

2014

Administrative Law

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Survey Editor

ARTICLES

ADMINISTRATIVE LAW

John Paul Jones *
John R. Mohrmann **

INTRODUCTION

This article is a report of certain developments during the last two years relating to the Virginia Administrative Process Act (“the VAPA”),¹ which governs rulemaking and adjudication of cases by state agencies as well as judicial review of both.

I. LEGISLATIVE CHANGES TO RULEMAKING

A. *More Time Allowed Agencies When Replacing an Emergency Regulation*

Their organic statutes and other basic laws empower many state agencies to adopt rules or regulations that have the force of law. With some exceptions, the process of agency rulemaking is governed by the VAPA.² That process has become ever more complicated over time because of serial amendments to the VAPA.

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** J.D., 2014, University of Richmond; B.A., 2011, Hampden-Sydney College. The authors are much obliged to the reference specialists of the Muse Law Library for their outstanding assistance in the research for this article.

1. VA. CODE ANN. §§ 2.2-4000 to -4031 (Repl. Vol. 2011 & Cum. Supp. 2014).

2. See *id.* § 2.2-4000 (Repl. Vol. 2011 & Cum. Supp. 2014); see also *id.* § 2.2-4002 (Repl. Vol. 2011 & Cum. Supp. 2014) (for agency and function exemptions from the entire Act); *id.* § 2.2-4006 (Repl. Vol. 2011 & Cum. Supp. 2014) (for agency and function exemptions from the Act’s rulemaking procedures in sections 2.2-4006 to -4017, or Article 2 of the Act).

Generally speaking, the VAPA calls for public notice of an agency's intention to make or amend a rule to be published in advance—in order for interested persons outside the agency to be alerted, and to allow a window of opportunity for the agency to receive comment, first on the plan to make or amend a rule and then on any draft that follows.³ The rulemaking agency is obliged to take account of such comment in the course of finalizing its new rule,⁴ and various organs of government are charged with reviewing the new rule before its promulgation in the official gazette known as the Virginia Register.⁵ There is no provision in the VAPA for absolute veto of an agency rule,⁶ but the standing committees of both chambers of the General Assembly, the Joint Commission on Administrative Rules,⁷ or the governor may suspend the effective date of any new rule or amendment until the first day of the next legislative term.⁸ Judicial review of the rulemaking process empowers courts to police agency rulemaking for conformity with the statutory protocol and to refuse enforcement of rules found to have been improperly produced.⁹

One recent amendment of the VAPA responds left-handedly to the length of time now required for the promulgation of a regulation in accordance with the VAPA. It is widely understood that a regulation promulgated in accordance with the VAPA may take more than a year to move from first public notice to final publica-

3. See generally *id.* §§ 2.2-4006 to -4017 (Repl. Vol. 2011 & Cum. Supp. 2014) (discussing the provisions within the VAPA that establish the procedures for notice and comment, public participation, economic impact analysis, and the implementing of changes to be regulations).

4. *Id.* § 2.2-4012(E) (Repl. Vol. 2011).

5. See *id.* §§ 2.2-4007.04, -4013 to -4014 (Repl. Vol. 2011 & Cum. Supp. 2014).

6. See John Paul Jones, *Legislative Changes to Virginia Administrative Rulemaking*, 19 U. RICH. L. REV. 107, 120–22 (1984). *But see infra* text accompanying note 18 (discussing the pocket veto afforded the governor under certain circumstances for regulations intended to replace emergency regulations).

7. Comprised of members from both chambers, the Joint Commission on Administrative Rules serves the General Assembly as its principal agent for oversight of agency rulemaking, reviewing existing agency regulations and monitoring the rulemaking process. It makes its own assessment of the impact of regulations on the economy, the environment, government operations, and members of the public. It describes itself as “constituent driven” and bases its work plan on concerns from affected members of the public. VA. CODE ANN. §§ 30-73.1 to -73.4 (Repl. Vol. 2011 & Cum. Supp. 2014); *Joint Commission on Administrative Rules*, DIV. OF LEGISLATIVE SERVS., <http://dls.virginia.gov/commissions/car.htm> (last visited Oct. 10, 2014).

8. VA. CODE ANN. §§ 2.2-4013 to -4014(B) (Repl. Vol. 2011 & Cum. Supp. 2014).

9. See *id.* § 2.2-4027 (Repl. Vol. 2011 & Cum. Supp. 2014).

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tion in the Virginia Register.¹⁰ For this reason, the VAPA provides a workaround for proposed regulations that qualify as “emergency” regulations.¹¹ Pursuant to Virginia Code section 2.2-4011, emergency regulations can be adopted summarily, that is, as soon as the attorney general and the governor agree with the agency on the predicate state of crisis.¹² Something less than a looming disaster may suffice as the predicate.¹³ According to section 2.2-4011(B), a rulemaking emergency can arise from nothing more than the impatience of the legislature.¹⁴ Whenever the General Assembly is so inclined, it can dispense with the ordinary rulemaking process. It need merely command an agency to promulgate certain rules within 280 days of the enactment of the bill articulating the mandate.¹⁵ The same goes for rules required by federal law to be promulgated by Virginia agencies within 280 days.¹⁶

10. In the lucid User Manual published at the Virginia Regulatory Town Hall, charts diagramming the processes required by the VAPA for ordinary and emergency rulemaking are available at <http://townhall.virginia.gov/UM/charts.cfm>. For a diagram illustrating the various stages of the regulatory process and associated timelines, see *Standard Regulatory Process: Guide for State Agencies*, VIRGINIA TOWN HALL, available at <http://townhall.virginia.gov/um/chartstandardstate.pdf> (last visited Oct. 10, 2014).

11. VA. CODE ANN. § 2.2-4011 (Repl. Vol. 2011 & Cum. Supp. 2014).

12. *See id.*

13. When regulations of the Virginia Alcohol Beverage Control Board (the “ABC Board”) pertaining to adult entertainment at the premises of licensees were enjoined by the United States District Court for the Eastern District of Virginia for violation of the First Amendment, *Norfolk 302, LLC v. Vassar*, 524 F. Supp. 2d 728, 736 (E.D. Va. 2007), the ABC Board successfully applied to the attorney general and the governor for consent to substitute emergency regulations. The ABC Board persuaded the attorney general and the governor that a threat to public safety warranted summary promulgation of yet another version of its rules pertaining to “nudity and associated conduct.” *See* 24 Va. Reg. Regs. 1344 (Feb. 24, 2008) (amending 3 VA. ADMIN. CODE § 5-50-140); *see also* *Imaginary Images, Inc. v. Evans*, 593 F. Supp. 2d 848, 853–54 (E.D. Va. 2008). Also of note, the Board for Barbers and Cosmetologists was able to persuade the attorney general and the governor of a threat to public health from the absence of rules governing hair braiding. *See* 20 Va. Reg. Regs. 2639 (July 26, 2004). More than a dozen such “emergencies” warranted avoidance of ordinary rule making from 2003 to 2008. *Virginia Emergency Regulations June 2003–June 2008*, VIRGINIA REGULATORY TOWN HALL (on file with author).

14. VA. CODE ANN. § 2.2-4011(B) (Repl. Vol. 2011 & Cum. Supp. 2014).

15. *Id.* In 2011, the General Assembly resorted to this tactic for rules it demanded of the Board of Medicine subjecting abortion clinics to regulations designed for hospitals. Act of Mar. 11, 2011, ch. 670, 2011 Va. Acts 1092 (codified as amended at VA. CODE ANN. § 32.1-127). *See generally* John Paul Jones & Afsana Chowdhury, *Annual Survey of Virginia Law: Administrative Law*, 47 U. RICH. L. REV. 7, 9 (2012) (discussing developments in the rules regulating abortion clinics).

