University is a public school, the suspension qualifies as state action. To prevail on an equal protection claim, Smith must first demonstrate that the university is treating similarly situated people differently. Matanuska-Susitna Borough School District v. State, 931 P.2d 391, 397 (Alaska 1997). Smith should be able to do this. The university's admissions policy for the teaching credential program treats applicants differently based on where they are from. Under the policy as adopted, an applicant from a rural area will always take precedence over an equally qualified applicant from an urban area. If the court concludes that there is disparate treatment, then the court will apply Alaska's sliding scale approach to equal protection analysis. Id. Alaska's sliding scale involves a three-step process: first, the court evaluates the weight to be afforded the interest impaired; second, the purposes served by the statute; and third, the state's interest in the particular means chosen to further its goals. Id.

B. Legal Standard

The first step is the most important and involves determining the importance of the interests impaired by the challenged statutes. Matanuska-Susitna Borough School District v. State, 931 P.2d 391, 396-97 (Alaska 1997)(quoting Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264, 269 (Alaska 1984)). Depending upon the primacy of the interest impaired, the state will have a greater or lesser burden in justifying the legislation. Id.

The second step involves examining the purposes served by the statutes and assessing their importance relative to the interests impaired by those statutes. Id. When the legislation impairs very important interests, the state must show a "compelling state interest" to justify the legislation. Id. When the legislation impairs relatively minor interests, the state must show that it has a "legitimate" state interest in treating the groups differently. Id.

In the third step, the court must evaluate the state's interest in the particular means chosen to further its goals. Id. The state's burden to justify its means depends upon the importance of the interests impaired. Id. At the low end of the sliding scale, the state needs to show a "substantial relationship" between the means and the ends. Id. When the legislation impairs very important interests, the state must show that that the fit between the means and the

ends is much closer and that the ends could not be accomplished with less restrictive means.

C. Analysis

1. Step One – Smith's Interest

The university will want to characterize Smith's interest as an economic one subject to the lowest level of review under Alaska's analysis. An economic regulation need only bear a fair and substantial relation to the attainment of a legitimate governmental objective. Pan-Alaska Const. v. Dept. of Admin., 892 P.2d 159, 162 (Alaska 1995). However, Alaska has concluded that the " right to engage in an economic endeavor within a particular industry" is an "important" right for equal protection purposes. State v. Enserch, 787 P.2d 624, 632 (Alaska 1989). Since the teaching credential is a requirement for teaching in Alaska, the admissions policy impairs Smith's ability to become a teacher and he should argue that the policy affects his right to engage in an economic endeavor in the particular industry of teaching. If the court accepts Smith's argument, then the court will closely scrutinize the admissions policy, requiring an important state interest and a close nexus between the policy and interest it serves. Id. On the other hand, if the court rejects Smith's argument, it will likely only require a legitimate state interest that is fairly and substantially related to the state's interest.

2. Step Two – The State's Interest

In Enserch, the court reaffirmed its position that "economically assisting one class over another" is not a legitimate goal. Ensearch, 787 P.2d at 634. In Ensearch, the state adopted a statute that created a local hiring preference for distressed areas of the state. The state's goals in adopting the hiring preference were "to reduce unemployment among residents of the state, remedy social harms resulting from chronic unemployment, and assist economically disadvantaged residents." Id. According to the court, these objectives masked the underlying objective of economically assisting one class over another. Id. If the court views the admissions preference as assisting one class economically over another, then it will invalidate the preference.

On the other hand,, the state may be able to strengthen its position by characterizing its interest in terms of meeting its obligation to educate the children of the state. In Breese v. Smith, 501 P.2d 159, 167 (Alaska 1972), the supreme court stated that article VII, section I, of the state constitution guarantees all children the right to a public education. However, the exact parameters of the state's obligation to educate its children have not been determined. In Hootch v. Alaska State Operated School System, 536 P.2d 793 (Alaska 1975), the court rejected a claim that the constitution guaranteed rural residents a secondary education in their village. Although the court concluded in Hootch that the state did not have a duty to provide a secondary education

in the villages, it may conclude that the state has an important interest in doing so.

