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Editorial Comments

This issue is the *Law Review's* second edition of the *Annual Survey of Virginia Law*, and includes four topics which were not included in the previous edition. Since it is the *Law Review's* goal to increase each year the number and breadth of topics covered, authors wishing to write on topics which are not yet included in the *Survey* are encouraged to contact the *Law Review.*

The Editorial Board wishes to acknowledge the efforts of three members of the *Law Review* who assisted in this year's edition: Jimese L. Pendergraft, Kyle E. Skopic, and Elizabeth E. Stanulis. We are also grateful to those authors who contributed articles to this year's *Survey*. The articles and their authors are as follows:

ADMINISTRATIVE PROCEDURE

* *John Paul Jones*

Since the last report, administrative law in Virginia has continued to develop on both the legislative and judicial fronts.[1] This year's General Assembly enacted amendments to the state's administrative procedure statute which embody the third and final round of recommendations by the Governor's Regulatory Reform Advisory Board.[2] The major changes were the standardization of procedures for obtaining judicial review of state agency action[3] and the embodiment in statute of a corps of independent hearing officers.[4]

In the Supreme Court of Virginia, the General Assembly's selection of a State Corporation Commissioner was tested for constitutionality,[5] and mandamus was denied the State Health Commissioner against a hearing officer who had reversed the department

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1. This article addresses legislation from the 1986 session of the General Assembly and court decisions issued in 1985.

2. The Governor's Regulatory Reform Advisory Board [hereinafter Board] was created by Exec. Order No. 20 (1982), with the general mission of improving the regulatory climate in Virginia. Its specific responsibilities include:

—reviewing any Executive Department proposals which result from studies of existing or proposed regulations, and making recommendations on those proposals;

—advising the Governor on new proposals for reducing, eliminating or clarifying state regulations;

—holding public hearings to identify citizen and private sector concerns related to existing regulations as well as regulatory reform; and

—advising the Governor on progress made in reducing, eliminating, simplifying, or clarifying state regulations.

Exec. Order No. 20 (1982), *reprinted in* 1985 GOVERNOR'S REGULATORY REFORM ADVISORY BOARD REP. 40 [hereinafter FINAL REPORT]. The twenty-two members of the Board represented the General Assembly, business, organized labor, the bar, and various citizen groups. The chairman was Delegate Ralph Axselle, Jr. *See* 1983 FINAL REPORT 63, at unnumbered page following title page. Delegate Axselle sponsored House Bill 6, the vehicle for the legislative changes discussed herein. The Board formally completed its work on October 21, 1985. *See* FINAL REPORT, *supra*, at unnumbered page following title page.

3. *See infra* text accompanying notes 9-45.

4. *See infra* text accompanying notes 46-85.

5. *See infra* text accompanying notes 85-92.

head's decision.[6] In the Virginia circuit courts, a competitor's rights to intervene in a licensing decision were explicated in the context of the state's health care planning law.[7] In the Virginia Court of Appeals, Board of Health regulations governing the same licensing procedure were found ultra vires.[8]

I. Legislative Changes to the Virginia Administrative Process Act

A. *Standardized Procedures for Obtaining Judicial Review*

The foremost legislative change to Virginia's administrative procedure enacted by the 1986 session of the General Assembly is the standardization of judicial review. One procedure, set forth in Virginia's Administrative Process Act (VAPA)[9] and the Rules of the Virginia Supreme Court (the "Rules") now governs standing, venue, notice, stays, and filing deadlines for virtually all appeals from administrative rulemaking[10] and adjudication[11] by state agencies subject to VAPA.[12] The change greatly improves Virginia's ju-

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6. *See id.*

7. *See infra* text accompanying notes 94-132.

8. *See infra* text accompanying notes 133-39.

9. Va. Code Ann. §§ 9-6.14:1 to :25 (Repl. Vol. 1985 & Cum. Supp. 1986).

10. The term "rulemaking" does not appear in the Virginia Administrative Process Act [VAPA]. It is used in this paper to denote the process by which agencies make regulations as described in Article 2 of VAPA. Compare "rulemaking" in federal administrative law. *See* Federal Administrative Procedure Act, 5 U.S.C. §§ 553, 556, 557 (1984); *see also* 1 K. Davis, Administrative Law Treatise ch. 6 (2d ed. 1978); B. Schwartz, Administrative Law ch. 4 (2d ed. 1984).

11. The term "adjudication" does not appear in VAPA. It is used in this paper to describe the bureaucratic endeavor which results in a "case decision" as that term is defined in VAPA. *See* Va. Code Ann. § 9-6.14:4(D) (Repl. Vol. 1985). Compare "adjudication" in federal administrative law. *See* 5 U.S.C. §§ 554-57 (1982); *see also* Davis, *supra* note 10, at chs. 12 & 13. *See generally* M. Ruhlen, Manual for Administrative Law Judges (1982).

12. Not all of Virginia's administrative agencies are subject to the rules of procedure set forth in VAPA. Some agencies (for example, the Virginia Housing Development Authority and the Milk Commission) are exempt from the reach of virtually the entire chapter. These exempted agencies are listed in VAPA's Article 1. *See* Va. Code Ann. § 9-6.14:4.1(A) (Cum. Supp. 1986). Even these otherwise exempted agencies, however, are subject to VAPA's Articles 6 and 7, which govern the recovery of attorney's fees and the publication of regulations, respectively. *See id.* §§ 9-6.14:21, :22 (Repl. Vol. 1985 & Cum. Supp. 1986). Some otherwise exempted agencies have been made subject to VAPA's new Article 3.1, which governs the use of hearing officers in formal administrative adjudication. *See infra* note 43. Some agency actions (for example contract awards or employee selection) are subject to VAPA but are excepted from the operation of one or more of its articles. *See, e.g.*, Va. Code Ann. § 9-6.14:4.1(B) (Cum. Supp. 1986); *id.* § 9-6.14 :7.1(G) (Repl. Vol. 1985). Agency actions immune from judicial review under VAPA are described in Va. Code Ann. § 9-6.14:15 (Repl. Vol. 1985).

dicial review procedure by making it simpler and more uniform. The old, diverse procedures for judicial review forestalled finality and presented traps for the unwary. For example, rights to review could be lost in ignorance of a notice or filing deadline.[13] The new procedural rules make simple what should be simple—access to judicial review for one aggrieved by a bureaucrat's decision.

Before the 1986 amendments, a party seeking judicial review of an adverse administrative decision referred to the basic law[14] for how to perfect what was in essence an appeal.[15] Standing, venue, timeliness, and the procedures for getting the court's attention were to be found in the statute enabling the agency decision at issue. For example, when someone felt that the Commissioner of Agriculture and Consumer Services had erred in issuing a thistle destruction order pursuant to the agricultural pest control law,[16] the would-be critic found the procedures for obtaining judicial review of the administrative order in Article 4 of Chapter 13 of the Virginia Code.[17] There he would find that only landowners had standing to obtain review of such an administrative enforcement order, that venue lay in the court of the county where the thistle grew, that appeals had to be taken within fifteen days of notice of the order, that notice of the landowner's intent to appeal was expected to go to the clerk of the court (who forwarded it to the Commissioner), and that notice of intent to appeal triggered an automatic stay of the order's enforcement.[18]

Not all basic laws had review procedures so specific. An aggrieved purveyor of commercial fertilizer, for example, who wished to have reviewed an administrative stop-sale order would be expected to turn to the Virginia Fertilizer Law.[19] There he would find provisions which specify standing and venue for judicial review, but not notice, enforcement stay, or deadline.[20]

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13. *See* Health Sys. Agency v. Department of Health, 5 Va. Cir. 196 (Fairfax County 1984); Health Sys. Agency v. Kenley, 3 Va. Cir. 101 (Arlington County 1983).

14. Basic laws are those authorizing administrative agencies to exercise delegated regulatory powers in the form of case decisions or regulations or stating procedural requirements therefor. VA. CODE ANN. § 9-6.14:4(C) (Repl. Vol. 1985).

15. This is still, after the 1986 amendments, the method for obtaining judicial review of decisions by agencies not subject to VAPA. *See, e.g., id.* § 12-40 (procedure for obtaining review of decisions by the State Corporation Commission).

16. *Id.* §§ 3.1-177 to -188 (Repl. Vol. 1983).