16. VA. CODE ANN. § 2.2-4011(B) (Repl. Vol. 2011).

Emergency regulations promulgated pursuant to section 2.2-4011 have force of law for only a limited period, during which the promulgating agency is expected to develop permanent replacements in accordance with rulemaking procedures otherwise standard in the VAPA.¹⁷ That period used to be twelve months long.¹⁸ However, it is common knowledge that sometimes a year is not enough time for a replacement regulation to complete the VAPA's regular rulemaking procedure. When it takes longer, the expiration of the emergency regulation leaves a void in circumstances that, for one reason or another, dictated an emergency response in the first place. Now, after passage of Senate Bill 1043, the time allowed for rulemaking to replace an emergency regulation is eighteen months.¹⁹ Moreover, an agency that foresees that it will not complete replacement regulations in time may apply to the governor for leave to keep at it for another six months.²⁰ Curiously, Senate Bill 1043 qualified this extra-time option by requiring that the governor give his consent before the eighteen-month window closes.²¹ It is therefore now possible for a governor to pocket veto agency regulations when an agency has taken too long developing permanent replacements for expiring emergency regulations. That seems most likely to happen when the governor who endorsed the state of emergency has been succeeded by another of a different mindset.

B. *The Moment of Adoption for Notice of Appeal*

A product of the Virginia Code Commission's Administrative Law Advisory Committee,²² Senate Bill 358 responded to appar-

17. *Id.* § 2.2-4011(C) (Repl. Vol. 2011 & Cum. Supp. 2014).

18. *Id.* (Repl. Vol. 2011) ("All emergency regulations shall be limited to no more than twelve months in duration.")

19. Act of Mar. 20, 2013, ch. 629, 2013 Va. Acts 1116 (codified as amended at VA. CODE ANN. § 2.2-4011(C) (Cum. Supp. 2014)).

20. VA. CODE ANN. § 2.2-4011(D) (Repl. Vol. 2011 & Cum. Supp. 2014).

21. Ch. 629, 2013 Va. Acts 1116-17 (codified as amended at VA. CODE ANN. § 2.2-4011(D) (Cum. Supp. 2014)).

22. The Virginia Administrative Law Advisory Committee (the "ALAC") was established in 1994 to assist the Virginia Code Commission with oversight of the operation and effectiveness of the VAPA and Virginia Register Act. The ALAC is a legislative branch agency with representatives from the business community, local government, the state bar, state agencies, the academic community, the Supreme Court of Virginia, public interest associations, and other interested parties. VA. CODE ANN. § 30-155(B) (Repl. Vol. 2011); ADMIN. L. ADVISORY COMM., <http://codecommission.dls.virginia.gov/alac/alac.shtml> (last

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ent confusion as to what constitutes adoption of a regulation for purposes of its appeal. The VAPA affords "any person affected by and claiming the unlawfulness of any regulation . . . a right to the direct review thereof by an appropriate and timely court action . . . in the manner provided by the Rules of [the] Supreme Court of Virginia."²³ Part 2:A of the rules governs such appeals, and Rule 2A:2 specifically calls for the appellant to file a petition within thirty days of the adoption of the rule.²⁴ Until now, the VAPA did not define adoption. In the form in which the VAPA was enacted, there was nothing calling into question the assumption that a rule was adopted for appeal purposes when it was adopted by the promulgating agency. Subsequently, however, the VAPA has been amended to provide for legislative and executive review of a regulation after final adoption by the agency, and allowing for its suspension.²⁵ But Rule 2A:2 was not amended accordingly.

In *Sherwin Williams Co. v. Commonwealth ex rel. Air Pollution Board*, the Richmond City Circuit Court, per Judge Markow, sustained a plea in bar after holding that Rule 2A:2 contemplated the agency's formal adoption of the rule as the event beginning the thirty days in which, according to the supreme court, the notice of appeal must be filed with the secretary of the agency.²⁶ More recently, however, the same circuit court came to a different conclusion. In *Karr v. Dep't of Environmental Quality*,²⁷ the court decided with reference to the definition of regulation in the VAPA, that a regulation was not really or fully a regulation un-

visited Oct. 10, 2014).

23. VA. CODE ANN. § 2.2-4026(A) (Cum. Supp. 2014).

24. VA. SUP. CT. R. pt. 2, R. 2A:2 (2014). Rule 2A:4 calls for the petition of appeal to be filed with the clerk of the circuit court within thirty days after notice has been given to the agency secretary. R. 2A:4. Note that this pertains to appeals of the regulation on its face. As the VAPA makes clear, defensive challenges, that is, challenges in resistance to a specific enforcement action are treated differently. "[W]hen any regulation . . . is the subject of an enforcement action in court, it shall also be reviewable by the court as a defense to the action, and the judgment or decree therein shall be appealable as in other cases." VA. CODE ANN. § 2.2-4026(A) (Repl. Vol. 2011 & Cum. Supp. 2014).

25. See VA. CODE ANN. §§ 2.2-4007.04, -4013 to -4014 (Repl. Vol. 2011 & Cum. Supp. 2014).

26. No. CH04-722-3 (Va. Cir. Ct. Oct. 5, 2004) (Richmond City) (unpublished decision), available at <http://codecommission.dls.virginia.gov/alac/Adoption%20Date%20Background%20materials.pdf>.

27. No. CL11-321 (Va. Cir. Ct. May 23, 2011) (Richmond City) (unpublished decision), available at <http://codecommission.dls.virginia.gov/alac/Adoption%20Date%20Background%20materials.pdf>.

less it had force of law,²⁸ and because a putative regulation could not have force of law before its review by the attorney general and the governor (and before it is filed with the Registrar of Regulations),²⁹ the petition³⁰ in question was filed in time.³¹ More recently, in obiter dictum, the Court of Appeals of Virginia, in *Russell v. Virginia Board of Agriculture & Consumer Services*, opined that due process considerations compelled the conclusion that, for purposes of Rule 2A:2, a rule was not adopted and, therefore, the window for giving notice to the agency secretary did not open until the time for review by the governor had expired.³²

Senate Bill 358 puts this controversy to rest, opting for the most certain if most distant horizon for challenges to rules at their creation. Henceforth, for purposes of appeal pursuant to Rules of the Supreme Court of Virginia, a regulation is considered adopted only when it has been printed in the Virginia Register.³³

II. LEGISLATIVE CHANGES TO JUDICIAL REVIEW OF AGENCY CASE DECISIONS

For most state agencies with regulatory authority, the VAPA dictates the procedures by which they will promulgate most of their rules of general application and decide most of the cases

28. VA. CODE ANN. § 2.2-4001 (Repl. Vol. 2011 & Cum. Supp. 2014) (“‘Rule’ or ‘regulation’ means any statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws.”).

29. Emergency regulations bypass the ordinary process of public participation and external review. The endorsement of the attorney general and governor are required *a priori*. See VA. CODE ANN. § 2.2-4011(A) (Cum. Supp. 2014). Emergency regulations are supposed to be effective upon their filing with the Registrar of Regulations. See *id.* § 2.2-4012(B) (Repl. Vol. 2011). However, section 2.2-4026(B) now makes them effective for purposes of appeal only when published in the Register—normally two to three weeks later. See *id.* § 2.2-4026(B) (Cum. Supp. 2014); VIRGINIA REGISTER OF REGULATIONS PUBLICATION SCHEDULE AND DEADLINES, JULY 2014 THROUGH JUNE 15, 2015, available at <http://register.dls.virginia.gov/issue.aspx?voliss=30:23&type=3>.

30. Rule 2A:2 calls for notice of appeal to the agency secretary within thirty days of the adoption of a challenged rule. VA. SUP. CT. R. pt. 2A, R. 2A:2 (2014). Rule 2A:4 calls for a petition of appeal to be filed with the circuit court within thirty days of the filing of the notice of appeal. R. 2A:4. In *Karr*, the court’s brief letter order referred to a “petition . . . filed within 30 days after the adoption of the regulation,” in accordance with Rule 2A:2. Final Order, *Karr v. Virginia Dep’t of Env’tl. Quality*, No. CL11-321 (Va. Cir. Ct. May 23, 2011) (City of Richmond) (on file with author).

31. Final Order, *Karr*, No. CL11-321.

32. 59 Va. App. 86, 93, 717 S.E.2d 413, 416 (2011).

