

1989

## Annual Survey of Virginia Law: Administrative Procedure

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# ARTICLES

## ADMINISTRATIVE PROCEDURE

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### I. INTRODUCTION

In 1989, the Virginia General Assembly made several relatively minor, but significant, changes to the Virginia Administrative Process Act (VAPA).<sup>1</sup> These amendments modified the manner in which agencies may promulgate regulations<sup>2</sup> and conduct informal fact finding hearings.<sup>3</sup> Two new exemptions to the VAPA were created: one for rules for the conduct of specific lottery games; and a second for orders condemning shellfish growing areas.<sup>4</sup> In other changes, rulemaking proceedings conducted by the State Water Control Board (SWCB),<sup>5</sup> certain decisions of the Board of Social Services,<sup>6</sup> and amendments to standards for asbestos inspections<sup>7</sup> became subject to different provisions of the VAPA.

The 1989 General Assembly enacted changes to Virginia health care facilities regulatory statutes which will affect administrative

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1. VA. CODE ANN. §§ 9-6.14:1 to :25 (Repl. Vol. 1989). This article addresses legislation from the 1989 session of the General Assembly and decisions of the Virginia courts issued from May 1988 through June 9, 1989.

2. *Id.* § 9-6.14:7.1(C).

3. *Id.* § 9-6.14:11(B).

4. *Id.* § 9-6.14:4.1.

5. *Id.* § 62:1-44.15(3b) (Cum. Supp. 1989).

6. *Id.* § 63.1-119.

7. *Id.* §§ 2.1-526.12, 32.1-126.1, 36-99.7.

procedures. First, it amended the certificate of public need law, exempting certain types of facilities and projects from agency review and extending the moratorium on the issuance of certificates of public need for nursing homes until January 1, 1991.<sup>8</sup> Second, the Statewide Health Coordinating Council was eliminated and its general role assigned to an advisory Health Planning Board, which was endowed with a new set of powers.<sup>9</sup>

The General Assembly also re-enacted the Wine Franchise Act,<sup>10</sup> the previous act having been declared unconstitutional by the Supreme Court of Virginia.<sup>11</sup>

Finally, perhaps the most significant act of the General Assembly was the establishment of a joint subcommittee to study Virginia administrative hearing procedure with a view toward creating a system of full-time administrative law judges and uniform rules of procedure.<sup>12</sup>

Although Virginia courts did not hand down any landmark cases affecting administrative procedure, several decisions deviated from the judiciary's recent deference to agency decision making. In one such case, the Supreme Court of Virginia overturned a court of appeals decision affirming the award of a landfill disposal permit by the State Board of Health.<sup>13</sup> In another case, the court of appeals eschewed the opportunity to dismiss an appeal of an agency decision on procedural grounds, and instead reversed the agency's decision on the merits.<sup>14</sup>

Otherwise, the courts were predictable. The Supreme Court of Virginia reversed an award of attorneys' fees in a VAPA appeal,<sup>15</sup> thereby affirming the axiom that attorneys' fees, although authorized by statute, are virtually impossible to obtain in practice. Finally, the lower courts dealt with procedural issues that were of minor significance.<sup>16</sup>

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8. *Id.* § 32.1-102.3:2.

9. *Id.* §§ 32.1-122.01 to -122.4.

10. *Id.* §§ 4-118.42 to .61.

11. *Heublein, Inc. v. Department of Alcoholic Beverage Control*, 237 Va. 192, 376 S.E.2d 77 (1989).

12. H.J. Res. 333, 1989 Sess., 1989 Va. Acts 2103.

13. *See infra* text accompanying notes 116-133.

14. *See infra* text accompanying notes 158-63.

15. *See infra* text accompanying notes 148-57.

16. *See infra* text accompanying notes 165-72.

## II. LEGISLATIVE CHANGES AFFECTING ADMINISTRATIVE LAW AND PROCEDURE

### A. *Changes in Agency Decision Making Procedures*

#### 1. Public Participation in Rule Making Broadened

In 1989, the General Assembly acted to broaden public participation in the promulgation of agency regulations. Under existing law, proposed regulations subject to the VAPA must be published in the Virginia Register of Regulations to inform the public of the intended action and to allow for public comment.<sup>17</sup> Perhaps because many regulations are lengthy and difficult to read, which may discourage the public from participating in the promulgation process, agencies are now required to provide the Registrar of Regulations with not only a copy of the proposed regulation, but also with a summary of that regulation and a concise statement of the basis, purpose, substance and issues of the regulations.<sup>18</sup> The text of the regulations, plus the summary and statement, must be published prior to promulgation.<sup>19</sup> If the agency is to conduct a public hearing, it must include the summary with the notice of the hearing published in the newspaper.<sup>20</sup> This change should enable the public to get a better grasp on proposed regulation changes.

#### 2. Prior Notice of Basis of Agency Decision Required

A second change concerns agency case decision making.<sup>21</sup> Unless an agency is required to conduct a formal evidential hearing before issuing its decision, it must "ascertain the fact basis" for its decision "through informal conference or consultation proceedings."<sup>22</sup>

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17. VA. CODE ANN. § 9-6.14:7.1(C) (Repl. Vol. 1989).

18. *Id.*

19. *Id.*

20. *Id.*

21. VAPA defines "case decision" to mean:

any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining license or other right or benefit.

VA. CODE ANN. § 9-6.14:4(D) (Repl. Vol. 1989). Thus, a letter from an agency applying the rules and regulations to a particular party is a case decision, but a general statement of an agency's position with regard to one aspect of its regulations, even though addressed to one party, is not a case decision. *Kenley v. Newport News Hosp.*, 227 Va. 39, 314 S.E.2d 52 (1984).