17. *Id.* § 3.1-186.

18. *Id.*

19. *Id.* §§ 3.1-74 to -106 (Repl. Vol. 1983 & Cum. Supp. 1986).

20. *Id.* § 3.1-84(b) (Repl. Vol. 1983).

Where the judicial review procedure in the basic law left such vital matters unspecified, one solution could have been to resort to the judicial review provisions of VAPA.[21] According to the statute itself, VAPA was passed for the purposes of supplementing basic law and standardizing court review of agency decision-making.[22] Article 4 of VAPA governs court review of agency decision-making. With respect to the procedures for obtaining such review, Article 4 makes it clear that VAPA applies in the "absence, inapplicability, or inadequacy" of the express judicial review provisions in the basic law.[23] But Article 4 itself contains few procedural details. For the procedure and deadlines governing court review of an agency decision, VAPA refers to the Rules.[24]

Part Two A of the Rules governs judicial review of bureaucratic decisions subject to judicial review by VAPA.[25] Part Two A contains the directions and the deadlines for filing both notice of,[26] and petition for,[27] appeal from agency rulemaking or adjudication.

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21. *Id.* § 9-6.14:1 to :25 (Repl. Vol. 1985 & Cum. Supp. 1986).

22. *Id.* § 9-6.14.3 (Repl. Vol. 1985). The policy behind the enactment of VAPA is stated in the statute as follows:

> *Policy.*—The purpose of this chapter is to supplement present and future basic laws conferring authority on agencies either to make regulations or decide cases as well as to standardize court review thereof save as laws hereafter enacted may otherwise expressly provide. *This chapter does not supercede or repeal additional procedural requirements in such basic laws.*

Id. (emphasis added).

23. *Id.* § 9-6.14:16 (Cum. Supp. 1986).

24. *Id.*

25. *See id.* § 9-6.14:16; VA. SUP. CT. R. 2A:1(a).

26. The deadline for noticing intent to appeal appears in Rule 2A:2 of the Rules of the Virginia Supreme Court [hereinafter Rules]. In pertinent part, this Rule reads as follows:

> Any party appealing from a regulation or case decision shall file, within 30 days after adoption of the regulation or entry of the final order in the case decision, with the agency secretary a notice of appeal signed by him or his counsel. The notice of appeal shall identify the regulation or case decision appealed from, shall state the names and addresses of the appellant and of all other parties and their counsel, if any, shall specify the circuit court to which the appeal is taken, and shall conclude with a certificate that a copy of the notice of appeal has been mailed to each of the parties. The omission of a party whose name and address cannot, after due diligence, be ascertained shall not be cause for dismissal of the appeal.

Id.

27. The deadline for filing an appeal petition appears in the Rules. In the pertinent parts, this Rule reads as follows:

> (a) Within thirty days after filing the notice of appeal, the appellant shall file his petition for appeal with the clerk of the circuit court named in the first notice of appeal to be filed and shall cause a copy of the petition for appeal to be served (as in the case of a bill of complaint in equity) on the agency secretary and on every other party.
>
> (b) The petition for appeal shall designate the regulation or case decision appealed

Where a basic law lacked one or more of these details, the lack of specificity could have been cured by resort to Part Two A via VAPA. Such was the position taken by the Attorney General on behalf of two VAPA agencies in *Commonwealth v. County Utilities Corp.*[28] and *Forbes v. Kenley.*[29] The supreme court made it clear in these cases that resort to VAPA and Part Two A was not the appropriate fix for a procedurally defective basic law.

In *County Utilities*, the basic law provided some details for one desiring judicial review of a State Water Control Board decision, but not all.[30] The basic law set a deadline for notifying the Water Control Board of an aggrieved's intent to seek circuit court review, but it did not set a deadline for his filing of the petition for review.[31] Because appellant had not filed its petition within thirty days of giving notice to the Board, the Board moved to dismiss, relying on the thirty-day petition deadline of the Rules. The Board argued that VAPA required resort to the Rules to repair the legislature's omission of a petition deadline in the basic law. The circuit court denied the Board's motion[32] and the supreme court affirmed, holding that the petition deadline in Rule 2A:2 is inapplicable to an appeal otherwise governed by procedures in the State Water Control Law.[33]

In *Forbes*, the Environmental Health Services Law provided for venue. No other details, including any time bars, were set out in the basic law.[34] To an appeal from the denial of three septic tank installation permits, the State Health Commissioner successfully demurred, relying on VAPA and the thirty-day notice deadline set out in Rule 2A:2. The supreme court reversed, holding that because the procedure in the basic law was "adequate" within the meaning of VAPA's section 9-6.14:16, resort to the Rules for a

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> from, specify the errors assigned, state the reasons why the regulation or case decision is deemed to be unlawful and conclude with a specific statement of the relief requested.

VA. SUP. CT. R. 2A:4.

28. 223 Va. 534, 290 S.E.2d 867 (1982).

29. 227 Va. 55, 314 S.E.2d 49 (1984).

30. The basic law at issue was the State Water Control Law. *See* VA. CODE ANN. §§ 62.1-44.2 to -44.34:7 (Repl. Vol. 1982 & Cum. Supp. 1986).

31. *Id.* § 62.1-44.29 (Cum. Supp. 1986).

32. The report of the decision below is based on the supreme court's statement of the facts. *County Utilities*, 223 Va. at 541, 290 S.E.2d at 871.

33. *Id.*

34. *See* VA. CODE ANN. §§ 32.1-163 to -248 (Repl. Vol. 1985 & Cum. Supp. 1986).

deadline was improper.[35]

The result of the decisions in *County Utilities* and *Forbes* with respect to judicial review of agency decision-making, was that the simplest solution to procedurally inadequate basic law was judicially foreclosed. Consequently, when the basic law failed to detail how and when to get the court's attention, VAPA's reference to the Rules provided no alternative direction.

For the bureaucracy and the bar, the resulting state of uncertainty was distressing. For the VAPA state agencies and their lawyer, the Attorney General, the absence of notice and petition deadlines in many basic laws robbed administrative action of desired finality.[36] An agency decision was conceivably open to appeal indefinitely if the thirty-day deadlines in Part Two A of VAPA did not apply when none were provided in the basic law.[37] For the generalist member of the bar whose practice took her across the jurisdictional boundaries of several agencies created by different basic laws, the presence of multiple procedural variations required unnecessary attention to statutory detail.[38]

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35. *Forbes*, 227 Va. at 60, 314 S.E.2d at 52. The court failed to provide a sufficient definition of what it would consider adequate basic law appeal procedure to foreclose reference to the Rules per § 9-6.14:16. The court stated:

> We agree that the statute under review leaves much to be desired. For example, it fails to provide time limits for filing pleadings. Nevertheless, the statute is not inadequate on its face. It provides for jurisdiction, venue, decision by judge, and optional relief at the judge's discretion. Moreover, by its express terms, the statute is limited to a single class of cases—appeals from denials of applications for septic tanks. We hold that the statute was adequate and that it was available to Forbes.

Id.

36. Va. Att'y Gen.'s Office Memorandum, APA Revision—Standardization of Judicial Review (April 18, 1985) (circulated to the members of the Board by its chairman on May 28, 1985).

37. Appeals from rulemaking or adjudication should be distinguished from challenges raised by one against whom the decision is subsequently enforced. VAPA provides that: "In addition [to appeals], when any such regulation or case decision is the subject of an enforcement action in court, the same shall also be reviewable by the court as a defense to the action . . . ." VA. CODE ANN. § 9-6.14:16 (Cum. Supp. 1986).

Both appeals and defenses should also be distinguished from motions for declaratory judgments. In Kenley v. Newport News Gen. & Non-Sectarian Hosp. Ass'n, 227 Va. 39, 314 S.E.2d 52 (1984), the Virginia Supreme Court in dictum opined that Part Two A did not apply to a hospital's motion for declaratory judgment which alleged that resumption of open-heart surgery after a year's hiatus did not require a certificate of public need pursuant to the state's health planning statute. *Id.* at 46-47, 314 S.E.2d. at 56. The hospital's appeal from the State Health Commissioner's refusal to grant such a certificate was pending when the hospital filed its declaratory judgment motion. *Id.* at 43, 314 S.E.2d at 54.