33. VA. CODE ANN. § 2.2-4026(B) (Cum. Supp. 2014).

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within their jurisdictions.³⁴ For those opposed to particular regulations or case decisions, Article 5 of the VAPA also creates rights to judicial review by appeal to the circuit courts as well as the procedures and standards for such review.³⁵ From 1975, when the VAPA was enacted,³⁶ until now, in appeals from agency case decisions made on the record,³⁷ Virginia Code section 2.2-4027 charged Virginia’s circuit courts with the duty of determining “whether there was substantial evidence in the agency record upon which the agency as the trier of the facts could reasonably find them to be as it did.”³⁸ Courts interpreted this charge as calling for the sort of review ordinarily afforded in appeals from a trial court,³⁹ with considerable deference paid to the factual determinations of the trial judge.⁴⁰ As the Court of Appeals of Virginia put it only last year, “[t]he circuit court has no authority under VAPA to reweigh the facts in the agency’s evidentiary record.”⁴¹

As introduced in the 2013 session of the General Assembly by Senator Edwards, Senate Bill 944 would have wrought drastic change to this regime.⁴² In its original form, the bill would have

34. See *id.* § 2.2-4002 (Cum. Supp. 2014) (listing the state agencies and agency actions exempt from the VAPA).

35. See *id.* §§ 2.2-4025 to -4030 (Repl. Vol. 2011 & Cum. Supp. 2014).

36. See Act of 1975, ch. 503, 1975 Va. Acts 999, 999 (codified as amended at VA. CODE ANN. §§ 9-6.14:1 to -6.14:20 (Repl. Vol. 1975)), currently codified at VA. CODE ANN. § 2.2-4000 (Repl. Vol. 2011 & Cum. Supp. 2014)).

37. “On the record” is a term of art in administrative law, denoting an agency hearing with many of the trappings of the typical bench trial, including testimony under oath, exhibits, and a verbatim transcript. Rulemaking on the record is the subject of VA. CODE ANN. § 2.2-4009 (Repl. Vol. 2011 & Cum. Supp. 2014). Formal hearings, that is, those producing a case decision on the record, are the subject of VA. CODE ANN. § 2.2-4020 (Repl. Vol. 2011).

38. *Id.* § 2.2-4027 (Cum. Supp. 2014).

39. See, e.g., *Family Redirection Inst., Inc. v. Dep’t of Med. Assistance Servs.*, 61 Va. App. 765, 771, 739 S.E.2d 916, 919 (2013) (“Under the VAPA, the circuit court reviews an agency’s action in a manner ‘equivalent to an appellate court’s role in an appeal from a trial court’”) (quoting *Mattaponi Indian Tribe v. Commonwealth*, 43 Va. App. 690, 707, 601 S.E.2d 667, 676 (2004) (citations omitted), *aff’d in relevant part sub nom.* *Alliance to Save the Mattaponi v. Commonwealth*, 270 Va. 423, 424–25, 621 S.E.2d 78, 78 (2005)).

40. *Alliance to Save the Mattaponi*, 270 Va. at 441, 621 S.E.2d at 88 (“Under the ‘substantial evidence’ standard, the reviewing court may reject an agency’s factual findings only when, on consideration of the entire record, a reasonable mind would necessarily reach a different conclusion.”).

41. *Family Redirection Inst., Inc.*, 61 Va. App. at 771, 739 S.E.2d at 920.

42. Invited to comment on the impact of the bill, the Supreme Court of Virginia responded that it anticipated “a ‘weighty impact’ on the circuit courts based on a significant increase in the number of appeals and the complexity of trying the cases de novo rather than based on the administrative record.” DEPT OF PLANNING & BUDGET FISCAL 2013

amended section 2.2-4027 in three significant ways. By the time the bill was enacted into law, the more blatant of its changes had been disposed of. Opinions vary about the survival of its more subtle change. Here is how the operative portion of the bill looked when introduced:

When the decision on review is to be made on the agency record, the duty of the court with respect to issues of fact shall be ~~limited to ascertaining to determine~~ whether there was substantial evidence in the agency record ~~upon which the agency as the trier of the facts could reasonably find them to be as it did to support the agency decision.~~ The duty of the court with respect to the issues of law shall be to review the agency decision *de novo*. Upon motion of any party, the court may augment the agency record in whole or in part. The court shall enter judgment either setting aside, modifying, remanding, or affirming the order or decision of the agency.⁴³

Here is how it looked when enacted:

When the decision on review is to be made on the agency record, the duty of the court with respect to issues of fact shall be ~~limited to ascertaining to determine~~ whether there was substantial evidence in the agency record ~~upon which the agency as the trier of the facts could reasonably find them to be as it did to support the agency decision.~~ The duty of the court with respect to the issues of law shall be to

IMPACT STATEMENT [FOR SB944], available at <http://leg1.state.va.us/cgi-bin/legp504.exe?131+oth+SB944F122+PDF>. The Office of the Attorney General advised that:

it would need a minimum of 6 new attorney positions and 3 paralegal positions [as a consequence of the *de novo* provision]. OAG believes the attorney time involved in defending appeals against parties that were previously unable to augment evidence would be very large. When records are supplemented, the dynamic of the case substantially changes. An agency would be required to find evidence to counter the newly introduced evidence and to make its own motion to supplement the record, which will invite further supplementation by the party complaining of agency action. At some point the court will have to devise a means of limiting supplementation, which will likely be on a case by case basis. Under this bill, agency counsel will likely have an entirely new case to defend from the one that was appealed, perhaps with a different basis than that for the agency action. OAG believes that this will change the face of administrative litigation and will substantially increase the cost of defending appeals. It is OAG's view that trial preparation would be very burdensome to the agency and its attorneys and trials would be extremely lengthy (additional witnesses, additional documentary evidence, etc.). Ultimately, with these proposed changes, agency attorney time would be overwhelmingly dedicated to agency appeal trials.

Id. The Department of Planning & Budget confessed that total financial impact of the bill could not be precisely forecast due to the uncertainty over the number of cases that would be appealed. Nevertheless, they ventured to predict that the bill would cost agencies in excess of \$4,000,000 annually. *Id.*

43. S.B. 944, Va. Gen. Assembly (Reg. Sess. 2013).

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*review the agency decision de novo. The court shall enter judgment in accordance with § 2.2-4029.*⁴⁴

The Senate altered the bill by striking the language: “upon motion of any party, the court may augment the agency record in whole or in part.”⁴⁵ This ended the potential threat to finality from allowing a circuit court to reopen the record on motion of any party. In its original form, the bill stopped short of explicitly obliging the court to do so, but it would have left that decision to the court’s discretion while conveying a suggestion that the General Assembly considered reopening the record to new evidence nothing out of the ordinary. That circuit courts would have taken a dim view of this new power, and reserve it for extraordinary cases, is less likely than that they would have opted to leave the agency’s record alone only on an adequate showing of good cause by the agency. After all, the presumption that attaches to statutory amendments is that they are intended by the General Assembly to be effective, that is, to alter the *status quo ante*.⁴⁶

The House amended the bill by striking from the last sentence the phrase, “either setting aside, modifying, remanding, or affirming the order or decision of the agency” and substituting the phrase, “in accordance with § 2.2-4029.”⁴⁷ This disposed of the potential shift of enforcement power and discretion from agencies to courts that would follow from empowering courts to take executive action delegated to agencies in their organic or basic laws. After all, had the General Assembly considered apt for judicial action the cases otherwise left to various agencies for judgment and remedy, the General Assembly certainly could have so chosen. Such a sweeping shift of adjudicative power from so many administrative agencies to the circuit courts was probably too drastic a change to attract the support of more deliberate legislators.

One subtle change in the protocol for review of agency case decisions on the record did make it into law. With respect to judicial review of issues of fact, compare the duty to determine “*whether*

44. S.B. 944 (enacted as Act of Mar. 10, 2013, ch. 619, 2013 Va. Acts 1105, 1105).

45. *Id.*; LEGIS. INFO. SYS., (*SB 944 Amendment(s) Proposed by the Senate*, <https://leg1.state.va.us/cgi-bin/legp504.exe?131+amd+SB944AS> (last visited Oct. 10, 2014)).

46. *See, e.g.*, *Britt Constr., Inc. v. Magazzino Clean, LLC*, 271 Va. 58, 63, 623 S.E.2d 886, 888 (2006).