22. VA. CODE ANN. § 9-6.14:11(A) (Repl. Vol. 1989).

Because these proceedings are informal, the procedural rules for trials, including the rules of evidence, are not used. Usually, there is no opportunity for cross examination, nor are the parties to the proceeding necessarily allowed to examine the information on which the agency plans to rely in making its decision. Thus, the parties are often not given the opportunity to respond to this information at the conference or at any other time before the agency makes its final decision.<sup>23</sup>

To help remedy the disadvantage an applicant or party has with respect to the agency, the VAPA now requires that the agency provide all parties with advance notice of its intent to rely on any "public data, documents or information" in making its case decision.<sup>24</sup> This requirement does not apply, however, when the agency intends to rely on case law or administrative precedent.<sup>25</sup>

Although this amendment is a step in the right direction, it does not go far enough to ensure fairness in agency proceedings. At present, each agency is allowed to promulgate its own rules as to how such conferences are to proceed. Some agencies, intent on retaining the "informal" aspect of the proceedings, do not require opposing parties to give advance notice of the nature of the evidence they intend to present at the conference.<sup>26</sup> Advance notice is especially important to the applicant, who is at a distinct disadvantage without such notice and an opportunity to respond to opponents' evidence at the conference. More importantly, the "fact basis" for the decision cannot be ascertained unless *all* relevant facts are brought to light and examined. Accordingly, it is doubtful whether the conference is indeed a "fact-finding" proceeding if the parties are not given the opportunity to rebut each other's evidence.<sup>27</sup>

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23. In *Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 369 S.E.2d 1 (1988), the court of appeals determined that the Health Commissioner's consideration of extra-record evidence was improper, but insufficient to compel a remand to the agency. The court held that the appellant must make "a clear showing of prejudice arising from the admission of such evidence, or unless it is plain that the agency's conclusions were determined by the improper evidence, and that a contrary result would have been reached in its absence." *Id.* at 258, 369 S.E.2d at 16; see Buniva, *Administrative Law: Annual Survey of Virginia Law*, 22 U. RICH. L. REV. 475, 485-89 (1988).

24. VA. CODE ANN. § 9-6.14:11(B) (Repl Vol. 1984).

25. *Id.*

26. For example, the Virginia Medical Facilities Certificate of Public Need Rules and Regulations do not provide for such notice. 2:6 Va. Regs. Reg. 702-14 (1985) (effective 1986).

27. The Health Department's certificate of public need decisional practice denies the disappointed applicant any opportunity for a formal evidentiary hearing, despite express provision therefore in its regulations. *Id.* at 712, § 9.1. The applicant is thus denied the opportunity to make a proper evidential record for appeal. The Health Department is believed to

Thus, a balance must be struck between retaining the informality of the proceeding, and instituting precautions that will insure both that the proceeding is fair to all the participants, and that the facts are indeed determined. One suggestion would be that all entities interested in participating in the conference file an advance notice describing the specific factual and legal basis for their intervention.

## B. *Changes in Applicability of VAPA*

### 1. Exemptions Created for Lottery Rules and Shellfish Condemnation Orders

Rules for the conduct of *specific* lottery games are exempt from the VAPA.<sup>28</sup> Such rules must be consistent with the regulations of the State Lottery Board, the latter of which must be published and posted.<sup>29</sup>

Until the 1989 General Assembly session, orders condemning or closing shellfish, finfish or crustacea growing areas were exempt from the VAPA provisions regarding regulations.<sup>30</sup> Now such orders are completely exempt from the VAPA.<sup>31</sup> This exemption allows the agency to act quickly to close contaminated growing areas in the event of an emergency such as the one in early 1989 when approximately two million gallons of raw sewage spilled from a waste treatment facility into the James River, contaminating the oyster beds.<sup>32</sup> Although these orders are exempt from the VAPA,

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have based this practice on its interpretation of the decision in *State Board of Health v. Virginia Hosp. Assoc.*, 1 Va. App. 5, 332 S.E.2d 793 (1985), which invalidated regulations that required every applicant to undergo an informal conference, followed by a formal evidentiary hearing, to obtain a final decision. These regulations were designed to continue past procedural practice, and plainly contravened a statutory amendment requiring an appealable decision within 120 days. See VA. CODE ANN. § 32.1-102.6(E) (Repl. Vol. 1985 & Cum. Supp. 1989). Neither the statute nor the court's decision, however, would preclude a formal evidentiary hearing conducted at the request of the disappointed applicant.

28. VA. CODE ANN. § 9-6.14:4.1(B)(15) (Repl. Vol. 1989).

29. *Id.* Other aspects of the operations of the State Lottery Board are exempt from public review. The confidential records of investigations of applications for licensees and licenses made by the Board, all official records and other game-related information, and all official records of studies and investigations of lottery agents, vendors and crimes, are not subject to freedom of information requests. *Id.* § 2.1-342(B)(2) (Cum. Supp. 1989). In addition, the Board can hold closed, executive meetings to discuss, consider and review matters related to proprietary lottery game information. *Id.* § 2.1-344(A)(16).

30. *Id.* § 9-6.14:4.1(C)(6) (Cum. Supp. 1988).

31. *Id.* § 9-6.14:4.1(B)(16) (Repl. Vol. 1989).

32. See Virginia Gazette, Jan. 4, 1989, at 1A, col. 1.

they must be filed with the Registrar either before or after their effective dates "to satisfy the need for public availability of information respecting the regulations of state agencies."<sup>33</sup>

## 2. Amendments to State Water Control Board Water Quality Standards Require Formal Hearing

The General Assembly responded to a 1988 state circuit court decision<sup>34</sup> by clarifying the rules governing the SWCB's amendments to its water quality standards regulations.<sup>35</sup> Although the SWCB is subject to the VAPA, the circuit court case brought to light an ambiguity in the process by which the SWCB amends these standards.