38. A letter to the Governor's Regulatory Reform Advisory Board [hereinafter Board] from David F. Peters on behalf of the Administrative Law Committee, Virginia Bar Association, dated June 19, 1985, nicely summarizes attorney comments to the Board on this prob-

Reform was initiated by the Office of the Attorney General through transmission to the Governor's Regulatory Reform Advisory Board (the "Board") of a memorandum identifying the many basic law differences in initiating judicial review of VAPA agency decisions.[39] Enlisting the aid of Legislative Services, the Board drafted legislative amendments intended to restore some finality and conformity to the process of obtaining judicial review of agency action reviewable under VAPA. The proposed amendments were adopted by the General Assembly with little fanfare and no significant amendment.[40]

Most of the relevant basic laws were amended to eliminate specific judicial review procedures.[41] Generally, the relevant section's description of the agency action subject to review remained intact, but the amendments then appended the words "in accordance with the provisions of the Administrative Process Act (§ 9-6.14:1)." Thus, appeals from thistle destruction orders would no longer face one fifteen-day deadline; instead, pursuant to Article 4 of VAPA and Part Two A of the Rules, they would face a thirty-day notice deadline and a thirty-day filing deadline. Venue would lie not only in the circuit court of the county where the thistle grows, but also where the owner resides or regularly does business, and where the Commissioner has his office.[42] Filing a notice of appeal would no longer operate as an automatic stay of the destruction order; stays would lie instead in the discretion of the court.

Neither finality nor conformity was paid absolute deference by the authors of the amendments. While filing and notice procedures, deadlines, and stays were standardized by the amendments, other aspects of judicial review were left for specification in the

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lem: "The Administrative Process Act and the Supreme Court Rules prescribe reasonable time periods and assure due process, and different procedures or shorter or longer time periods for petitions for review as to particular agencies or actions are totally unnecessary and confusing." Letter from David F. Peters to Board at 2 (June 19, 1985) [hereinafter Peters].

39. Va. Att'y Gen.'s Office Memorandum, APA Revision—Standardization of Judicial Review (April 18,1985).

40. 1986 Va. Acts 615.

41. An exception that survived both Board debate and General Assembly scrutiny is judicial review of abandoned or surface mining site reclamation orders. VA. CODE ANN. § 45.1-263 (Repl. Vol. 1980). This code section was not changed by the 1986 amendments. Because it specifically refers to VAPA and the court rules for review procedure, *Forbes* probably does not apply, and the practical effect of preserving § 45.1-263 is to limit venue to the circuit courts of the mining regions.

42. *Id.* § 8.01-261 (Cum. Supp. 1986).

basic laws. There is no time limit on a defendant's right to challenge the underlying regulation or case decision in a subsequent enforcement proceeding.[43] The alternative to appeal presented by a motion for declaratory judgment remains unaffected by VAPA's reference to Part Two A of the Rules.[44] Limitations on standing (like that limiting thistle destruction order appeals to affected landowners) also remain intact after the 1986 amendments.[45]

B. *Systematized Hearing Officer Use, Training, and Discipline*

The second major change wrought by the 1986 amendments was the statutorification of the use and qualifications of administrative hearing officers in Virginia. From now on, only the agency head or certain designated subordinates may preside over formal hearings governed by VAPA.[46] When the agency head declines to preside, the agency is foreclosed from selecting the presiding subordinate. In order to obtain and retain the designation prerequisite to presiding, subordinates must, for the first time, meet minimal educational standards. The power to discipline presiding officer misconduct has been delegated to the Executive Secretary of the Supreme Court of Virginia. The creation of a central panel of full-time presiding officers was rejected in favor of the retention of the existing scheme of both agency employees and independent contractors.

Overall, the new system deserves mixed reviews. The resultant appointment scheme goes a long way to meeting bar criticisms of potential and apparent bias in VAPA adjudication. The creation of statutory educational requirements may contribute to better out-

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43. *See supra* note 35.

44. *See supra* note 37.

45. Specific limits in standing remain in basic laws governing judicial review of agency action despite rigorous criticism by citizen groups represented at public meetings of the Board. Written statements accurately reflected oral comment. *See, e.g.*, Comments of Chesapeake Bay Foundation Before the Governor's Regulatory Reform Advisory Board on Judicial Review of State Agency Decisions (June 19, 1985) (opposing limits on standing in the Wetlands Act; VA. CODE ANN. §§ 62.1-13.1 to -13.20 (Repl. Vol. 1982 & Cum. Supp. 1986); and the State Water Control Law; *id.* §§ 62.1-44.2 to 44.34:7); Letter from Jill A. Hanken, Senior Staff Attorney, Virginia Poverty Law Center, Inc., to the Board (June 14, 1985) (opposing exemption of public assistance denials from VAPA's Article 4).

46. Article 3 of VAPA governs case decisions, that is, the outcomes of administrative adjudication. *See* VA. CODE ANN. § 9-6.14:4(D) (Repl. Vol. 1985). Article 3 provides for adjudication by resort to either informal or formal procedures. Only when formal procedures are employed, does VAPA identify the event as a "hearing." *Id.* § 9-6.14:4(E). Thus, an informal adjudication would not be a hearing. The 1986 VAPA amendments pertain only to formal adjudications governed by § 9-6.14:12, hence, by VAPA usage, to all VAPA adjudicative hearings. *Id.* § 9-6.14:14.1 (Cum. Supp. 1986).

comes by better adjudicators. This may meet most of the bar criticisms of occasional presiding officer incompetence or misfeasance. The imperfect fit of the new requirements to the historical criticisms makes prediction difficult. Whether the establishment of a formal disciplinary structure will be a net positive contribution to Virginia administrative procedure is even less clear.

Heretofore, three different kinds of state officers presided over formal adjudicative proceedings under VAPA's Article 3: agency heads, agency employees, or independent contractors. The agency head might be a single director (like the Director of Mines, Minerals and Energy),[47] or a multi-member commission (like the seven-member Water Control Board).[48] Where the agency was headed by a multi-member commission, sometimes the body (or an operative quorum thereof) presided; sometimes a single commissioner presided. When the commission or agency chief presided, no administrative appeal normally followed; the agency decision was final, and appeal lay next in the courts. When a subordinate employee or independent contractor presided, review by the agency head was required before the decision was considered final.[49] When a single member of a commission-headed agency presided, review by the collective body followed, but the presiding commissioner did not, typically, withdraw from the subsequent collective review.[50]

Where agency employees acted as presiding officers, they were sometimes specialists in such duties,[51] often not; they were some-

47. *See id.* § 45.1-1.1 (Cum. Supp. 1985).

48. *See id.* §§ 62.1-44.7 to -44.8 (Repl. Vol. 1982).

49. *Id.* § 9-6.14:12(C) (Repl. Vol. 1985). This statute says in pertinent part:

> Where subordinates preside, they shall recommend findings and a decision unless the agency shall by its procedural regulations provide for the making of findings and an initial decision by such presiding officers subject to review and reconsideration by the agency on appeal to it as of right or on its own motion.

Id.

50. The State Water Control Board is composed of seven citizen board members, appointed for staggered terms. When a hearing is required, at least one board member is appointed by the Chairman to act as hearing officer. That board member will sit independently when the hearing is held and report back to the Board, with recommendations, at the next regular meeting. The hearing officer normally votes at the meeting and, as a matter of course, usually initiates the motion for action. The State Water Control Board has conducted hearings in this manner for many years.

Letter from David S. Bailey, Virginia Director, Environmental Defense Fund, to the Honorable Ralph L. Axselle, Jr., Chairman, Board (June 19, 1985).

51. The Alcohol Beverage Control Board (ABC) and the Division of Motor Vehicles (DMV) are two VAPA agencies which employed full-time presiding officers prior to the 1986 amendments. Their existing practices in this regard were endorsed by the General Assembly. The General Assembly grandfathered ABC and DMV presiding officer employees hired

times lawyers, often not.[52] Agency employees who presided over formal hearings were sometimes, but not often, isolated from enforcement duties or departments.[53] Independent contractors offering to preside over formal hearings had to be Virginia lawyers and had to have two years experience in some kind of legal practice. However, they did not have to have any familiarity with either the substantive regulatory scheme involved or the traditions and procedures of formal adjudication.[54] When the practice was to use either subordinate employees or independent contractors, managerial level agency bureaucrats had the discretion to make specific assignments. Thus, the agency head or a trusted lieutenant could choose the presiding officer for a formal adjudication to which the agency was a party.[55] For the bar, the bureaucracy, and the public, this system presented many faults.