47. LEGIS. INFO. SYS., *supra* note 45.

there was substantial evidence in the agency record upon which the agency as the trier of the facts could reasonably find them to be as it did" with the duty to determine "whether there was substantial evidence in the agency record to support the agency decision."⁴⁸ Before its 2013 amendment, section 2.2-4027 afforded more finality for agency fact-finding than it does now. Before the 2013 amendment, a reviewing court was obliged to uphold an agency's finding of fact so long as a reasonable person would find it supported by substantial evidence. Now, it is left to the judgment of the circuit court to determine whether the evidence on which the agency finding rests is substantial. Thus, close calls that once went to the agency now go to the reviewing court. What used to be deference similar to that afforded a jury verdict⁴⁹ is now no more than that afforded a fact finding in a bench trial.⁵⁰ This may be a distinction that does not produce a difference, but some difference ought to attach to the new wording.⁵¹ That remains to be seen.

III. A CASE DECISION ADRIFT IN A SEA OF PUBLIC TRUST AND FEDERAL PREEMPTION

For additional seating during the tourist season, the owner of the Chincoteague Inn moored a barge to the dock alongside his

48. S.B. 944.

49. According to the Supreme Court of Virginia:

Great respect is accorded a jury verdict, and it is not sufficient that a trial judge, had he been on the jury, would have rendered a different verdict. Indeed, every reasonable inference must be drawn in favor of a verdict that has been rendered fairly under proper jury instructions. *Forbes & Co. v. [sic] Southern Cotton Oil Co.*, 130 Va. 245, 259, 108 S.E. 15, 19 (1921). The time-honored standard that a court must apply in deciding whether to approve a verdict was stated succinctly in *Forbes*:

If there is conflict of testimony on a material point, or if reasonably fairminded men may differ as to the conclusions of fact to be drawn from the evidence, or if the conclusion is dependent upon the weight to be given the testimony, in all such cases the verdict of the jury is final and conclusive and cannot be disturbed either by the trial court or by this court, or if improperly set aside by the trial court, it will be reinstated by this court.

Hall v. Hall, 240 Va. 360, 363, 397 S.E.2d 829, 831 (1990).

50. As the Supreme Court of Virginia put it in *Alliance to Save the Mattaponi v. Commonwealth Dep't of Environmental Quality*, "the reviewing court may reject an agency's factual findings only when, on consideration of the entire record, a reasonable mind would necessarily reach a different conclusion." 270 Va. 423, 441, 621 S.E.2d 78, 88 (2005).

51. See, e.g., *Kiser v. A.W. Chesterton Co.*, 285 Va. 12, 24-25, 736 S.E.2d 910, 917-18 (2013).

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restaurant, and used it as a dining area.⁵² Finding the barge to be encroaching upon or over state bottomland without a permit,⁵³ the Virginia Marine Resources Commission (“the Commission”) ordered the barge removed.⁵⁴ When the owner appealed, the Accomack County Circuit Court, per Judge Lowe, set aside the order and dismissed the agency’s enforcement action with prejudice,⁵⁵ having found that, so long the barge was moored only temporarily, it was beyond the jurisdictional reach of the Commission.⁵⁶

On appeal by the Commission, the Court of Appeals of Virginia reversed and remanded,⁵⁷ holding that, in light of the Federal Submerged Lands Act,⁵⁸ state regulation of bottomlands is not preempted in this case by federal maritime law.⁵⁹ Applying a variation of the hoary *Jensen* test,⁶⁰ the court found the record devoid of any evidence to support such preemption.⁶¹

52. Va. Marine Res. Comm’n v. Chincoteague Inn, 287 Va. 371, 376-77, 757 S.E.2d 1, 3 (2014).

53. VA. CODE ANN. § 28.2-1203 (Repl. Vol. 2011 & Cum. Supp. 2014) (noting that, subject to certain exceptions not pertinent to this case, it is “unlawful for any person to build, dump, trespass or encroach upon or over, or take or use any materials from the beds of the bays, ocean, rivers, streams, or creeks which are the property of the Commonwealth, unless such act is performed pursuant to a permit issued by the Commission”).

54. *Chincoteague Inn*, 287 Va. at 377, 757 S.E.2d at 3.

55. Final Order, *Chincoteague Inn v. Va. Marine Res. Comm’n*, No. 001-CL000399 (Va. Cir. Ct. Dec. 20, 2011) (Accomack County) (on file with author).

56. Transcript at 44-46, *Chincoteague Inn*, No. 001-CL000399 (Va. Cir. Ct. Oct. 14, 2011) (unpublished transcript) (on file with author).

57. Va. Marine Res. Comm’n v. *Chincoteague Inn*, 60 Va. App. 585, 588, 731 S.E.2d 6 (2012), *rev’d en banc*, 61 Va. App. 371, 374-75, 735 S.E.2d 702, 703-04 (2013).

58. Generally speaking, the Submerged Lands Act (the “SLA”) recognized state jurisdiction over tidal and submerged lands beneath out to three miles seaward on the coast, and beneath navigable rivers and other internal waterways forming the navigable waters of the United States. See James Lockhart, Annotation, *Validity, Construction and Application of Submerged Lands Act (SLA) of 1953*, 43 U.S.C.A. §§ 1301 *et seq.*, A.L.R. FED. 2d 363, 382 (2014). The SLA has been aptly described as a “quitclaim” by the United States. *Id.*

59. *Chincoteague Inn*, 60 Va. App. 585 at 598, 731 S.E.2d at 12.

60. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917) (“[T]he general maritime law may be changed, modified, or affected by state legislation . . . to some extent,” but “no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.”). The United States Supreme Court later used this same language in *American Dredging Co. v. Miller*, 510 U.S. 443, 447, 451 (1994); see *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 627 (1st Cir. 1994); *Calhoun v. Yamaha Motor Corp., USA*, 40 F.3d 622, 630 (3d Cir. 1994).

61. *Chincoteague Inn*, 60 Va. App. at 596, 598, 731 S.E.2d at 11, 12 (quoting *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 210 (1996)).

En banc, however, the court of appeals affirmed the judgment of the circuit court that the Commission had no jurisdiction over the barge,⁶² but did so for a different reason. According to the court, per Judge Huff, a temporarily moored vessel does not encroach upon bottomland so as to interfere with its use by the public or its management by the Commission.⁶³ Mooring a barge in the same spot for two months was not encroaching, as that term describes an offense in Virginia Code section 28.2-1203, because it did not interfere with the public rights of “fishing, fowling, hunting, and taking and catching oysters and other shellfish”⁶⁴—the protection of which the Commission was empowered to police.⁶⁵ Because such mooring did not violate section 28.2-1203 in the first place, there was no need to consult federal maritime law for possible conflict.

On appeal by the Commission, the Supreme Court of Virginia reversed and remanded, 5-2.⁶⁶ The court agreed that the power of the Commonwealth to protect its bottomland is constrained by the public trust doctrine, that is, by an implicit preservation in the Virginia Constitution of rights *jus publicum*, among which is a right to navigate.⁶⁷ But, according to the court, per Justice Millette, the barge in question was indisputably employed as a restaurant for such a period of time that it could no longer be regarded as in navigation, and consequently, engaged in the exercise of a right *jus publicum*.⁶⁸ As the barge was not constitutionally protected, it was therefore subject to the statutory requirement for a permit. In its holding to the contrary, the court of

62. *Chincoteague Inn*, 61 Va. App. at 375, 735 S.E.2d at 704 (2013) (en banc). The court split 7-4. Judges Frank, Elder, and Humphreys were joined in dissent by Judge Petty for the reasons stated in the opinion accompanying the panel’s decision. *See id.* at 387, 735 S.E.2d at 710.

63. *Id.* at 386, 735 S.E.2d at 709.

64. VA. CODE ANN. § 28.2-1200 (Repl. Vol. 2011 & Cum. Supp. 2014).

65. *Chincoteague Inn*, 61 Va. App. at 385-86, 735 S.E.2d at 709.

66. *See Va. Marine Res. Comm’n v. Chincoteague Inn*, 287 Va. 371, 390, 757 S.E.2d 1, 11 (2014).