In September 1987, the SWCB amended its water quality standards to prohibit chlorine in discharges to streams inhabited by threatened or endangered species or classified as trout waters.<sup>36</sup> The Appalachian Power Company (APCO), which uses chlorine as an anti-fouling agent at its Clinch River plant, appealed the regulation to the Circuit Court of the City of Roanoke.<sup>37</sup> The court ruled that the regulations had not been validly promulgated because the SWCB failed to conduct a formal evidentiary hearing.<sup>38</sup> In so holding, the circuit court accepted APCO's argument that the State Water Control Law<sup>39</sup> requires the SWCB to conduct a hearing prior to revising its water quality standards.<sup>40</sup> The law also requires that the water quality standards be adopted in accordance with the VAPA.<sup>41</sup> The VAPA defines a "hearing" as an "opportunity for private parties to submit factual proofs in formal proceedings."<sup>42</sup> The SWCB argued that a hearing meant only the "opportunity" for a hearing and that because APCO had the opportunity to request a formal hearing, but did not do so, the regulations were promulgated validly.<sup>43</sup> The court did not accept this argument and

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33. VA. CODE ANN. § 9-6.18 (Repl. Vol. 1989).

34. *Appalachian Power Co. v. Commonwealth*, No. CH87-000733 (Roanoke Aug. 17, 1988).

35. VA. CODE ANN. § 62.1-44.15 (Cum. Supp. 1989).

36. 3:18 Va. Regs. Reg. 1941 (1987).

37. *APCO*, No. CH87-000733, slip op. at 1-2.

38. *Id.*

39. VA. CODE ANN. §§ 62.1-44.3 to -44.38 (Repl. Vol. 1987 & Cum. Supp. 1989).

40. *APCO*, No. CH87-000733, slip op. at 1.

41. VA. CODE ANN. § 62.1-44.15(3b) (Repl. Vol. 1987 & Cum. Supp. 1988).

42. *Id.* § 9-6.14:4(E) (Repl. Vol. 1989).

43. Commonwealth's Memorandum in Opposition to APCO's Motion for Summary Judg-

ruled that the SWCB was obligated to conduct formal evidential hearings pursuant to section 9-6.14:8 of the Code of Virginia when it promulgated the challenged regulations, and the failure to conduct such hearings was a reversible error.<sup>44</sup>

The General Assembly made the circuit court's interpretation of the law explicit in the statute.<sup>45</sup> Under the revised law, the SWCB must hold a formal hearing pursuant to section 9-6.14:8 upon the request of an affected person or upon its own motion.<sup>46</sup> If it is not requested to hold a formal hearing, it must "afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency."<sup>47</sup>

### 3. Amendments to Asbestos Inspections Standards Subject to VAPA

The General Assembly also brought two other agency actions within the purview of certain provisions of the VAPA. The first such action relates to the standards for the inspection of asbestos in certain buildings.<sup>48</sup> In 1988, the General Assembly exempted the promulgation of these standards from the VAPA.<sup>49</sup> In 1989, the General Assembly appears to have reversed its field by requiring that all amendments to these standards be promulgated pursuant to the VAPA.<sup>50</sup> The reasoning behind this change, as with the original exemption, is unclear.<sup>51</sup>

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ment at 4, *APCO v. Commonwealth*, No. CH87-000733 (Roanoke Aug. 17, 1988).

44. *APCO*, No. CH87-000733, slip op. at 1-2. The SWCB responded to this decision at its September 1988 meeting by re-promulgating the regulations under the VAPA provisions authorizing adoption of regulations without a hearing in "emergency" situations. 5:2 Va. Regs. Reg. 215-17 (1988). The Board contended that an emergency existed because the regulations were without force and the inability of the SWCB to enforce these regulations on *APCO* posed an "unacceptable threat to the environment." *Id.* at 216.

45. VA. CODE ANN. § 62.1-44.15(3a) (Cum. Supp. 1989).

46. *Id.*

47. *Id.* Presumably, the statute will be construed to allow the SWCB to conduct informal proceedings initially, promulgate the standards, and thereafter reconsider the standards in a formal hearing upon request by an affected party or its own motion.

48. The buildings include hospitals, buildings to be renovated or demolished, child care centers and condominium conversions.

49. VA. CODE ANN. § 2.1-526.14 (Cum. Supp. 1988); see also Buniva, *Administrative Law: Annual Survey of Virginia Law*, 22 U. RICH. L. REV. 475, 494 (1988).

50. VA. CODE ANN. §§ 2.1-526.14:1(B), 32.1-126.1 (inspection standards for hospitals), 36-99.7 (buildings to be renovated or demolished), 55-79.94 (condominium conversions) (Cum. Supp. 1989). The General Assembly appears to have omitted child care centers.

51. See Buniva, *supra* note 49, at 494.



#### 4. Public Assistance Decisions Subject to Judicial Review

In a second action, certain case decisions by the State Board of Social Services regarding public assistance are now subject to the judicial review provisions of the VAPA.<sup>52</sup> The case decisions subject to this requirement involve the granting or denial of aid to dependent children, Medicaid, food stamps, general relief, auxiliary grants, or state-local hospitalization.<sup>53</sup> Judicial review is limited, however, to the agency record, and the court is only allowed to ascertain whether there was evidence in the agency record to support the case decision.<sup>54</sup>

The General Assembly was careful to limit the extent of the judicial review. The statute excludes from the review the adequacy of the standards of need and payment levels for public assistance programs, and precludes review of the validity of any statute, regulation, standard or policy upon which the agency action was based.<sup>55</sup>

#### C. *Changes in Health Care Law*

##### 1. Certificate of Public Need Law Revised But Not Abolished

The General Assembly continued its review of certificate of public need (COPN) law in the 1989 session.<sup>56</sup> After considering the report of the Governor's Commission on Medical Care Facilities Certificate of Public Need,<sup>57</sup> the General Assembly rejected arguments that the COPN law should be repealed entirely and continued its moratorium on the approval of new nursing home beds until 1991.<sup>58</sup>

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52. VA. CODE ANN. § 9-6.14:16(B) (Repl. Vol. 1989).