3. Step Three – The State's Interest In The Means

The means that the state has chosen to accomplish its goal of increasing the number of qualified teachers is substantially related to that goal. Studies show that the rural students are more likely to return to the rural school districts. Moreover, the obvious remedy to the problem – raising salaries - has not sufficed. On the other hand, there is no guarantee that the rural students will return to the villages to teach. There is no definitive answer as to whether the means are sufficiently close to meet the greater scrutiny required for the impairment of an important interest, such as the right to pursue an economic endeavor. These means might be sufficiently close but they might not. Thus, an examinee may reach either conclusion.

II. The Suspension

A. Freedom of Speech (30%)

Article I, § 5, of the Alaska Constitution protects the freedom of speech. This clause provides at least as much protection as the First Amendment of the United States Constitution. Mickens v. State, 640 P.2d 818, 820 (Alaska 1982). The right to free speech is not absolute. Messerli v. State, 626 P.2d 81, 83 (Alaska 1981). The court must weigh the conflicting rights and interests. Id.

Smith may have a claim for a violation of his freedom of speech. He has two prongs to his argument. First, he may argue that the radio station is a public forum. Second, he can argue that the university is punishing him for expressing his opinion.

1. The Public Forum Doctrine

The Alaska Supreme Court has adopted the public forum doctrine. Alaska Gay Coalition v. Sullivan, 578 P.2d 951, 955 (Alaska 1978). According to the doctrine, there are three kinds of public places: traditional public forums, designated public forums, and property that is not a forum for public communication. Fardig v. Municipality of Anchorage, 803 P.2d 879, 883 (Alaska App. 1993)(quoting Perry Education v. Perry Local Educators' Ass'n, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed. 794 (1983)). The free speech clause circumscribes the state's ability to limit expressive activity in places, which by long tradition (traditional forums) or by government fiat (designated forums) have been devoted to assembly and debate. The state may not prohibit all expressive activity. Id. However, the state may enforce time, place, and manner regulations so long as they are content neutral, narrowly tailored to serve a significant government interest, and leave ample alternative channels of communication. Id. The state may only enforce content-based prohibition if the regulation serves a compelling state interest and the regulation is narrowly

drawn to serve that interest. Id. If the public property has not been designated a forum for public communication, the state may reserve its use for its intended purpose, communicative or otherwise.

Smith has an argument that the radio station is a public forum because the station is open to community volunteers. In Aldrich v. Knab, 858 F.Supp. 1480 (W.D. Wash. 1994), the University of Washington fired a number of volunteers from the campus radio station for violating a policy that prohibited criticizing the university or the station. Ultimately, the court concluded that the radio station was not a public forum because the University had not opened the station up for the expressive activities of the public. Id. at 1493. The University maintained programming guidelines that limited access to the air waves. According to the court, the state cannot turn a non-traditional forum into a public forum through inaction.

The State University will argue that it is not a public forum because it maintains control over the station's finances and operations. The university will also argue that it does maintain some editorial control over the broadcasts by making the decision about which disc jockeys get shows. Finally, the university will point, as an example of its editorial control, to the incident when the disc jockey named a particular student during the show on stupid questions. However, the actual practice of the station appears that the university does not exercise much editorial oversight, for the university has taken a rather hands off approach to the content of the broadcasts. Moreover, Smith has a history castigating politicians with intemperate language without reprimand. Ultimately, the court would have to decide whether the State University intended to open the station up for expressive activity or whether it was merely guilty of inaction. The facts in the question are ambiguous enough that a court could go either way.

2. Punishment For Expressive Activity

Smith could analogize his situation to that of a state employee who has been fired for his expressive activity. Alaska applies a three-pronged analysis to evaluate a claim by a public employee that he or she was fired for constitutionally protected speech. Methvin v. Bartholomew, 971 P.2d 151, 154 (Alaska 1998). The plaintiff must show that he engaged in protected speech and that speech was a substantial or motivating factor in the termination. Id. The public employer may rebut the plaintiff's position by demonstrating that it would have discharged the plaintiff regardless of the speech. Id. Despite Smith's personal interest, the admissions policy of the teaching credential program would appear to be a matter of public concern because it involves the allocation of state resources and public education. Based on the e-mail exchange, Smith's statements were the reason he was suspended. And finally, nothing in the facts indicates that the university would have discharged Smith absent the speech.