67. *Id.* at 386-87, 757 S.E.2d at 9 (citing *James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp.*, 138 Va. 461, 470, 122 S.E. 344, 347 (1924)); *see id.* at 387, 757 S.E.2d at 9 (“The right of navigation . . . is ‘the right to *move* and transport goods *from place to place* over [water].”) (quoting *Commonwealth v. City of Newport News*, 158 Va. 521, 550, 164 S.E. 689, 698 (1932)) (emphasis by the *Chincoteague Inn* court); *see also* VA. CONST. art. XI, § 4 (“The people have a right to hunt, fish, and harvest game, *subject to such regulations and restrictions as the General Assembly may prescribe by general law.*”) (emphasis added).

68. *Chincoteague Inn*, 287 Va. at 376, 386-87, 757 S.E.2d at 3, 9.

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appeals erred in two ways. First, it was wrong to interpret the statute as limiting the Commission's enforcement authority to only such regulation as necessary to protect the rights *jus publicum* found in section 28.2-1200. The text of the statute deserved the broader interpretation afforded by its plain meaning, which broached no constitutional conflict so long as rights *jus publicum* were viewed as rights rather than as power parameters. It followed that the Commission could regulate not just activity that threatened rights *jus publicum*, but any activity except those regarded as a right *jus publicum*. Because the barge was not employed for fishing, fowling, hunting, taking and catching shellfish, or navigating, but instead for serving food and drink, the Commission could insist on its licensing.⁶⁹

The second error of the court of appeals appears to have been its conclusion that the barge's situation was only temporary. To the supreme court, a mooring for two months, intended for two more, that is, for the duration of the tourist season, was not merely a temporary interruption of navigation.⁷⁰

In the view of the supreme court, the proposition that the words "navigation" and "vessel" may have different meanings in federal law is irrelevant to this matter of Virginia public law, at least at this stage.⁷¹ Because of the general rule that a reversal en banc is a reversal *in toto*, the panel's holding that no federal law preempts did not survive,⁷² so the case was remanded for the court of appeals to revisit that issue.

Justice Powell dissented, joined by Justice McClanahan. In their view, that the meaning of navigation in Virginia law can vary from the meaning of navigation in federal law is a legal proposition long overtaken by events. This proposition did not survive decisions by the United States Supreme Court that extended federal regulation to intrastate commerce,⁷³ and runs afoul

69. *Id.* at 388, 757 S.E.2d at 9–10 (noting that the barge was being used as a restaurant and "using the floating platform for restaurant operations convert[ed] the public[s] property"—which property was the Commonwealth's subaqueous bottomland) (internal quotations omitted); see also 3 VA. ADMIN. CODE § 5-50-110 (2013) (detailing the requirements of licensing where food and drink is sold).

70. See *Chincoteague Inn*, 287 Va. at 387, 757 S.E.2d at 9.

71. *Id.* at 390, 757 S.E.2d at 11.

72. *Id.*

73. *Id.* at 392–93, 757 S.E.2d at 12–13 (Powell, J., dissenting).

of the Supremacy Clause.⁷⁴ According to Justice Powell, navigation, in federal law, proves vessel and vice versa. In support of this proposition, she cited 1 U.S.C. § 3 and the recent United States Supreme Court decisions of *Stewart v. Dutra Construction Co.*⁷⁵ and *Lozman v. City of Riviera Beach*.⁷⁶ Justice Powell cited *Dutra* for the proposition that a watercraft is capable of navigation, and therefore a vessel, if its use for transportation over water is a real possibility and not merely a theoretical one,⁷⁷ and cited *Lozman* for the proposition that a watercraft removed from navigation for extended periods of time is no longer a vessel.⁷⁸ This somehow proved that how the barge was being used is irrelevant.

As far as the law of Virginia is concerned, the Supreme Court of Virginia was unanimous on points both revisited and novel. In this case, the court reaffirmed that a right of navigation is part of the constitutional law of the Commonwealth because it is a right *jus publicum*. Meanwhile, the court has held that the right of navigation may be forfeited by fixing a vessel to shore for a long period of time and for a private purpose.

It remains to be seen whether, in this case, such functional forfeiture leaves this barge subject to the Commission's control. On remand, the court of appeals must take up again the question of whether any federal law preempts the application of Virginia Code section 28.2-1203(A).⁷⁹ Much of the regulation of navigation is generally left by the U.S. Constitution to federal authorities, but not all. As the Marshall Court made clear in *Gibbons v. Ogden*, navigation is an aspect of Commerce, the regulation of which is up to Congress, so that when regulatory schemes collide, the federal scheme leaves any conflicting state scheme unenforcea-

74. *Id.* at 393, 757 S.E.2d at 13.

75. *Id.* at 389, 757 S.E.2d at 10 (citing *Stewart v. Dutra Const. Co.*, 543 U.S. 481, 484, 497 (2005) (holding that a "dumb" barge, that is, one with neither steering nor power, is a vessel, even when it is on site supporting a clamshell bucket that is dredging, and thus entitling its injured attendant to a seaman's remedy)).

76. *Id.* (citing *Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 740-41 (2013) (holding that even if afloat in a marina after being towed there, a two-story residential structure atop a buoyancy chamber is not a vessel subject to a maritime action in rem)).

77. *Id.* at 394, 757 S.E.2d at 13.

78. *Id.* at 393-94, 757 S.E.2d at 13.

79. *Id.* at 390, 757 S.E.2d at 11.

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80. 22 U.S.

81. *Id.* at 3

82. 36 U.S.

83. 53 U.S.

84. 411 U.S.

85. 435 U.S.

86. *Id.* at 1

87. 529 U.S.

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ble.⁸⁰ But the Court left room for state regulation of some aspects of navigation where the state's interest outweighs any federal interest served by uniform regulation nationwide.⁸¹ The Taney Court soon furnished that room. In *Mayor of New York v. Miln*, for example, the Court upheld a state law obliging the master of any ship arriving from a foreign port to indemnify the City of New York against any charge by a passenger who, once ashore, resorted to the city's dole.⁸² Later, in *Cooley v. Board of Wardens*, the Court allowed enforcement of a state law obliging visiting ships to employ a local pilot for maneuvering in the port of Philadelphia and its approaches.⁸³ Modern cases are in accord. In *Askew v. American Waterways Operators, Inc.*, a unanimous Court upheld Florida's law obliging operators of tank ships to present proof of financial responsibility and holding them strictly liable for spill pollution of state waters.⁸⁴ More recently in *Ray v. Atlantic Richfield Co.*, the Court upheld a Washington law obliging tankers to engage standby tugs for their passage through Puget Sound.⁸⁵

But when a state's regulation of navigation in its waters conflicts with federal regulation, the former is unenforceable. In *Ray*, for example, other provisions of Washington's tanker law, e.g., those mandating certain safety features, were declared unenforceable because they conflicted with a federal statute dictating design and construction standards for tankers.⁸⁶ In *United States v. Locke*, several provisions of the next generation of Washington's tanker law were declared unconstitutional for the same reason.⁸⁷

It is generally accepted that federal maritime law may be derived from Article III, as well as from the Commerce Clause.⁸⁸ Not

80. 22 U.S. (8 Wheat.) 1, 21, 37-38 (1824).

81. *Id.* at 37.

82. 36 U.S. (11 Peters) 102, 105, 142-43 (1837).

83. 53 U.S. (12 How.) 299, 300, 321 (1851).

84. 411 U.S. 325, 327-28, 344 (1973).

85. 435 U.S. 151, 173 (1978).

86. *Id.* at 160-61.

87. 529 U.S. 89, 112-14 (2000); see generally ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 5.2 (4th ed. 2011) (for a useful primer on the law of federal preemption).