53. *Id.*

54. *Id.*

55. *Id.* The amendment also excludes intermediate relief pursuant to section 9-6.14:18 of the Code of Virginia. *Id.*

56. A "certificate of public need" is similar to a franchise. Before a medical care facility can be built, or medical equipment can be purchased, permission must be obtained from the Virginia Department of Health, assuming certain monetary thresholds for the facility of equipment have been met. VA. CODE ANN. § 32.1-102.1 (Repl. Vol. 1985 & Cum. Supp. 1989). The purpose behind the law is to control health care costs by allowing only those facilities or equipment for which there is a demonstrated need.

57. REPORT OF THE GOVERNOR'S COMMISSION ON MEDICAL CARE FACILITIES CERTIFICATE OF PUBLIC NEED (1987) [hereinafter GOVERNOR'S COMMISSION REPORT]. The Commission was established in 1986. Exec. Order No. 31 (1986).

58. VA. CODE ANN. § 32.1-102.3:2 (Cum. Supp. 1989).

The legislative amendments eliminate agency approval of virtually all new equipment and new services, regardless of cost. New equipment or services that cost more than \$400,000 must be registered with the Health Commissioner.<sup>59</sup> Many specialized centers are no longer subject to COPN review, however.<sup>60</sup> Regulatory review is retained, however, for establishing new medical care facilities, adding or relocating beds, and for certain specialized new services.<sup>61</sup> A July 1, 1991 sunset provision was imposed for regulation of outpatient or ambulatory surgical centers.<sup>62</sup>

For medical care facilities that remain subject to the law, the 1989 amendments remove the minimum capital expenditure exemption from review.<sup>63</sup> Thus, all such facilities, regardless of capital cost, must undergo agency review.

The Governor's Commission Report recommended that nursing homes remain under COPN review,<sup>64</sup> but that the COPN procedure be revised to eliminate "gaming" and other procedural tricks.<sup>65</sup> The General Assembly did not resolve this issue, but decided instead to extend the moratorium on COPN approvals for nursing homes to January 1, 1991.<sup>66</sup>

The General Assembly has been grappling with hospital and nursing home cost regulation for several years in its attempt to lower the state's astronomical Medicaid bill.<sup>67</sup> It has been hampered by the lobbying efforts of industry and other interest groups, some opposing deregulation, others supporting it, and others advocating continued regulation only if similar providers remain regu-

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59. *Id.* § 32.1-102.3:4.

60. These are: renal dialysis therapy, radiation therapy, computerized tomography, scanning, and other medical or surgical treatments requiring the utilization of equipment not usually associated with the provision of primary health services. *Id.* § 32.1-102.1.

61. These include open heart surgery, psychiatric, medical rehabilitation and substance abuse services not previously offered. *Id.* (subsection four under definition of "project").

62. *Id.* § 32.1-102.3:3.

63. *Id.* § 32.1-102.1.

64. See GOVERNOR'S COMMISSION REPORT, *supra* note 57, at 32.

65. *Id.* at 34-36.

66. VA. CODE ANN. § 32.1-102.3:2 (Cum. Supp. 1989). As under the previous moratorium, the Health Commissioner is authorized to issue COPNs for the renovation or replacement on site of an existing facility to comply with life safety codes, licensure, certification or accreditation standards. *Id.* The Commissioner can also approve the conversion of existing nursing home beds to skilled nursing service beds if certain specified conditions are met. *Id.*

67. According to the Governor's Commission, at the time of its Report, the State's Medicaid budget was \$1.4 billion for the biennium. GOVERNOR'S COMMISSION REPORT, *supra* note 57, at 24.

lated.<sup>68</sup> As a result, the 1989 legislation was a hodgepodge of changes to the existing regulatory review system, rather than a change of direction,<sup>69</sup> which may be necessary to success in controlling health care cost increases.

## 2. Statewide Health Coordinating Council Replaced with Virginia Health Planning Board

The Governor's Commission Report also recommended that the Statewide Health Coordinating Council be abolished and its functions<sup>70</sup> re-delegated to the Health Commissioner.<sup>71</sup> The report recommended reconstituting the Council in an advisory capacity.<sup>72</sup> It also recommended the establishment of a system of regional health planning advisory boards,<sup>73</sup> which would assume full responsibility for the development of the State Health Plan and State Medical Facilities Plan, for the adoption by the Board of Health.<sup>74</sup>

The General Assembly followed these recommendations and repealed the statutory provisions regarding the Statewide Health Coordinating Council,<sup>75</sup> replacing the Council with a newly created entity, the Virginia Health Planning Board.<sup>76</sup> This advisory Board is charged with supervising the statewide health planning system and participating in the development of state health policy.<sup>77</sup> Specifically, it must help develop, but not approve, the State Health Plan.<sup>78</sup> These amendments also created regional health planning agencies,<sup>79</sup> which are charged with aiding the State Planning Board in developing the State Health Plan.<sup>80</sup>

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68. *Id.* at 15-18.

69. Mandatory hospital rate review, as applied in Maryland, would be an example of a new direction for regulation of hospital costs. MD. HEALTH-GEN. CODE ANN. §§ 19-201, -222 (Repl. Vol. 1987).

70. The Health Coordinating Council held the responsibility for approving the State Health Plan and the State Medical Plan, the state's primary health planning documents.

71. GOVERNOR'S COMMISSION REPORT, *supra* note 57, at 36. The reasoning behind this recommendation was that the federal law, which mandated the formation of the Council, had been repealed. *Id.*

72. *Id.*

73. These would replace the regional Health Systems Agencies, mandated by the repealed federal law, which had the responsibility for regional review of COPN applications. *Id.*

74. *Id.* at 36-37.

75. VA. CODE ANN. §§ 32.1-117 to -122 (Cum. Supp. 1989).

76. *Id.* § 32.1-122.02.

77. *Id.*

78. *Id.* § 32.1-122.03.

79. *Id.* § 32.1-122.05.