Several charges of potential conflict of interest were heard; all were nonspecific.[56] Criticism emphasized the appearance rather

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on or before July 1, 1986, from the minimum educational and experience prerequisites imposed by the 1986 amendments. 1986 Va. Acts 615. Among the state agencies exempted from all or part of VAPA, the Industrial Commission and the State Corporation Commission employed full-time presiding officers; others did not. The use of hearing officers by the Commission of Game and Inland Fisheries, the Virginia Housing Development Authority, the Milk Commission, and the Virginia Resources Authority was specifically made subject to the new VAPA Article 3.1. VA. CODE ANN. § 9-6.14:14.1(F) (Cum. Supp. 1986).

52. ABC hearing officer employees are lawyers; most DMV hearing officer employees are not. Simpson & Schwertz, The Use of Independent Hearing Officers in Virginia Administrative Proceedings (1983-1985) (January, 1986) (unpublished paper).

53. *See, e.g.*, Letter from Donald G. Owens to Ralph L. Axselle, Jr., Member, House of Delegates (Sept. 27, 1985) [hereinafter Owens].

54. Attorney General Gerald Baliles wrote to the Board:

> The present system uses hundreds of hearing officers to compile a record and make recommended findings of fact and conclusions for consideration by the agency head. Many of these hearing officers are private attorneys who only occasionally are appointed to serve as hearing officers. Others may actually be employees of the agency in question and still others may simply be lay persons with little actual experience in either the law or in the administrative process.
>
> Under this system, there is an obvious problem resulting from inconsistency and a lack of uniform guidelines with respect to the actual handling of the hearing process. This follows because, in some instances, hearing officers lack knowledge of the underlying administrative process, their knowledge of the substantive law may be questioned and, frequently, the scope and extent of their authority are not adequately defined.

G. Baliles, A New Proposal for Regulatory Reform: Administrative Law Judges (Sept. 25, 1984) (unpublished paper delivered to the Board) [hereinafter Baliles].

55. Simpson & Schwertz, *supra* note 52, at 3, 6.

56. At least in public hearings and written submissions, critics refrained from specific evidence of bias or incompetence on the part of individual presiding officers. Critics emphasized instead the inadequate safeguards in existing procedures. When anecdotal evidence was offered, it was devoid of specifics. Thus, a concrete basis for dissatisfaction with how the

than the reality of impropriety.[57] When an agency employee was used to preside over formal hearings, the appearance of a conflict of interest arose from his dual role as both loyal servant and arbiter.[58] Isolating presiding officer specialists from enforcement specialists in an agency went only part way in alleviating this anxiety on the part of those with whom the agency interacted adjudicatively.[59] When an independent contractor was used, the appearance of conflict of interest was only greater. The agency paid his fee, and, as the power to select presiding officers for future hearings lay with agency management, future contracts depended on the agency party's appreciation of his presiding skills.[60] A party challenging agency action through a formal hearing had no countervailing source of potential influence over the presider. As a result of the presiding officer selection scheme, formal adjudication lacked an atmosphere of even-handedness commonly accepted as part of fair play and due process.

Charges of inadequate training were made concerning both agency employee and independent contractor presiding officers. The general complaint against agency employees who were not lawyers was ignorance of courtroom procedure, especially the generally accepted norms of due process.[61] The general complaint against independent contractors (who had to be lawyers) was ignorance of the specific regulatory program at stake.[62] Despite being lawyers, independent contractors were also cited for unfamiliarity with courtroom procedure, especially regarding management of a formal hearing.[63] Complaints about independent contractors also

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existing scheme operates (as opposed to how it looks) was largely undeveloped. Little attention was paid to the operation of other presiding officer schemes, particularly to how they had performed when measured against bias and competence standards. Perhaps the systemic weaknesses of the existing scheme were such as to make these inquiries instrumentally as well as politically superfluous.

57. *See, e.g.*, Baliles, *supra* note 54, at 3; Letter from Edward E. Lane to Honorable Ralph L. Axselle, Jr., Chairman, Board (June 7, 1985) [hereinafter Lane].

58. These hearings are currently conducted by staff members of the Health Department. The hearing examiner is often the supervisor of that staff which is actively participating in the proceeding and advocating a position on the merit of the pending matter. The possibility of a fair and independent evaluation in such circumstances is remote, especially since the hearing officer comes to the proceeding with the same agency "views" on the issue being advocated by the staff.
Owens, *supra* note 53 at 2.

59. *See, e.g.*, Hanken, *supra* note 45; Lane, *supra* note 57.

60. Simpson & Schwertz, *supra* note 52.

61. Baliles, *supra* note 54.

62. *Id.*; Peters, *supra* note 38.

63. Baliles, *supra* note 54; Peters, *supra* note 38.

focused on inordinate delay in their submissions of findings and recommendations.[64]

Considering the nature and level of criticism from virtually all sides, it is perhaps surprising that the status quo was largely maintained by the 1986 amendments. The Attorney General had proposed substitution of a corps of full-time, legally trained administrative law judges employed by the state, who would be independent of any state agency. His proposal was endorsed by the Administrative Law Committee of the Virginia Bar Association, among others.[65] The Committee offered the additional suggestion that the corps be subdivided into divisions by subject matter in order to develop expertise in specific regulatory areas.[66] What the present scheme probably had in its favor was its economy. Independent contractors were often paid as little as thirty dollars an hour. They received no tangible fringe benefits. Agency employees who were occasionally assigned presiding duties generated little additional overhead. Expense for the agency rose significantly when full-time hearing officers were created.[67] A corps, or central panel, would require new and highly visible state expenditures. No regulatory agency or its constituency could be expected to promote the reform expenditure, nor could the public be expected to rally to the cause of improving the appearance of bureaucratic decision-making. The drafters settled for evolution, not revolution, in administrative adjudicatory procedure.

Without discarding the existing general framework of presiding officer employment, the 1986 amendments attempt to remedy the system's most glaring shortcomings. The amendments make significant changes in presiding officer selection, preparation, and use. Most of the changes apply only to adjudications and agencies subject to VAPA.[68] The use of agency employees has been curtailed. Those agencies which presently employ full-time presiding officers may continue the practice; other agencies may not start.[69] When an

64. *See, e.g.*, Baliles, *supra* note 54.

65. Peters, *supra* note 38.

66. *Id.*

67. *See* Simpson & Schwertz, *supra* note 52. *But see* M. RICH & W. BRUCAR, THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES (1983) (offering evidence of net savings from use of a central panel of presiding officers).

68. The mandatory reach of the presiding officer reforms in the 1986 amendments is to "all hearings conducted in accordance with § 9-6.14:12." VA. CODE ANN. § 9-6.14:14.1(A) (Cum. Supp. 1986).

69. *Id.*

agency head declines to preside over a formal adjudicative hearing provided for in VAPA, those agencies which do not employ full-time presiding officers must use statutorily designated hearing officers.[70] Agencies are no longer involved in the selection and assignment of these independent contractors.[71] Single commissioners may no longer preside over formal adjudicative hearings.[72] Standards and procedures for hearing officer disqualification have been established.[73] The majority of these reforms seem aimed at the elimination of any opportunity or appearance of improper presiding officer bias. Others aim at improving presiding officer competence.

To the extent that the Attorney General's proposal urged enlistment of new state employees, it did not emerge as law. To the extent that it urged creation of a corps of expert administrative law judges, it may have. The 1986 amendments establish the position of hearing officer. While hearing officers remain independent contractors, they must nevertheless qualify and requalify according to statutory standards set forth in VAPA. These standards are significantly higher than those governing presiding officers before the 1986 amendments.