88. U.S. CONST. art. III, § 2 ("The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction . . .").

only has this been understood to afford Congress legislative authority to make rules for federal courts sitting as admiralty courts;⁸⁹ it has also been understood by federal courts as authority to make rules of common law for cases within admiralty's jurisdiction.⁹⁰

In *Southern Pacific Co. v. Jensen*, the United States Supreme Court, per Justice McReynolds, denied a widow recovery of benefits after the death on navigable waters of her husband, a long-shoreman, on the grounds that, even absent conflict with an Act of Congress, the state law remedy was incompatible with maritime law's traditional or customary liabilities and remedies.⁹¹ In 1970, a unanimous Court declared that the general maritime law of the United States authorizes a wrongful death action in U.S. waters not covered by wrongful death statutes, state or federal.⁹² More recently, the Court confirmed an injured seaman's right under the general maritime law to recover punitive damages for his employer's willful refusal of medical care.⁹³ That both the premise and the *ratio decidendi* of *Jensen* have long outlived its holding is evident from *American Dredging Co. v. Miller*, in which the Court upheld a Louisiana law, ruling out resort by state courts to the doctrine of *forum non conveniens* in certain maritime cases, after finding that it passed the *Jensen* test.⁹⁴

89. See *United States v. Matson Nav. Co.*, 201 F.2d 610, 615-16 (9th Cir. 1953) (holding that although the exercise of admiralty jurisdiction by U.S. courts was not officially recognized in cases where ships caused damage to land until the Admiralty Extension Act of 1948 was passed, such accidents were "both reasonably and historically within the concept of maritime affairs," and thus within the admiralty jurisdiction of United States courts); see also *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 209 (1963) (denying respondent's contention that it was excluded from liability in a similar case because of the Admiralty Extension Act's assigning to vessels liability for damage or injury, even if the damage or injury were incurred on land).

90. See Joseph F. Smith, Jr., *Choice of Law Analysis: The Solution to the Admiralty Jurisdictional Dilemma*, 14 TUL. MAR. L.J. 1, 2-4 (1989). While such usage is far from universal, herein the phrase "federal maritime law" is meant to cover not only statutes and administrative regulations, but also law uttered by judges in the common law manner. "General maritime law" is meant to cover only the subset of federal maritime law made by judges.

91. 244 U.S. 205, 207, 217-18 (1917).

92. *Moragne v. States Marine Line*, 398 U.S. 375, 408-09 (1970).

93. *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 424-25 (2009).

94. 510 U.S. 443, 457 (1994). The *Jensen* proposition—that there is a pocket of federal common law for admiralty cases, that is, that federal maritime law is not just statutory—is not without its critics. Justice Holmes, joined by Justices Brandeis, Clark, and Pitney, dissented strenuously in *Jensen* to the notion that the common law, including that said to

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Thus, to the question of whether the Commission's regulation of the barge in the *Chincoteague Inn* case is preempted by federal law pertaining to navigation, the best answer is, "it depends." For this reason, the dissent in *Chincoteague Inn* is premature when it insists that the meaning of navigation in Virginia law must correspond with the meaning of navigation in federal law.⁹⁵ The Supremacy Clause is not a Uniformity Clause; its trigger in a case like this would be a finding that state and federal laws, of one sort or another, collide. What is certain is that a federally recognized right of navigation is not immune ipso facto from state restriction. It depends.⁹⁶

govern maritime cases, was some "brooding omnipresence in the sky" to be discovered by judges, rather than the work of a specific sovereign. 244 U.S. at 222, 255 (1916) (Holmes, J., dissenting). More recently, in *American Dredging*, Justice Stevens unsuccessfully invited his colleagues to reconsider *Jensen*. 510 U.S. at 458-59 (Stevens, J., concurring). As might be expected, scholars have differed. Compare, e.g., Robert Force, *An Essay on Federal Common Law and Admiralty*, 43 ST. LOUIS U. L.J. 1367, 1387 (1999) (arguing that preemption should not occur in the absence of an overwhelming need for uniformity or where a state statute purports to diminish remedies created under general maritime law), with Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469, 470 (2004) ("[F]ederal common lawmaking in admiralty cases should be sharply curtailed or even eliminated.").

95. 287 Va. 371, 393-94, 757 S.E.2d 1, 13 (2014).

96. There is scant case law on the issue of whether a right of navigation insulates a vessel and its owner from state or local restrictions on mooring or anchoring. In *Barber v. Hawaii*, the United States Court of Appeals for the Ninth Circuit upheld state regulation of mooring and anchorage in the small boat harbors of the islands against claims that the scheme was preempted by various federal statutes, contravened the Commerce Clause, and violated the fundamental federal right of interstate travel. 42 F.3d 1185 (9th Cir. 1994). For its preemption holding, the *Barber* court relied in part on holding in *Beveridge v. Lewis*, in which the court upheld a municipal ordinance prohibiting mooring within a certain distance of the city pier during winter months against a claim that it was preempted by federal law. 939 F.2d 859, 862 (9th Cir. 1991). An argument by plaintiff-appellant in *Barber* that the scheme violated one of the privileges and immunities guaranteed by Article IV, § 6 of the U.S. Constitution was deemed waived because it was not raised below. 42 F.3d 1185, 1197 (9th Cir. 1994). Earlier, in *Hawaii Boating Ass'n v. Water Transportation Facilities Division*, the Ninth Circuit had held that a state law rationing moorage space and imposing higher fees on non-resident boaters was not preempted by any federal law and did not implicate any federal right. 651 F.2d 661, 664-65 (9th Cir. 1981). In *LCM Enters. v. Town of Dartmouth*, the First Circuit relied, in part on *Hawaii Boating* when it upheld a municipal ordinance imposing on non-resident boaters higher fees to use the harbor against claims of preemption, violation of the Commerce Clause, and denial of both protection and due process in contravention of the Fourteenth Amendment. 14 F.3d 675, 680 & n.8, 681-82 (1st Cir. 1994). As the Ninth Circuit had in *Hawaii Boating*, the First Circuit, in *LCM Enterprises*, defaulted to minimal scrutiny and upheld government regulation. *Id.* at 678-79.

IV. NEW RULES FOR VIRGINIA'S FREELANCE HEARING OFFICERS

A. Rules of the VAPA But Not Governed by It

With certain important exceptions, Article 3 of the VAPA governs the management by state agencies of particular cases,⁹⁷ calling first for informal methods of dispute resolution and, in the event those fail to produce a result agreeable to the non-agency party, for hearings formal in the sense that they resemble trials.⁹⁸ To preside, a corps of hearing officers has been created, comprised of volunteers from the bar engaged on a case-by-case basis and selected by the Office of Executive Secretary of the Supreme Court of Virginia (the "Executive Secretary"), more or less as independent contractors.⁹⁹ An agency with a case calling for a formal hearing must apply to the Executive Secretary, who serves as matchmaker, pairing each case that comes his way with the next available hearing officer on his list.¹⁰⁰ Virginia Code section 2.2-4024 governs the administration of this system, and obliges the Executive Secretary to promulgate rules in accordance with the statute. On January 1, 2014, the latest revision of the Hearing Officer System Rules of Administration became effective.¹⁰¹

These rules were not promulgated in accordance with the VAPA.¹⁰² No notice of intended regulatory action opened discus-

97. VA. CODE ANN. §§ 2.2-4018 to -4023 (Repl. Vol. 2011 & Cum. Supp. 2014). Under the definitions section of the VAPA, the term "agency" means "any authority, instrumentality, officer, board or other unit of the state government empowered by the basic laws to make regulations or decide cases." *Id.* § 2.2-4001 (Repl. Vol. 2011 & Cum. Supp. 2014). Section 2.2-4002 exempts a long list of specific organs of state government otherwise satisfying the definition in section 2.2-4001, and excludes certain actions by non-exempt organs of state government qualifying as agencies by reference to the definition in section 2.2-4001. *Id.* § 2.2-4002 (Repl. Vol. 2011 & Cum. Supp. 2014).

98. *See id.* §§ 2.2-4019, -4020 (Repl. Vol. 2011 & Cum. Supp. 2014).

99. *Id.* § 2.2-4024(A) (Repl. Vol. 2011 & Cum. Supp. 2014).

100. *Id.* § 2.2-4024(B) (Repl. Vol. 2011 & Cum. Supp. 2014).

101. HEARING OFFICER SYS. RULES OF ADMIN. R. 1A (2014), http://www.courts.state.va.us/programs/ho/rules_of_admin.pdf [hereinafter "RULES OF ADMIN."]. These revised rules replace those promulgated in 2005. Memorandum from Karl R. Hade, Exec. Sec'y, to the Hearing Officers Designated Pursuant to Va. Code § 2.2-4024 and State Agencies and Using Hearing Officers (Nov. 26, 2013), available at <http://www.courts.state.va.us/programs/ho/deskbook.pdf> (located on page 24, in the Appendix, of the PDF titled "Hearing Officer Deskbook: A Reference for Virginia Hearing Officers") [hereinafter Hade Memorandum].