80. *Id.*

#### D. *Wine Franchise Act*

The General Assembly acted promptly in 1989, using emergency legislation, to repeal and reenact a revised Wine Franchise Act after the Supreme Court of Virginia declared the entire act unconstitutional in *Heublein, Inc. v. Department of Alcoholic Beverage Control*.<sup>81</sup> In *Heublein*, the court found that the Wine Franchise Act was unconstitutional on three grounds. First, the court found that the provision prohibiting the termination of at-will contracts in the six-month period before the act became effective violated the contract clause.<sup>82</sup> Second, the provision requiring wineries to amend all contracts they have with out-of-state wholesalers to conform to any unilateral contractual amendments with Virginia wholesalers was found to be an unlawful attempt to regulate the commerce of other states in violation of the commerce clause.<sup>83</sup> Third, the statute's exemption of small Virginia farm wineries was found to be an impermissible attempt to favor local wineries over out-of-state wineries, also in violation of the commerce clause.<sup>84</sup> Finally, in spite of the inclusion of a non-specific severability clause, the court found that the General Assembly would not have enacted the Act without the unlawful provisions, and therefore these provisions could not be severed from the rest of the act.<sup>85</sup> For this reason, the court held the entire Act to be unconstitutional.<sup>86</sup>

The General Assembly responded quickly to this decision. The existing Act was repealed,<sup>87</sup> offensive provisions deleted, and the Act re-enacted without these provisions.<sup>88</sup> The Act was put into force immediately upon its passage.<sup>89</sup> The new Act is virtually

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81. 237 Va. 192, 376 S.E.2d 77 (1989).

82. *Id.* at 197, 376 S.E.2d at 78. In reaching this determination, the court examined the interplay between the prohibition of legislation impairing the obligation of contracts and the exercise of the state's police powers. *Id.* at 196, 376 S.E.2d at 79. The court agreed with the trial court's holding that limitation on a winery's discretionary right to terminate contracts with its wholesalers was a "severe alteration of contractual obligations." *Id.* Moreover, the court could not find a valid police power purpose behind the condition; rather, it found it to be "simply an effort to protect a small group of wholesalers from possible economic loss." *Id.* at 197, 376 S.E.2d at 79. For this reason, the court invalidated the provision. *Id.*

83. *Id.* at 198, 376 S.E.2d at 79.

84. *Id.* at 199, 376 S.E.2d at 80. The court found this purpose to be explicit in the legislative background of the Act. *Id.*

85. *Id.* at 200, 376 S.E.2d at 81.

86. *Id.* at 201, 376 S.E.2d at 81.

87. VA. CODE ANN. §§ 4-118.21 to -118.41 (Repl. Vol. 1988).

88. *Id.* § 4-118.42 to .61 (Cum. Supp. 1989).

89. *Id.*

identical to the previous Act, except for those new provisions inserted to replace the invalidated provisions.<sup>90</sup>

### E. *Joint Subcommittee to Study Administrative Hearing Procedure*

In 1986, the General Assembly amended VAPA to allow the use of private attorneys in formal adjudicatory hearings.<sup>91</sup> The 1986 amendments codified the existing practice of using attorneys in private practice as hearing officers,<sup>92</sup> and has raised questions concerning conflicts of interest and other deficiencies in the system.<sup>93</sup>

The 1989 General Assembly recognized these problems when it passed a joint resolution establishing a joint subcommittee to study the administrative law hearing system.<sup>94</sup> These problems were brought to the General Assembly's attention by the Report of the Ad Hoc Committee on Hearing Officers, ("Ad Hoc Committee Report"), which was submitted to the legislature on December 7, 1988.<sup>95</sup> The Ad Hoc Committee Report made two recommendations which, if instituted, would undoubtedly have a profound effect on Virginia administrative procedure. The first recommendation was for a system of full-time hearing officers. According to the report, one of the most common complaints about the existing system is that the part-time hearing officers lack expertise regarding

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90. These new sections include a provision allowing wineries to amend their contracts with Virginia wine wholesalers, provided such amendments are not inconsistent with the Act, a conflict of laws provision providing that Virginia law applies to any contract governing the marketing of wine in Virginia, a provision defining when a contract is to be deemed in effect as of the effective date of the Act and therefore covered by the Act, and a shortened severability clause. *Id.* §§ 4-118.47, -118.57, -118.58, -118.61.

91. VA. CODE ANN. § 9-6.14:14.1 (Cum. Supp. 1987); see also Jones, *Administrative Procedure: Annual Survey of Virginia Law*, 21 U. RICH. L. REV. 611, 622 (1987).

92. Jones, *supra* note 91, at 622.

93. Jones, *supra* note 91, at 622-27; see also VSB Comm. on Legal Ethics, *Legal Ethics Op. Nos.* 987, 981 (1987).

94. H.J. Res. 333, 1989 Sess., 1989 Va. Acts 2103. Some of the other problems cited in the joint resolution creating the subcommittee were the lack of a mechanism for developing precedent and case law, decisional inconsistency that has led to confused interpretations of statutes and regulations, and a rotation system that has not permitted the development of sufficient professional expertise. *Id.*

95. REPORT OF THE AD HOC COMMITTEE ON HEARING OFFICERS at 3 (1988). The Ad Hoc Committee was established by Secretary of Administration Carolyn Jefferson Moss. It consists of two members of the Virginia State Bar, two members of the Virginia Bar Association, two or three Agency heads and two or three hearing officers. The Ad Hoc Committee was established on the recommendation of the Governor's Commission on Efficiency in Government to review the use of attorney volunteers as hearing offers in the decision of administrative cases in Virginia. *Id.* at 2.

the laws and regulations they are engaged to interpret and apply.<sup>96</sup> The problem is caused by inadequate training and a mandatory rotation system that denies hearing officers the opportunity to develop expertise in any particular subject area.<sup>97</sup> This lack of expertise has, the report found, contributed to decisional inconsistency and increased transactional costs.<sup>98</sup> The committee recommended, therefore, that the hearing officer's primary function should be presiding over hearings.<sup>99</sup>

The second recommendation was for standardized formal hearing rules that would apply to all regulatory agencies, boards and commissions.<sup>100</sup> Of the more than sixty agencies polled by the committee, thirty-one reported that they used procedural rules in addition to the VAPA.<sup>101</sup> The report found that a second, common complaint was inefficiency that resulted from having to learn new rules for each agency.<sup>102</sup> Thus, the report concluded, uniform procedural rules would produce greater efficiency in case decisions, reduce the likelihood of meritorious claims being foreclosed by procedural technicalities<sup>103</sup> and "enhance the image of governmental fairness."<sup>104</sup>

The joint subcommittee is charged, therefore, with the responsibility to study the feasibility of creating a panel of full-time administrative law judges and establishing uniform rules of procedure for administrative hearings.<sup>105</sup> The subcommittee must submit its recommendations to the Governor and the General Assembly by December 1, 1989,<sup>106</sup> presumably so that any bills concerning a new system can be addressed in the 1990 session.