To qualify for selection as a VAPA hearing officer, an applicant must be a lawyer. She must have completed five years of active legal practice. She must be an active member of the Virginia State Bar. She must have completed at least a basic hearing officer training course; she may be required to complete additional training for assignment to specific types of cases.[74] Qualification results in addition of the candidate's name to a list maintained by the Executive Secretary of the Virginia Supreme Court. In addition to enroll-

70. *Id.* § 9-6.14:14.1(C),(D),(E). Elsewhere in VAPA, the subordinate who presides over a formal adjudicative hearing is a "presiding officer". *Id.* § 9-6.14:12 (Repl. Vol. 1985). Subordinates may "preside" at both legislative and adjudicative formal hearings. The verb "preside" and its derivatives are not used in connection with informal hearings, legislative or adjudicative. In the latter case, at least, this omission may reflect inchoate notions about the role the agency subordinate is expected to adopt. *See id.* § 9-6.14:11. VAPA's new Article 3.1 adopts without explanation the term "hearing officer" as describing one designated under the new system to preside at a formal adjudicative hearing. The distinction which results within VAPA is between Article 3.1 hearing officers who oversee formal adjudicative hearings and presiding officers who oversee formal legislative hearings. It bears repeating that Article 3.1 applies only to § 9-6.14:12 hearings.

71. *Id.* § 9-6.14:14.1(B) (Cum. Supp. 1986).

72. *Id.* § 9-6.14:14.1(E).

73. *Id.* § 9-6.14:14.1(C).

74. *Id.* § 9-6.14:14.1(A).

ment on this master list, the candidate may specify enrollment on sub-lists which differentiate by geography or specialized training.[75]

Once selected, a VAPA hearing officer may be subject to disqualification or removal. Disqualification amounts to recusation. It pertains to a particular hearing and results from the bias or conflict of interest on the part of the hearing officer.[76] Disqualification may be either *sua sponte* or at the request of a party. The amendments require a hearing officer to disqualify himself when he "cannot afford a fair and impartial hearing or consideration, or when required by the applicable rules governing the practice of law in the Commonwealth."[77] Where disqualification is not *sua sponte*, the power to disqualify is vested in the Executive Secretary of the supreme court.[78]

Removal amounts to disenrollment and results from misconduct by the hearing officer. Removal is not explicitly limited to misconduct related to a single hearing. The power to remove a hearing officer from the rolls is vested in the Executive Secretary. A VAPA hearing officer may only be disenrolled after written notice, a hearing, and a showing of cause.[79] There is no provision for eventual requalification. Removal of a hearing officer is judicially reviewable according to the procedures set forth in VAPA.[80]

Neither the extent of the hearing nor the nature of the requisite cause is articulated in the statute. For hearings associated with the discharge of state employees, the due process clause of the U.S. Constitution's fourteenth amendment requires certain minimal procedures.[81] However, by the nature of the VAPA scheme, an Article 3.1 hearing officer is not an employee, but an independent contractor. Assuming that the hearing officer facing removal is not assigned to a pending hearing, the officer is therefore not then in-

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75. For example, specialized training is required of officers presiding over hearings arising from parent-school board disputes regarding board duties under the Federal Education of the Handicapped Act. *See* 20 U.S.C. §§ 1400-1461 (1983). The requisite training is set forth in state regulation. *See* VA. DEPT. OF EDUC., REGULATIONS GOVERNING SPECIAL EDUCATION PROGRAMS FOR HANDICAPPED CHILDREN AND YOUTH IN VIRGINIA 51 (1984) (administered by the Department's Office of Special and Compensatory Education).

76. *Cf.* VA. COMM. ON LEGAL ETHICS, ADVISORY OP. (1984) (improper for attorney-hearing officer in special education hearing to be advocate in such hearing).

77. VA. CODE ANN. § 9-6.14:14.1(C) (Cum. Supp. 1986).

78. *Id.*

79. *Id.* § 9-6.14:14.1(D) (Cum. Supp. 1986).

80. *Id.*

81. *See* Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487 (1985); *see also* Mathews v. Eldridge, 424 U.S. 319 (1976).

volved in a contractual relationship with the state similar to employment. She would thus not be entitled to the expectation of any definite future assignment. Lacking both present contractual right and sufficient expectation of future contractual right, the Article 3.1 hearing officer would seem to be without the constitutionally cognizable legal interest necessary to invoke federal due process guarantees.[82] Without such guarantees, the scope of the officer's hearing right is unclear. Because the amendments make it explicit that VAPA governs the right of judicial review, the amendments' failure to make explicit the applicability of VAPA's hearing procedures may be argued for their inapplicability. Alternative theories for the judicial imposition of procedural minima in public contract or employment terminations, derived from state constitutional guarantees or common law, remain inchoate in Virginia.[83]

As to the nature of cause sufficient to sustain removal of a hearing officer, no greater legislative guidance is supplied by the amendments. During the public discussion which preceded these amendments, independent contractor hearing officers were subject to three general criticisms: bias, ignorance, and tardiness. The bias criticism stemmed from the potential conflict of interest arising from the agency's power to reemploy those hearing officers whose decisions it approved. This danger has been alleviated by removing the agency from the assignment process. Therefore, there is no longer a need for the power to remove hearing officers for succumbing to improper agency influence.

The ignorance charge stemmed from unfamiliarity with either the administrative hearing procedure or with the substantive regulatory scheme involved. This shortfall is addressed by the institution of both basic and specialized training requirements for qualification. If, henceforth, the complaint is that a hearing officer has failed to meet training criteria, a sufficient remedy would be the power of the Executive Secretary to pass by the hearing officer's name in making his selections. The name passed by is not yet or no longer qualified by her own inaction. This remedy satisfies the particular complaint as to a particular hearing, and the hearing officer can thereafter restore her availability by submitting to the

82. *See* Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

83. *Cf.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) (holding federal judiciary lacked common law power to make new administrative procedure law).

requisite training. Permanent disenrollment for temporary ignorance is too harsh. The public interest in more educated hearing officers is not served by permanently removing the incompletely trained volunteer.

The tardiness criticism stemmed from the occasional failure of a presiding officer to deliver an opinion as promptly as the agency or the aggrieved might expect. To the extent that a presiding officer's delay in rendering an opinion is unreasonable, Virginia law permits judicial supervision by way of a writ of mandamus.[84] Mandamus prompts delivery of an overdue opinion, whereas removal only contributes to its further delay. Substitution of another hearing officer unfamiliar with the case must follow removal. Moreover, mandamus places the decision as to when a hearing officer has taken too much time in making an adjudicative decision in the hands of a fellow adjudicator. A *judge* decides when the hearing officer has procrastinated. Under VAPA, removal of the presiding officer for unreasonable delay depends on the judgment of the Executive Secretary, an officer otherwise removed from the adjudicating experience.[85] Thus, the existing remedy of mandamus offers a greater likelihood that judgment will be informed by relevant experience. Removal by the Executive Secretary for unreasonable delay would be superfluous and less reliable.

II. Court Decisions

A. *Bicameral Action Required for Selection of Commissioner of State Corporation Commission*

In a case curiously reminiscent of the great federal milestone, *Marbury v. Madison*,[86] the Supreme Court of Virginia considered the constitutional limits imposed upon the General Assembly when it sought to elect a Commissioner of the State Corporation Commission (SCC).[87] In *Thomson v. Robb*,[88] the court denied a writ of

84. *See* Prince William County v. Hylton Enters., Inc. 216 Va. 582, 221 S.E.2d 534 (1976); *see also* Hicks v. Anderson, 182 Va. 195, 199, 28 S.E.2d 629, 630 (1944).

85. The decision of the Executive Secretary to remove a hearing officer would be a judicially reviewable case decision. Va. Code Ann. § 9-6.14:14.1(D) (Repl. Vol. 1986). However, the standard prescribed for such review would not permit the court to substitute its own experience and judgment for that of the Executive Secretary. *See* State Bd. of Health v. Godfrey, 223 Va. 423, 290 S.E.2d 875 (1982).

86. 5 U.S. (1 Cranch) 137 (1803).

87. The State Corporation Commission is unique in status among Virginia's administrative agencies, both because it is the product of constitutional action, and because it is a court of record. *See* Va. Const. art. IX. It has jurisdiction over financial institutions, stocks

mandamus which ordered the commissioning of one who had received a majority of votes in the House of Delegates and a majority of the votes of the combined chambers. Buttressed by a pair of Attorney General opinions,[89] the Governor and the Secretary of the Commonwealth had refused to commission Thomson, the candidate declared elected by the Speaker of the House. When Thomson sought a judicial order compelling his investiture, the court held, per Chief Justice Carrico, that where the constitution is silent as to the means of voting, the General Assembly's action must be bicameral. Joined by Justices Stephenson and Russell, Justice Compton dissented, finding that constitutional silence as to the means of voting left the General Assembly free to legislate the requirement for combined chamber voting. The result of the decision in *Thomson* was to render ineffectual the SCC election attempt by the 1986 General Assembly, leaving the Governor free to appoint a commissioner pro tem.