102. Article 2 of the VAPA governs rulemaking by state agencies, with exceptions and exemptions listed in section 2.2-4006. An exception is provided for "[r]egulations that establish or prescribe agency organization, internal practice or procedures, including delega-

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sion, and no invitation was made in the Virginia Register for interested persons to comment thereafter on the work in progress. Effective since January, their final version cannot be found printed in the Register or online at the Town Hall website. Given that their creator is the Executive Secretary, it might be assumed that they are beyond the reach of the VAPA, which explicitly exempts an "agency of the Supreme Court."¹⁰³ But the Executive Secretary has himself declared that, "these rules are promulgated in accordance with section 2.2-4024 of the Code of Virginia."¹⁰⁴ The Executive Secretary is therefore on record as acknowledging that, for these rules, the source of his rulemaking authority is not the court but the General Assembly. With that in mind, the better view is that these rules are exempt from the ordinary rulemaking procedures dictated by the VAPA by virtue of the exception for any action relating to "[t]he selection, tenure, dismissal, direction or control of any officer . . . of an agency of the Commonwealth."¹⁰⁵ Even when a hearing officer's case decision is only a recommendation, she ought to qualify as an agency officer *pro hoc vice*, exercising with sufficient discretion certain powers of the agency for which she presides. On this basis, the Rules of Administration are exempt not only from notice and comment rulemaking, but also from such judicial review as the VAPA provides for rulemaking.¹⁰⁶ Moreover, unlike rules subject to the VAPA, the Rules of Administration could have been promulgated over the objections of the governor or the attorney general had either official been so inclined. In short, the Rules of Administration follow from the VAPA but they are not governed by it.

tions of authority." VA. CODE ANN. § 2.2-4006(A)(2) (Repl. Vol. 2011 & Cum. Supp. 2014). Because the Executive Secretary has been empowered by section 2.2-4024 to prescribe rules for the administration of the hearing officer system, the Executive Secretary qualifies as an agency and the Rules of Administration qualify for this exception. *See id.* § 2.2-4024(A) (Repl. Vol. 2011 & Cum. Supp. 2014) ("The Executive Secretary may promulgate rules necessary for the administration of the hearing officer system . . .").

103. *Id.* § 2.2-4002(A)(2) (Repl. Vol. 2011 & Cum. Supp. 2014).

104. RULES OF ADMIN., *supra* note 101, at R.1; *see* Hade Memorandum, *supra* note 101.

105. VA. CODE ANN. § 2.2-4002(B)(7) (Repl. Vol. 2011 & Cum. Supp. 2014).

106. *Id.* § 2.2-4001 (Repl. Vol. 2011 & Cum. Supp. 2014). Under the definitions section of the VAPA, the term "agency action" means "either an agency's regulation or case decision or both, any violation, compliance, or noncompliance with which could be a basis for the imposition of injunctive orders, penal or civil sanctions of any kind, or the grant or denial of relief or of a license, right, or benefit by any agency or court." *Id.* § 2.2-4001 (Repl. Vol. 2011 & Cum. Supp. 2014).

B. Case Decisions of and by the VAPA

If the rules and their promulgation are not governed by the VAPA, what about their application in specific cases? Rule 2 addresses requests for appointment to the corps of hearing officers, sets forth the qualifications for such appointment, and designates the Executive Secretary as the judge in such cases.¹⁰⁷ If he rejects a request, he must explain why in writing.¹⁰⁸ The rule explicitly provides a rejected candidate with the right to ask for reconsideration, and obliges the Executive Secretary to respond to that request within fifteen business days.¹⁰⁹ Thus, adverse action on a request for appointment may prompt disputes in two circumstances: when an applicant objects to his rejection, and when the Executive Secretary refuses to reconsider that rejection. The Rules of Administration are otherwise silent as to how either sort of dispute is to be handled, but both are surely the sort of cases within the purview of Article 3 of the VAPA because both arise from "an agency . . . determination that, under laws or regulations at the time, a named party as a matter of past or present fact, . . . is not . . . in compliance with any existing requirement for obtaining or retaining a license or other right or benefit."¹¹⁰ It follows that a frustrated applicant in either sort of case is entitled to a hearing *ore tenus*, however informal, and, in any case arising from the Executive Secretary's refusal to reconsider a rejection, to an explanation of that refusal.¹¹¹

From the Executive Secretary's refusal to reconsider an application previously rejected, no further appeal is authorized by the

107. RULES OF ADMIN., *supra* note 101, at R. 2.

108. RULES OF ADMIN., *supra* note 101, at R. 2(C).

109. *Id.*

110. VA. CODE ANN. § 2.2-4001 (Repl. Vol. 2011 & Cum. Supp. 2014).

111. *Id.* § 2.2-4019(A) (Repl. Vol. 2011 & Cum. Supp. 2014). ("Agencies shall ascertain the fact basis for their decisions of cases through informal conference or consultation proceedings unless the named party and the agency consent to waive such a conference or proceeding to go directly to a formal hearing. Such conference-consultation procedures shall include rights of parties to the case to (i) have reasonable notice thereof, (ii) appear in person or by counsel or other qualified representative before the agency or its subordinates, or before a hearing officer for the informal presentation of factual data, argument, or proof in connection with any case, (iii) have notice of any contrary fact basis or information in the possession of the agency that can be relied upon in making an adverse decision, (iv) receive a prompt decision of any application for a license, benefit, or renewal thereof, and (v) be informed, briefly and generally in writing, of the factual or procedural basis for an adverse decision in any case.")

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Rules of Administration. However, if these are case decisions to which the VAPA applies, then a frustrated applicant may appeal to the circuit court and, in the event that court denies relief, to the highest court of the Commonwealth.¹¹² Should the appellant substantially prevail, the VAPA allows for the award of as much as \$25,000 in attorneys' fees and costs.¹¹³

C. *The Ephemeral Tenure of the Hearing Officer*

Rule 2 also covers tenure. In the past, appointment to the corps of hearing officers appeared to confer life tenure on good behavior. The 2005 version of Rule 2(D) bore the title "Retention," but said only that, "[r]etention of the hearing officer shall be determined by the Executive Secretary."¹¹⁴ Out of context, that terse statement might be interpreted to have vested the Executive Secretary with unfettered discretion to fire at will, but Rule 4(A) spoke to "Removal," limiting it to cases of misconduct in only nine forms, after an *ore tenus* hearing at which testimony was taken under oath subject to cross examination.¹¹⁵ In light of these retention-friendly aspects of Rule 4, the old form of Rule 2 is better understood as no more than a designation of the Executive Secretary as the administrator for uncontested matters of retention, e.g., retirement or death.

112. *Id.* § 2.2-4026 (Cum. Supp. 2014) ("Any . . . party aggrieved by and claiming unlawfulness of a case decision and whether exempted from the procedural requirements of Article . . . 3 (§ 2.2-4018 et seq.) shall have a right to the direct review thereof by an appropriate and timely court action against the agency or its officers or agents Actions may be instituted in any court of competent jurisdiction as provided in § 2.2-4003, and the judgments of the courts of original jurisdiction shall be subject to appeal to or review by higher courts as in other cases unless otherwise provided by law.")

113. *Id.* § 2.2-4030(A) (Repl. Vol. 2011 & Cum. Supp. 2014).

114. The 2005 version of the Hearing Officer System Rules of Administration was last published by the Executive Secretary as Appendix A to the Hearing Officer Deskbook (2009). That Deskbook has been superseded by the Hearing Officer Deskbook (2014), available at <http://www.courts.state.va.us/programs/ho/deskbook.pdf>, but the 2009 edition (with appendices) is still available as an attachment to a questionnaire distributed to hearing officers by the Virginia Code Commission's Administrative Law Advisory Committee. The questionnaire, 2009 Deskbook, and 2005 Rules of Administration are available at <http://codecommission.dls.virginia.gov/alac/Hearing Officer Deskbook Group Materials.pdf>.