A full-time panel of hearing officers would help solve the problems cited by the General Assembly and others.<sup>107</sup> By using

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96. *Id.*

97. *Id.* at 4-5.

98. *Id.* at 3.

99. *Id.* at 5. An additional benefit produced by the employment of full-time hearing officers through a central office, as opposed to employment through individual agencies, would be the reduction of the appearance of undue influence of the agency over the conduct of the hearing and recommended decision. *Id.*

100. *Id.* at 6.

101. *Id.* at 7.

102. *Id.*

103. *Id.* at 8.

104. *Id.* at 9.

105. *Id.*

106. *Id.*

107. *E.g.*, Jones, *supra* note 91, at 622-27.

judges who are not in private practice and who would not be appearing before the same agency on behalf of a client, the potential for conflict of interest and the appearance of impropriety would be reduced.

The potential disadvantages to this approach are increases in transactional costs and the further institutionalization of the process, resulting in a larger bureaucracy. These disadvantages are not extreme, however, because most agencies will continue to use informal proceedings to handle most rulemaking and case decisions. It would not be necessary to involve hearing officers in these informal proceedings if the agency affords the parties an opportunity for a later formal evidentiary hearing.

Practitioners should welcome both proposed changes. Appearing before knowledgeable and professional hearing officers using uniform rules should enable attorneys to make more accurate predictions of how their cases will be decided. These changes should also increase the use of case decision precedents, facilitating better preparation of cases before agencies.

### III. AGENCY DECISION AFFECTING ADMINISTRATIVE PROCEDURE

Several important procedural decisions were made in a formal hearing before the State Air Pollution Control Board (SAPCB) on a permit to operate a poultry rendering plant.<sup>108</sup> Citizens living near the proposed rendering plant petitioned the SAPCB for a formal hearing on their challenge to the issuance of the permit. The SAPCB had no formal hearing rules and decided to employ the SWCB's Procedural Rule No. 1 for that purpose.

The hearing officer appointed by the SAPCB rejected the applicant's contention that the citizens had no standing to prosecute the appeal, relying on the Supreme Court of Virginia's decision in *Virginia Beach Beautification Commission v. Board of Zoning Appeals*.<sup>109</sup> The hearing officer held that "those persons occupying or owning land within close proximity of a proposed rendering plant of this nature have a 'substantial' grievance in terms of potential impact of obnoxious odors."<sup>110</sup> The applicant also contended that

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108. Formal Hearing on Mountain View Rendering Company Permit (Registration No. 21087) (State Air Pollution Control 1988).

109. Recommended Findings of Fact and Conclusions of Law, Formal Hearing on Mountain View Rendering Co. Permit (Registration No. 21087) at 13-14 (Aug. 18, 1988).

110. *Id.* at 13.

the hearing officer must conduct a hearing in the same manner as a reviewing court, sustaining the SAPCB on the basis of its informal record if its initial decision were supported by substantial evidence. The hearing officer rejected the applicant's contentions concerning the burden of proof and scope of review.

The logical conclusion of this approach would be that, even though the formal record, standing alone, might support a Board decision in the petitioner's favor, petitioner could prevail only by showing that the informal record standing alone could not have reasonably supported the Board's previous decision. Neither the VAPA, Procedural Rule No. 1, nor the principles of administrative law support such a position.<sup>111</sup>

The hearing officer concluded that the record of the formal hearing should be reviewed in its entirety, *de novo*, and that the "degree of proof required should be similar to the 'preponderance of the evidence' standard applied in the majority of civil cases in Virginia."<sup>112</sup> The hearing officer also concluded that "parties who have petitioned for the formal hearing have the burden of going forward on the issues of fact and shall bear the burden of ultimate persuasion on all issues."<sup>113</sup> The hearing officer's decisions on these points were accepted by the SAPCB as part of its final decision.

#### IV. JUDICIAL DECISIONS AFFECTING ADMINISTRATIVE PROCEDURE

##### A. *Judicial Deference to Agency Action*

One of the hallmarks of judicial review of agency decisions is the high degree of deference afforded to agency decisions by the court.<sup>114</sup> In recent years, courts have overturned agency decisions only on rare occasions. In 1988, however, the Supreme Court of Virginia, the Court of Appeals of Virginia, and the lower courts did

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111. *Id.* at 17.

112. *Id.* at 18-19.

113. *Id.* at 15.

114. Under the VAPA, the burden is on the party complaining of the agency action to designate and demonstrate an error of law. VA. CODE ANN. § 9-6.14:17 (Repl. Vol. 1989). The court's review is limited to an examination of the agency record; no *de novo* review is allowed. *Id.* The standard of review with respect to issues of fact is whether there is substantial evidence in the record to support the agency's decision. *Id.* Under this standard, the court can overturn the agency's decision only if, considering the record as a whole, a reasonable mind would *necessarily* come to a different conclusion. *Virginia Real Estate Comm. v. Bias*, 226 Va. 264, 269, 308 S.E.2d 123, 125 (1983) (emphasis in original).



reverse several agency decisions.<sup>115</sup> These cases should probably not be viewed, however, as an emerging trend away from judicial deference to agency decision making.