The issue before the court was whether the constitutional direction that the General Assembly be a bicameral body[90] limits the General Assembly's procedure when appointing, as opposed to lawmaking. Although the constitution specifies the method by which the legislature may vote to enlarge the number of SCC commissioners, the constitution is silent on the method by which the legislature must select a commissioner.[91]

In *Thomson*, the majority's view is that such silence respecting selection by a bicameral body does not give rise to an ambiguity.[92] It seems doubtful that the framers of article IX, section 1 anticipated or intended commissioner selection by a majority vote of each house, in view of the express requirement for such voting in

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and bonds, insurance matters, franchises, transportation, and utilities. *See* VA. CODE ANN. Adm. Law App. 37-56 (1985-86). In their excellent study of the Commission, O'Toole and Montjoy say it "in several respects appears to be the most powerful regulatory body in the fifty states." L. O'TOOLE & R. MONTJOY, REGULATORY DECISION MAKING: THE VIRGINIA STATE CORPORATION COMMISSION 1 (1984).

88. 229 Va. 233, 328 S.E.2d 136 (1985).

89. 1984-85 Va. Att'y Gen. Rep. 289, Op. Va. Att'y Gen. 371 (1972).

90. The Constitution of Virginia provides: "§ 1. *Legislative Power.*—The legislative power of the Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and House of Delegates." VA. CONST. art. IV, § 1.

91. "The General Assembly may, by majority vote of the members elected to each house, increase the size of the Commission to no more than five members. Members of the Commission shall be elected by the General Assembly and shall serve for regular terms of six years." *Id.* art. IX, § 1.

92. *Thomson*, 229 Va. at 242, 328 S.E.2d at 141.

the commission-enlarging provision of the immediately preceding sentence.[93] The judicial decision seems unnecessarily obtrusive upon the inherent power of a coordinate branch to order operations which are not expressions of the legislative power.

B. *Competitors' Rights to Participate in Licensing*[94] *Applications*

Two circuit court decisions explicate a competitor's participatory rights in the award of Medical Care Facilities Certificates of Public Need (CON) under the Health Care Planning Law.[95] Both of these decisions develop aspects of what may be called standing. The first considers competitor standing to intervene in the adjudicative hearing prior to final agency action. The second considers competitor standing to obtain judicial review of that final agency action.

Since 1982, growth in the market for medical services in Virginia has been regulated under the state's Health Care Planning Law. The device legislatively adopted for such regulation is licensing. A medical facility wishing to make certain capital expenditures, acquire equipment, or introduce new services must first obtain a

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93. *See supra* note 90.

94. Licensing is a regulatory technique frequently used by the General Assembly to enforce minimum standards in a trade, industry, or profession, or (as in the health services context of these cases) to limit entry into a field for reasons of economic efficiency. Compare, for example, the state's scheme for licensing homes for the aged, VA. CODE ANN. §§ 63.1-172 to -182.1 (Cum. Supp. 1985), with its scheme for licensing moving vans, VA. CODE ANN. §§ 56-338.1 to .18 (Repl. Vol. 1981).

VAPA guarantees license applicants and holders the procedural protections of Article 3. *See id.* § 9-6.14.4(D)(ii) (Repl. Vol. 1985).

95. *Id.* §§ 32.1-102.1 to -122.4. For certain capital expenditures, equipment acquisitions, and new service introductions by medical facilities, the state's Health Care Planning Law requires a Certificate of Public Need (CON). *Id.* §§ 32.1-102.1, .3. This requirement was mandated by Congress in the National Health Planning and Resources Development Act of 1974. *See* 42 U.S.C. § 300k to y-11 (1982).

Finding uncontrollable and inflationary increases in the cost of health care and maldistribution of health facilities and manpower, Congress directed the states to develop comprehensive plans for the supply, distribution, and organization of health resources. *Id.* §§ 300k, 300l-2. Among other objectives, the plans must enable the restraint of health service cost increases and the prevention of unnecessary health resource duplication. *Id.* § 300k.

In addition to goals, Congress mandated means for restraining cost and preventing duplication. One such objective was the establishment by each state of a licensing system for new health projects. Proposed health services, facilities, and organizations were to be permitted by the state only upon demonstration of public need. Need was to be determined by a state agency (designated by the Governor) in cooperation with a federally mandated health systems agency. *Id.* §§ 300l-2, 300m-2(a)(4)(B). In Virginia, the designated state agency is the State Health Commission. *See* VA. CODE ANN. § 32.1-102.3 (Repl. Vol. 1985). The Commissioner's determination is made in accordance with VAPA. *Id.* § 32.1-102.6(E).

CON.[96] The basic law creates a procedure for obtaining a CON which includes both an informational meeting of the sort contemplated by VAPA's Article 2, and an adjudication of the sort contemplated by VAPA's Article 3.[97] The former is held by the local health systems agency (HSA);[98] the latter by the State Health Commissioner or his designate. The informational meeting is open to the public. The basic law requires prior general notice by newspaper publication of the informational meeting. In addition, regulations promulgated by the State Board of Health require specific notice of the meeting by invitation to local health care providers and consumer groups. After the informational meeting, the HSA makes a recommendation on the application to the State Health Commissioner, who decides to issue or deny the CON.[99]

The application undergoes an adjudicative process if the applicant, a person showing good cause, a qualifying health care insurer, or the HSA disagree with the State Health Commissioner's decision. Thus, standing to obtain or participate in the adjudicative phase is more limited than standing to participate in the informational phase. Noticeably absent from the list of those who may participate in the adjudicative hearing are health care providers likely to be affected by the applicant's project.

In *Southwest Virginia Health, Inc. v. Kenley (Lewis-Gale)*, Judge Wood of the Twenty-Fifth Circuit considered several procedural issues in appeals from the award of a CON to Lewis-Gale Hospital for the operation of a linear accelerator.[100] One of these issues was the extent to which a competitor was entitled to participate in the adjudicative hearing on Lewis-Gale's application. The State Health Commissioner had permitted Roanoke Memorial

96. VA. CODE ANN. § 32.1-102.3 (Repl. Vol. 1985).

97. *Id.* § 32.1-102.6. As to the adjudicative phase, the basic law expressly provided before 1984 for both informal proceedings pursuant to § 9-6.14:11 and formal proceedings pursuant to § 9-6.14:12. *See* 1982 Va. Acts 637-38. Both were available upon request by the applicant, any person showing good cause, the health systems agency (HSA), or any third party payor providing health insurance to 5% of the patients in the applicant's service area. *Id.* Now, the basic law simply provides for disposition of the application in accordance with VAPA. Only the applicant, a person showing good cause, a qualifying health care insurer, or the local health service agency may trigger such disposition.

98. An HSA is a non-profit entity charged with planning, promoting, and supervising the development of health services in a geographic region within a state. The establishment and functions of HSAs are mandated by Congress in the Social Security Act. *See* 42 U.S.C. § 300(*l*) (1982).

99. VA. CODE ANN. § 32.1-102.6 (Repl. Vol. 1985).

100. 5 Va. Cir. 270 (Salem 1985) (consolidated along with Lewis-Gale Hosp., Inc. v. Kenley and Roanoke Memorial Hosps. v. Kenley).

Hospital to participate in the informal adjudicative hearing on its competitor's application. Notwithstanding the intervenor's objections, the Commissioner subsequently granted the applicant a CON. Roanoke Memorial, the local HSA, and Lewis-Gale all sought judicial review. Lewis-Gale, despite getting its CON, challenged the Commissioner's decision allowing Roanoke Memorial to intervene.