115. HEARING OFFICER SYS. RULES OF ADMIN. R. 4(A)(1), (2) (2005). The 2005 version of Rule 4 of the Hearing Officer System Rules of Administration are available in the 2009 edition of the Hearing Office Deskbook which can be found as an attachment at <http://codecommission.dls.virginia.gov/alac/Hearing Officer Deskbook Group Materials.pdf>.

The new version of Rule 2 makes major changes to tenure. Henceforth, appointment is for a term of not more than six years, after which a decision to reappoint (or not) is required of the Executive Secretary.¹¹⁶ To qualify for reappointment, a hearing officer must ask for it in a writing that also certifies his active membership in good standing in the Virginia State Bar.¹¹⁷ This new protocol answers only partially a question left open by the old rules: whether, once appointed, a hearing officer could leave the bar, or take associate status, without losing his eligibility for presiding in agency cases. The new form of Rule 2 makes it clear that active bar membership is a qualification required for both appointment and reappointment.¹¹⁸ But, in the absence of further direction, it appears that active membership in the bar is not required between the time of appointment and the time to request reappointment, that is, for more than five years of any six year term. Put another way, the rules do not yet call for active membership as a condition of presiding. At today's prices, a hearing officer can save several hundred dollars in bar dues by switching to associate status immediately after her appointment to the corps,¹¹⁹ yet qualify for reappointment six years later by switching back to active status just before she makes her request to the Executive Secretary.

The new retention scheme in Rule 2 treats incumbent hearing officers differently, however counterintuitively. A hearing officer in good standing on January 1, 2014 exchanges life tenure for a term of not six years, but three.¹²⁰ In effect, her experience on the job, perhaps since the corps was founded in 1986, costs her three years of future membership.¹²¹

116. RULES OF ADMIN., *supra* note 101, at R. 2(D).

117. *Id.*

118. RULES OF ADMIN., *supra* note 101, at R. 2(B), 2(D).

119. In 2014, active members of the Virginia State Bar were charged \$225, while associate members (i.e., those not engaged in the active practice of law) were charged \$112.50. See *Annual Dues Statement*, VIRGINIA STATE BAR, <http://www.vsb.org/docs/dues-form.pdf>. As counter-intuitive as it might seem, one who presides at an agency hearing of the adjudicative sort prescribed by section 2.2-4024 is not engaged in the active practice of law. See VA. SUP. CT. R. pt. 6, § I, Practice of Law in Virginia (2014).

120. See RULES OF ADMIN., *supra* note 101, at R. 2(D).

121. See Act of Apr. 16, 1986, ch. 615, 1986 Va. Acts 1523, 1537-39 (currently codified at VA. CODE ANN. § 2.2-4024 (Cum. Supp. 2014)) (establishing the practice of having hearing officers selected from a list by the Executive Secretary of the Supreme Court to preside over the hearings); see also generally John Paul Jones, *Annual Survey of Virginia Law:*

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123. *Id.*

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D. *Force Reduction Absent Force Majeur*

The new version of Rule 2 also leave open the question of what sort of decision by the Executive Secretary is contemplated by Rule 2(D) in light of Rule 4's provisions for removal. Does Rule 2(D) empower the Executive Secretary to refuse reappointment to a hearing officer who is in good standing and has requested reappointment in timely fashion? While Virginia Code section 2.2-4024 established a corps of hearing officers, it did not explicitly limit its enrollment, but left that to the Executive Secretary.¹²² It is unclear whether the Executive Secretary's power to establish the number of hearing officers allows him to refuse reappointment on the sole grounds of redundancy. It is at least plausible that performance improves with experience, and that too many hearing officers leaves each with too few hearings for proficiency. Thinning the ranks of even the faultless might then be justified as "necessary for the administration of the hearing officer system."¹²³ The challenge for an Executive Secretary so inclined would be articulating an impersonal basis on which to refuse reappointment that does not look like circumvention of the limitations on his removal power in Rule 4. Decimation comes to mind.

In accordance with the VAPA, Rule 4 provides for removal of a hearing officer, that is, for her dismissal from the corps, but only for cause and only after an *ore tenus* hearing with important procedural safeguards guaranteed.¹²⁴ The accused hearing officer gets to confront her accuser, hear his complaint, cross-examine him, and counter with both her own oral argument and the testimony of witnesses on his behalf.¹²⁵ According to the rule, the Executive Secretary may preside in person or designate a substitute.¹²⁶ The

Administrative Procedure, 20 U. RICH. L. REV. 673, 680-88 (1986) (for a detailed explanation of the 1986 amendments, including discussion on the tenure and retention of hearing officers).

122. VA. CODE ANN. § 2.2-4024(A) (Repl. Vol. 2011 & Cum. Supp. 2014).

123. *Id.*

124. *Id.* § 2.2-4024(E) (Repl. Vol. 2011 & Cum. Supp. 2014) ("The Executive Secretary shall remove hearing officers from the list, upon a showing of cause after written notice and an opportunity for a hearing. When there is a failure by a hearing officer to render a decision as required by subsection D, the burden shall be on the hearing officer to show good cause for the delay. Decisions to remove a hearing officer may be reviewed by a request to the Executive Secretary for reconsideration, followed by judicial review in accordance with this chapter.")

125. RULES OF ADMIN., *supra* note 101, at R. 4(A)(3).

126. RULES OF ADMIN., *supra* note 101, at R. 4(A)(3)(a).

rule does not limit the discretion of the Executive Secretary in choosing such a substitute; it does not, for example, call for the presiding substitute to be a member of either the bar or the hearing officer corps. On the other hand, the rule explicitly prohibits *strict* application of the rules of evidence,¹²⁷ leaving to the imagination how rules of evidence may be applied in any fashion by a presiding substitute untrained in them. The good sense to be presumed for any Executive Secretary because of the nature of his office makes this a very unlikely scenario, especially in light of the explicit provision in the VAPA for judicial review.¹²⁸

E. *To Grieve or Not to Grieve*

It is an open question whether a hearing officer of the sort described in Virginia Code section 2.2-4024 may grieve removal pursuant to the State Grievance Procedure,¹²⁹ which would guarantee that the officer presiding be either a fellow member of the corps of VAPA hearing officers or else a member of the bar employed by the Department of Human Resource Management.¹³⁰ Assuming that a VAPA hearing officer is an independent contractor, rather than an employee, she is nevertheless an officer, not only by her title, but also by the nature of her duties.¹³¹ The State Grievance Procedure applies not only to employees, but also to officers.¹³² Certain officers are made exempt, but not hearing officers answering to the Executive Secretary pursuant to section 2.2-4024 of the VAPA.¹³³ Section 3 of Rule 4 would not be “necessary for the administration of the hearing officer system”¹³⁴ if, on this matter, the two statutes can be reconciled. They can if section 2.2-4024(E) is understood as nothing more than general direction to the Executive Secretary not to remove a hearing officer without

127. RULES OF ADMIN. *supra* note 101, at R. 4(A)(3)(f).

128. VA. CODE ANN. § 2.2-4024(E) (Cum. Supp. 2014).

129. *Id.* §§ 2.2-3000 to -3008 (Repl. Vol. 2011 & Cum. Supp. 2014).

130. *Id.* §§ 2.2-3003(H), -3004(A), -3005(B) (Repl. Vol. 2011 & Cum. Supp. 2014).

131. *See supra* note 93 and accompanying text.

132. *See* VA. CODE ANN. § 2.2-2905 (Cum. Supp. 2014).

133. *Id.* Among the classes of officer exempt from the State Grievance Procedure is that of officers appointed by Supreme Court of Virginia. *Id.* § 2.2-2905(2) (Cum. Supp. 2014). Recall that the Executive Secretary exercises delegated legislative power (not delegated judicial power) when he appoints hearing officers pursuant to the VAPA. *See supra* text accompanying notes 102-06.

134. VA. CODE ANN. § 2.2-4024(A) (Cum. Supp. 2014).

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cause and a hearing. The State Grievance Procedure may then be read as filling in the procedural blanks, that is, as the General Assembly's default form for hearings in cases in which the dismissal of such an officer is at risk.