In *Board of Supervisors v. King Land Corporation*,<sup>116</sup> the Supreme Court of Virginia reversed the court of appeals decision<sup>117</sup> that had upheld the agency's action. In this case, the State Health Commissioner had issued a permit to operate a solid waste landfill without requiring proof of financial responsibility.<sup>118</sup> The Virginia solid waste statutes<sup>119</sup> directed the State Board of Health to promulgate regulations requiring owners of solid waste landfills to show evidence of financial responsibility for closure and post-closure care, but the statute did not contain a deadline for the promulgation of the regulations.<sup>120</sup> The Board had not promulgated any such regulations at the time the permit was issued.<sup>121</sup> The Board of Supervisors of King and Queen County challenged the issuance of the permit as an error of law because the permittee was not required to demonstrate financial responsibility.<sup>122</sup> The court of appeals held that the Board of Health's failure to promulgate the regulations did not invalidate the permit because the statute lacked a specific deadline for promulgating the regulations.<sup>123</sup>

The Supreme Court of Virginia reversed the court of appeals,<sup>124</sup> holding that because the Board of Health had failed to promulgate the regulations within a reasonable time after the statute had been enacted, the Health Department lacked the authority to issue any

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115. *E.g.*, *Board of Supervisors v. King Land Corp.*, 238 Va. 97, 380 S.E.2d 895 (1989); *Cooper v. Occoquan Land Dev. Corp.*, 8 Va. App. 1, 377 S.E.2d 631 (1989); *Lundy v. Merilat Indus.*, 14 Va. Cir. 224 (1988).

116. 238 Va. 97, 380 S.E.2d 895 (1989).

117. *King Land Corp. v. Board of Supervisors*, 4 Va. App. 597, 359 S.E.2d 823 (1987).

118. 238 Va. at 99, 380 S.E.2d at 895.

119. VA. CODE ANN. § 32.1-182 (Repl. Vol. 1985).

120. The statute required the Board to:

no sooner than October 1, 1981, promulgate regulations which insure that, in the event that a facility for the disposal of solid waste or a facility in which hazardous waste is stored, treated, or disposed is abandoned, the costs associated with protecting the public health and safety from the consequences of such abandonment may be recovered from the person abandoning the facility.

C. No sooner than October 1, 1980, and no later than March 1, 1980, the Board shall make available for public hearing and comment an initial draft of such regulations.

*Id.*

121. *King Land Corp.*, 238 Va. at 101, 380 S.E.2d at 896.

122. *Id.* at 102, 380 S.E.2d at 897.

123. *Id.*

124. *Id.* at 105, 380 S.E.2d at 898.

landfill permits until the regulations were in effect and complied with by permit applicants.<sup>125</sup>

Because the statute was ambiguous, the court was required to determine the intent of the legislature, by invoking a principle of statutory construction known as the "mischief rule."<sup>126</sup> "Under this rule, every statute is to be read so as to 'promote the ability of the enactment to remedy the mischief at which it is directed.'"<sup>127</sup> The court found that the mischief the General Assembly sought to redress was expressed in the statute, *i.e.*, to protect the public from the potentially adverse consequences of abandoned landfills.<sup>128</sup> Construing the statute in light of this purpose, the court held that the General Assembly intended the Board of Health to finalize the regulations by October 1, 1981.<sup>129</sup> The court found further that because the intent of the General Assembly was to suppress the mischief described above, it must have intended that no permits could be granted if the financial responsibility requirements were not finalized by that date.<sup>130</sup>

Justice Lacy, concurring in part and dissenting in part, argued that the statute did not provide that the Commissioner's licensing authority would be terminated if it failed to issue the regulations.<sup>131</sup> Furthermore, by terminating the Commissioner's licensing authority, the dissent contended that the majority created as much mischief as it sought to remedy.<sup>132</sup>

When this case is examined in light of federal environmental case law, it is not surprising that the permit was invalidated.<sup>133</sup> What is somewhat surprising is that the Supreme Court of Virginia

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125. *Id.*

126. *Id.* at 102, 380 S.E.2d at 897.

127. *Id.*

128. *Id.* at 103-04, 380 S.E.2d at 898.

129. *Id.*; *see supra* note 120.

130. *Id.*

131. *Id.* at 107, 380 S.E.2d at 899-900 (Lacy, J., concurring in part, dissenting in part).

132. *Id.* at 106, 380 S.E.2d at 899. In support of this argument, Justice Lacy contended that if no permits could be issued, the "multi-pronged regulatory scheme" would be disrupted, and state control over an area "clearly sought to be regulated" would be withdrawn. *Id.*

133. The trend in environmental law is to take a strict stand in favor of protecting the environment, even when other, traditional legal axioms must yield. Nowhere is this more evident than in the federal "Superfund" legislation, where courts have discarded traditional rules of corporate liability in holding officers and directors of corporations responsible for hazardous waste sites personally liable for clean up costs. *See, e.g.*, *United States v. Northeast Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984), *modified*, 810 F.2d 726 (8th Cir. 1986).

would do so, given its tradition of judicial deference, and the fact that the statute in question did not state expressly that no permits could be issued if the financial responsibility regulations were not promulgated within a certain time.

Earlier in 1989, the Supreme Court of Virginia followed its traditional approach to agency review in *Ford Motor Co. v. Courtesy Motors*.<sup>134</sup> In this case, Ford wished to grant a franchise to a dealership located within six miles of an existing dealer. The Commissioner of Motor Vehicles, operating pursuant to the Virginia Motor Vehicle Dealer Licensing Act,<sup>135</sup> designated a hearing officer to hear evidence whether the market could support a second dealership.<sup>136</sup> Before making his decision, the hearing officer was required to obtain the recommendation of the Motor Vehicle Dealers' Advisory Board.<sup>137</sup> Despite the Act's mandate that no two Board members could be dealers of the same manufacturer,<sup>138</sup> two members were Ford dealers.<sup>139</sup> The hearing officer obtained the recommendations of most of the members of the advisory board, including the two Ford dealers.<sup>140</sup> The Commissioner determined that the existing dealer had failed to show that the market could not support a second dealership.<sup>141</sup>

The existing dealer appealed this decision to the circuit court which confirmed the Commissioner's findings.<sup>142</sup> The dealer then appealed to the court of appeals, which reversed the trial court on the grounds that the recommendations of the Advisory Board members were a condition precedent to the Commissioner's action, and because the Board was not validly constituted, the Commissioner's decision was invalid.<sup>143</sup>

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134. 237 Va. 187, 375 S.E.2d 362 (1989).