A threshold justiciability issue which the court addressed briefly was whether the Commissioner's decision allowing Roanoke Memorial to intervene was subject to judicial review. Finding that intervention was a right or benefit conferred by the State Health Commissioner as a result of a decision based upon separate findings of fact and application of the basic law, the court held that the Commissioner's decision to allow intervention was itself a VAPA "case decision" reviewable under section 9-6.14:16.[101] For this proposition, the court relied upon the Virginia Supreme Court's decisions in *Kenley v. Newport News General & Non-Sectarian Hospital Association*[102] and *State Board of Health v. Godfrey*.[103] Finding that intervention "compelled" Lewis-Gale "to resist vigorous opposition," the court also held that Lewis-Gale had standing as a "party aggrieved" to challenge the Commissioner's intervention decision.[104]

Turning to the propriety of the Commissioner's decision to allow intervention by Roanoke Memorial, the court noted that, although the regulations require specific notice to competitors regarding the informational phase and permit their participation, neither the regulations nor the basic law authorizes involvement in the subsequent adjudicative phase by a competitor per se. The court held that the fact that such a standing limitation is inconsistent with both federal regulation and the practice in other states did not sufficiently answer the plain language of Virginia's statute. The court found that the federal regulations applied only in states which have not developed their own CON procedure,[105] and that the state case authority offered as persuasive involved construction of a ba-

101. *Id.* at 273.

102. 227 Va. 39, 314 S.E.2d 52 (1984) (holding Commissioner's letters advising that open heart surgery resumption after 12 month hiatus required CON was a reviewable case decision); *see* Virginia ABC Comm. v. York St. Inn, 220 Va. 310, 257 S.E.2d 851 (1979).

103. 223 Va. 423, 290 S.E.2d 875 (1982) (agency's informal rejection of post-hearing septic tank permit applications was reviewable case decision).

104. *Southwest Va. Health*, 5 Va. Cir. at 273.

105. *Id.* at 275-76.

sic law less explicit on the point than Virginia's.[106]

Notwithstanding the Health Care Planning Law's limitation of CON intervention short of the competition, the court found that the Commissioner had properly allowed Roanoke Memorial to participate in the adjudicative hearing as a person showing "good cause" within the meaning of section 32.1-102.6(E). The regulations define good cause as including "significant, relevant information not previously presented at and not available at the time of the public [informational] hearing."[107] The court held that the Commissioner had correctly found good cause in Roanoke Memorial's proffer of figures on the preceding year's rate of increase in utilization of its existing radiation therapy. For the court as well as the Commissioner, historical utilization data was significant information to a CON decision based in part upon a future community need for expanded cancer treatment capacity.[108]

Roanoke Memorial got to intervene. Lewis-Gale got its CON. The court's decision is sound, but its dictum as to competitor intervention in the absence of good cause is suspect. The National Health Planning and Resources Development Act requires both the HSA and the Commissioner to process CON applications using procedures in accord with regulations published by the Secretary of Health and Human Services (HHS).[109] Regulations promulgated by the Secretary provide for an administrative proceeding to review the Commissioner's decision at the request of any "affected person."[110] In *Lewis-Gale*, the court's acknowledgement of the administrative standing dichotomy between the federal and Virginia schemes suggests that the court regarded a competitor *qua* competitor as an "affected person" entitled by federal regulation to ad-

106. *Id.*

107. 2 Va. Regs. Reg. § 9.1.B at 713 (1985) (this Amendment #2 to the Virginia Medical Facilities Certificate of Public Need Rules and Regulations became effective on Jan. 22, 1986). Good cause also includes significant change, after the informational meeting, in factors or circumstances relating to the application, or substantial material mistake of fact or law by the department's staff or the HSA. *Id.* Good cause sufficient under Virginia regulations to entitle one to participate in the adjudicative hearing is defined in language virtually identical to that formerly used in the Health and Human Services (HHS) regulations to identify sufficient basis for public hearings to reconsider a final agency CON decision. *See* 45 Fed. Reg. 69,751 (1980). I read the federal regulations as distinguishing reconsideration from administrative review. *Compare* 42 C.F.R. § 123.410(11) (1985) (reconsideration informational hearings) *with id.* § 123.410(13) (administrative appeals mechanism for final CON action).

108. *Southwest Va. Health*, 5 Va. Cir. at 276-77.

109. 42 U.S.C. § 300n-1(a) (1982).

110. 42 C.F.R. § 123.410 (1985).

judicative review and therefore to intervention. Thus, if the federal regulations reached the Virginia CON process, Virginia's omission of affected persons other than applicants, health insurers, HSAs, and persons able to show good cause would, as a constitutional matter, be ineffective as a limit on who could intervene.[111]

As authority for the proposition that the federal regulations did not reach the Virginia CON process, the court cited *St. Joseph's Hill Infirmary, Inc. v. Mandl.*[112] However, the court in *St. Joseph's Hill* considered a competitor's standing to obtain judicial review of the issue of a CON, not its standing to participate in the administrative process preceding the decision to issue. Thus, the federal regulation pertinent in *St. Joseph's Hill* was different from that raised in *Lewis-Gale.*[113] More importantly, to the extent that *St. Joseph's Hill* involved conflict between federal and state standing limitations, the federal limitation was considered only as a source for possible construction of the relevant state statutory provision, and not as preemptive.[114] As to who may obtain judicial review, more persuasive authority on the preemptive effect of HHS regulations can be found in *Roman Catholic Diocese v. Department of Health.*[115] In that case, the court held that state attempts to restrict judicial review of CON decisions must yield to the less restrictive federal regulation.[116]

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111. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Fiedlity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982). There remains the objection that HHS regulations extending administrative standing at the adjudicative phase to any affected person are without effect because they conflict with the underlying federal statute. *See Addison v. Holly Hill Co.*, 322 U.S. 607 (1944). The federal statute requires states to provide public hearings in the course of CON review at the request of persons directly affected, however it requires states to provide public hearings on CON decisions only when persons directly affected can show good cause. 42 U.S.C. § 300(n-1)(b)(8). Arguably, Virginia's section 32.1-102.6(E) comes closer to the line of the federal statute than does the federal regulation. *See* 42 C.F.R. § 123.410(a)(12). There is no indication in the court's opinion that Lewis-Gale raised this issue when it resisted Roanoke Memorial's intervention.

112. 682 S.W.2d 821 (Mo. Ct. App. 1984).

113. *Compare* 42 C.F.R. § 123.410(a)(13) *with id.* § 123.410(a)(14). At the time the controversy in *St. Joseph's Hill* occurred, HHS regulations expressly included competing health care facilities in the definition of affected persons entitled to both administrative standing and judicial review. *See* 45 Fed. Reg. 69,745 (1980).

114. *St. Joseph's Hill*, 682 S.W.2d at 826-27.

115. 109 A.D.2d 140, 490 N.Y.S.2d 636 (N.Y. App. Div. 1985).

116. Since the Federal regulation in effect at the time of the commencement of this proceeding is not in conflict with the NHPRDA section on standing and is not challenged as beyond the scope of the regulatory authority of the Secretary of Health and Human Services, it should be controlling over any State restriction on access to the courts by persons having a Federal right to review State agency CON decisions.

109 A.D.2d at ___, 490 N.Y.S.2d at 639 (citations omitted).

In *Bio-Medical Applications of Arlington, Inc. v. Kenley*,[117] Judge Robertson of the Twentieth Circuit held that an unsuccessful CON candidate has standing to obtain judicial review of the Commissioner's award of a CON to another candidate whose application was concurrently reviewed. When the unsuccessful applicant, Bio-Med, sought judicial review, the successful applicant, Fairfax Dialysis, demurred, in part on the ground that Bio-Med lacked standing to obtain judicial review of the decision on Fairfax's application. Fairfax argued that the basic law limited standing to obtain judicial review of a final administrative decision granting or denying a CON to the applicant, the relevant HSA, or a qualifying health care insurer and no one else.[118] Therefore, according to Fairfax, Bio-Med could obtain review of the denial of its own application, but not review of the Commissioner's grant of Fairfax's application.[119]

The court's response was to note that, in the absence of explicit provision for comparative review of contemporaneous competing applications, provision in the regulations for concurrent review led to the same result.[120] The court found that such a result was both inevitable and consistent with the policy behind the basic law. Recognizing that comparative review of competing applications was an integrated process, the court held that the case decision from which an applicant could obtain judicial review was the amalgam of CON grant and denial (or denials) resulting from a single comparative review. Thus, Bio-Med could obtain review of the Commissioner's treatment of Fairfax's application as well as its own.

In *Bio-Medical Applications*, a competitor was able to obtain judicial review of the grant of a CON, but only because that competitor was also an applicant involved in the same concurrent CON review. *Bio-Medical Applications* is thus distinguishable from *Virginia Heart Institute v. Kenley*,[121] in which it was held that a com-

117. 5 Va. Cir. 159 (Arlington County 1985).