B. Procedural Due Process (30%)

Smith may have a due process claim. He was suspended. He received notice of the reason for the suspension and an opportunity to be heard via-e-mail, but the Dean conducted the proceedings in a manner that might create an undue risk of an erroneous deprivation. In Mathews v. Eldridge, 96 S.Ct. 893, 902-03 ((1976), the Supreme Court set out the basic test for determining the amount of process due. A court must consider three factors: (1) the private interest affected, (2) the risk of an erroneous deprivation through the procedures used and the probable value of additional safeguards against the government's interest, and (3) the government's interest, including the fiscal and administrative burden that additional safeguards would entail. The Alaska Supreme Court uses the Mathews v. Eldridge standard when reviewing procedural due process issues. Whitesides v. State, 20 P.3d 1130,1135 (Alaska 2001).

The due process clause protects only property and liberty interests. Nickerson v. University of Alaska, 975 P.2d 46, 52 (Alaska 1999). Neither the Alaska Supreme Court nor the United States Supreme Court has specifically held that a person has a property interest in their position as a student at a state university. Id. However, the Supreme Court of Alaska has held that a school must provide minimal process before dismissing a student for hostile, abrasive, intimidating, and unprofessional behavior because the dismissal could stigmatize the student's professional reputation sufficiently to amount to an infringement of a liberty interest. Id. Smith may not have a property interest in his position as a student. Nothing in the facts indicates that he has any sort of entitlement to the position. On the other hand, he has a liberty interest in his professional reputation, and the Dean suspended him for the same type of behavior that the court discussed in Nickerson.

The primary issue in this case is the sufficiency of the process afforded Smith. In Nickerson, the Alaska Supreme Court cited United States Supreme Court precedent with approval. The Supreme Court's leading case on due process in the context of schools is Goss v. Lopez, 419 U.S. 565, 74, 95 S.Ct. 729 (1975). Goss involved a student at a public high school. The Supreme Court held that an informal meeting at which the student is advised of the charges and the basis of the accusation and then given a chance to respond is sufficient. Goss, 419 U.S. at 582. There need be no delay between the notice and the hearing, which can occur within minutes of the misconduct. Id.

According to the Supreme Court, there is a "non-trivial risk" of an erroneous decision in school disciplinary proceedings because the allegations are often based on information gleaned from others and the facts are often in dispute. Goss, at 583-84. On the other hand, imposing a requirement for trial-like procedures would vastly increase the administrative costs of imposing suspension as a disciplinary tool and may overwhelm the administrative facilities in some school districts. Id. at 583-84. Goss, however, expressly

limited its informal procedure to short term suspension of 10 days or less. Id. at 581.

In Nickerson v. University of Alaska, Anchorage, 975 P.2d 46 (Alaska 1999), the court cited Supreme Court precedent in determining the amount of process due a graduate student being dismissed from a graduate degree program. In Nickerson the court concluded that a disciplinary violation required oral or written notice and an informal "give and take" between the student and the administrative body which gives the student the opportunity to characterize his conduct and to put it in to context.

The basic process appears to comport with Nickerson. The Dean e-mailed Smith, asking him why he had engaged in such abrasive, hostile, and unprofessional conduct. This may constitute sufficient notice because the e-mail advised Smith of the allegation even if it did not say anything about the possibility of a suspension. The exchange of e-mails meets the requirement for an informal give and take, and the Dean gave Smith an opportunity to characterize his conduct and to put it in perspective. Smith should, however, argue that he should have been afforded more process because of the effect of the suspension. The three week suspension will result in Smith missing his finals and flunking his classes. This is a far more significant effect than the day suspension anticipated in Goss or even the one year suspension approved of in Nickerson. The suspensions by themselves do not have the same permanent effect on the student's record that flunking courses will. Smith will not be able to pursue a career as a teacher because he will not be able to get in to a credential program.

There is a non-trivial risk that the Dean's process will result in an erroneous decision. The Dean had not heard the program himself. He was, therefore, basing his conclusions in part on what someone else had told him about the content of the broadcasts. Smith told the Dean that other volunteers at the station would support him.

Smith has a reasonable argument that the balance of interests tips in favor of allowing him a more formal opportunity to defend himself. Smith could argue that, given the consequences of the suspension, the university should grant him a hearing at which he could present his defense and his defense witnesses. That kind of hearing would not be that much more expensive or time consuming. The university would not, however, have to hold a full trial.