118. VA. CODE ANN. § 32.1-102.7(A) (repealed by ch. 740, Acts of 1984).

119. *Bio-Medical Applications*, 5 Va. Cir. at 178.

120. Section 6.8 of the Virginia Medical Facilities Certificate of Public Need Rules and Regulations, entitled "Consideration of Applications," states, "All competing applications shall be considered at the same time by the health systems agency and the commissioner. The commissioner shall determine if an application is competing and shall provide written notification to the competing applicants and appropriate health systems agency." 2 Va. Regs. Reg. § 6.8, at 709 (1985) (effective Jan. 22, 1986).

121. 3 Va. Cir. 151 (Alexandria 1984).

petitor which participated in the adjudicative phase nevertheless lacked standing to obtain judicial review of the Commissioner's subsequent CON award. The short list in the basic law of applicant, health insurer, or HSA, upon which Fairfax unsuccessfully relied in *Bio-Medical Applications*, controlled in *Virginia Heart Institute*.

The common thread to *Lewis-Gale* and *Bio-Medical Applications* is that competing medical service purveyors sought to intervene in the licensing of a potential rival. *Lewis-Gale* involves intervention in the administrative decision, and *Bio-Medical Applications* involves intervention in judicial review of the administrative decision. Under Virginia's scheme, a competitor has the right to participate only in the first, informational phase of a CON decision. The competitor has no right, *qua* competitor, to involvement in the second, adjudicative phase. When the competitor submits a competing CON application, or when the competitor shows cause as defined in the basic law, however, graduation to adjudicative party status can occur. Only when the competitor submits a competing CON application does the opportunity for judicial review party status follow.

C. *No Mandamus Against Hearing Examiner for Reversing Commissioner*

Arising from the same medical facilities licensing context is *Richlands Medical Association v. Commonwealth*,[122] in which the Supreme Court of Virginia vacated a writ of mandamus against a hearing examiner who had directed the issuance of a CON for new hospital construction. Under the former medical facilities licensing law, the Commissioner made an initial decision on the CON application after the informational hearing and a recommendation by the forerunner to the HSA.[123] Either the applicant or the planning agency could obtain administrative review of the Commissioner's initial decision.[124] Such review occurred in an adjudicative proceeding before an independent hearing examiner, who reviewed the Commissioner's decision for substantial evidence and abuse of discretion.[125] While either the applicant or the agency could get ad-

122. 230 Va. 384, 331 S.E.2d 737 (1985).
123. 1973 Va. Acts 603.
124. 1977 Va. Acts 911.
125. *Id.*

ministrative review, only an applicant could obtain judicial review of the hearing examiner's final decision.[126]

In *Richlands Medical Association*, the hearing examiner found abuse of discretion by the Commissioner and reversed the Commissioner's decision to withhold the CON.[127] The Commissioner sought a writ of mandamus ordering the hearing examiner "to adhere to the law, to interpret properly the . . . Certificate of Public Need Law, to restrict his review to the function specified in [the statute] . . ., to abandon his erroneous construction of the law, and to affirm the . . . Commissioner's original denial of the application."[128] The Circuit Court of Richmond obliged, and the applicant appealed to the supreme court.

The supreme court unanimously reversed, holding the writ had been improperly issued, because mandamus cannot be used to substitute the trial court's judgment for that of the hearing officer, and because mandamus is not available when the action complained of is both discretionary and completed.[129]

Because it explicitly subjected the department head's decision to non-appealable final reversal by an independent examiner, the pre-1982 CON review process was something of an anomaly. The new statute and regulations are less specific, providing for adjudicative hearings by independent hearing examiners only in the general terms of VAPA.[130] Practically speaking, the decision of a VAPA hearing examiner is a recommendation to the department head, unless the chief delegates otherwise.[131] Thus, the new system removes the barrier to department head rejection of the hearing examiner's findings. The Commissioner's need for an extraordinary remedy is gone. As before, protection against unwarranted rejection of the findings or decision recommended below lies in judicial review, and in the administrative common law principle that the hearing examiner's rejected findings or decision are properly part of the record before a reviewing court, and weigh in the measure of the basis for the department head's decision.[132]

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126. 1973 Va. Acts 603.

127. *See Richlands Medical Ass'n*, 230 Va. at 385-86, 337 S.E.2d at 738-39. The facts are taken from the supreme court's opinion.

128. *Id.* at 386, 337 S.E.2d at 739.

129. *Id.* at 388, 337 S.E.2d at 740.

130. VA. CODE ANN. § 32.1-102.6(E) (Repl. Vol. 1985); 2 Va. Regs. Reg. § 9.1, at 713-14 (1985) (effective Jan. 22, 1986).

131. *See* VA. CODE ANN. § 9-6.14:12 (Repl. Vol. 1985) (Revisor's Note).

132. *See* Universal Camera v. NLRB, 340 U.S. 474 (1951).

D. *Board of Health Regulations Must Produce 120-Day CON Decision*

In *State Board of Health v. Virginia Hospital Association*,[133] the Virginia Court of Appeals affirmed the decision of Judge Wright of the Circuit Court of Richmond holding invalid amendments to the regulations implementing the medical facility CON application process. In 1984, the General Assembly had amended the basic law, subjecting the review process to VAPA and requiring a "public need determination" by the Commissioner within 120 days of application submission.[134] The Board of Health reacted to the statutory change with amendments to its regulations. The amendments required an "initial determination" within 120 days after the informational hearing, and an informal adjudicative proceeding under section 9-6.14:11.[135] A formal adjudicative hearing under section 9-6.14:12 was available upon request within fifteen days of the initial determination. The regulations characterized this formal adjudicative hearing as "reconsideration."[136] Thus, the Board's amendments bifurcated the adjudicative phase of the CON application, requiring its informal aspect within the statutory deadline, but reserving its formal aspect for a reconsideration process after the statutory deadline. The result was a 195-day review cycle.

Rejecting the Board's interpretation of the statutory amendments, the supreme court found the new regulatory scheme to be in conflict with basic law. From the failure of the General Assembly to adopt language in either the recommendations of a joint subcommittee or a related bill, the court found the legislature's omission of the modifier "initial" to be purposeful.[137] It followed that the decision required in 120 days was the final agency action. Such a conclusion was in harmony with the General Assembly's purpose of simplifying and streamlining the CON review process.[138] Because sections 9-6.14:11 and :12 operated together to produce a final agency action, provision for the latter after the statutory deadline was ultra vires.[139]

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133. 1 Va. App. 5, 332 S.E.2d 793 (1985).
134. VA. CODE ANN. § 32.1-102.6(E) (Repl. Vol. 1985).
135. 2 Va. Regs. Reg. § 7.4, at 710 (1985) (effective Jan. 22, 1986).
136. *Id.* § 9.1(A), at 713.
137. *Virginia Hosp. Ass'n*, 1 Va. App. at 9, 332 S.E.2d at 795-96.
138. *Id.* at 8, 332 S.E.2d at 795.
139. *Id.*

In 1986, the General Assembly simplified the procedures for obtaining judicial review of bureaucratic decisions by agencies subject to VAPA. In so doing, the legislature expressed its approval for the scheme set forth in Part Two A of the Rules. Part Two A creates relatively brief windows in which the jurisdictionally required notice and petition for appeal must be filed by the aggrieved party. But because judicial review can only follow the completion of a public process of rulemaking or adjudication, the early deadlines should not produce a trap for the unwary.

Also in 1986, the General Assembly codified the existing scheme for employing independent contractors as hearing examiners in formal administrative adjudications pursuant to VAPA. At the same time, the legislature curtailed agency use of its own commissioners and subordinates as hearing officers. The imposition of preliminary and recurring educational requirements for the new breed is a laudatory step, but the provision for blacklisting by the supreme court's Executive Secretary seems unnecessary.

In 1985, the supreme court found a constitutional limit on the General Assembly's power to decide how to choose a new SCC Commissioner, and denied mandamus to the State Health Commissioner against a hearing examiner who overturned the Commissioner's hospital construction licensing refusal. Also in the health care industry regulation context, the circuit court of appeals held the State Board of Health to the 120-day licensing cycle mandated by the legislature, while circuit courts found opportunities for competing health care providers to participate in the review of licensing decisions.