135. VA. CODE ANN. §§ 46.1-515 to -550.538 (Repl. Vol. 1986) (repealed 1989 Va. Acts 727).

136. 237 Va. at 189, 375 S.E.2d at 363.

137. *Id.* at 189, 375 S.E.2d at 363.

138. VA. CODE ANN. § 46.1-550.2 (Repl. Vol. 1986) (repealed 1989 Va. Acts 727).

139. 237 Va. at 189, 375 S.E.2d at 363.

140. *Id.* The members of the Board did not meet and act as a unified body in rendering their recommendations, but rather acted independently, each sending his individual recommendation to the hearing officer. There was no evidence in the record that any of the Board members, including the two Ford dealers, had consulted each other before sending their recommendations. *Id.* at 191, 375 S.E.2d at 364.

141. *Id.* at 189-90, 375 S.E.2d at 363.

142. *Id.* at 190, 375 S.E.2d at 363.

143. *Courtesy Motors, Inc. v. Ford Motor Co.*, 1 Va. App. 366, 339 S.E.2d 202 (1986).

The Supreme Court of Virginia reversed the court of appeals.<sup>144</sup> It found that the disqualification of one member of the board was harmless error and did not nullify the action of the remaining board members.<sup>145</sup> This case is more typical of judicial review in Virginia<sup>146</sup> in that the court refused to overturn the agency's decision in spite of a violation of State law by invoking the doctrine of "harmless error."<sup>147</sup>

### B. *Recovery of Attorneys' Fees*

The VAPA provides that in any civil case brought under the judicial review sections a person who challenges an agency action and "substantially prevails on the merits" can recover reasonable costs and attorneys' fees from the agency, if the agency is found to have acted unreasonably.<sup>148</sup> It would appear from the lack of reported cases in this area that such fees are rarely awarded.<sup>149</sup>

Recently, the Supreme Court of Virginia reversed an award of attorneys' fees. *Commonwealth v. Lotz Realty Co.*<sup>150</sup> culminated protracted litigation that pitted the right to religious freedom against Virginia's anti-discrimination laws. In this case, a realtor in

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144. 237 Va. at 190-91, 375 S.E.2d at 364. The court based its decision on the following factors:

First, there is no evidence indicating that Courtesy's rights were affected in any way by the disqualification of one board member.

Second, the board does not act as a body; the statute contemplates that each member make his or her recommendations to the Commissioner, and that is what was done in this case. There is no evidence that either Britt or Barkhouser had contact with each other or the other board members before each of the five board members submitted independent recommendations. Moreover, the Commissioner could have disregarded these recommendations.

Third, the statute permits one member of the board to be a Ford dealer; excluding either Barkhouser or Britt from consideration, a total of four members, a majority of the board, recommended granting the second franchise.

*Id.* at 191, 375 S.E.2d at 364.

145. *Id.* at 190-91, 375 S.E.2d at 364.

146. *See, e.g., Johnston-Willis Hosp., Ltd. v. Kenley*, 6 Va. App. 231, 258-59, 369 S.E.2d 1, 6-7 (1988); *Cooper v. Occoquan Land Dev. Corp.*, 8 Va. App. 1, 377 S.E.2d 631 (1989); *Greenlee v. Virginia Supplemental Retirement Sys.*, No. 0765-88-1 (Va. App. 1989); *Lowe v. Virginia Supplemental Retirement Sys.*, 13 Va. Cir. 221 (1988).

147. 237 Va. at 190-91, 375 S.E.2d at 364.

148. VA. CODE ANN. § 9-6.14:21 (Repl. Vol. 1989). This provision contains one caveat, however, and that is that attorneys fees and costs will not be awarded if "special circumstances would make an award unjust." *Id.*

149. One would assume that if the fees were awarded, the agency would appeal the award. From the lack of appeals from such awards, one can surmise that they are rarely granted.

150. 237 Va. 1, 376 S.E.2d 54 (1989).

Newport News used Christian symbols and slogans in its advertising.<sup>151</sup> The Virginia Real Estate Commission filed a complaint against the realtor charging that the realtor was violating the Virginia Fair Housing Law.<sup>152</sup> The circuit court found that the Commission had failed to carry its burden of proving a violation of the statute and awarded attorneys' fees to the realtor.<sup>153</sup>

The Supreme Court of Virginia affirmed the trial court's decision with respect to the violation, but reversed the order awarding the attorneys' fees.<sup>154</sup> With little discussion, the court found that because the trial court had not found that the Commission had acted unreasonably, "and the record would not have supported such a finding in any event"<sup>155</sup> the award should be set aside.

This case affirms the proposition that attorneys' fees are difficult to recover in VAPA cases. The difficulty probably arises in part from the standard of review itself, which requires the court to "take due account of the presumption of official regularity [and] the experience and specialized competence of the agency."<sup>156</sup> Thus, there is a presumption that the agency has acted reasonably, and the challenger has the burden of showing the agency has acted unreasonably. This is a formidable burden, especially if it is construed by the courts as the state agency's attorney would have it.<sup>157</sup>

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151. *Id.* at 4, 376 S.E.2d at 55. In conjunction with the use of these symbols, the realtor included a disclaimer in many of its advertisements that claimed to "list, sell and rent any property without any preference, limitation or discrimination based on race, color, religion, sex, or national origin or any intention to make such a preference, limitation or discrimination." *Id.* at 6.

152. VA. CODE ANN. §§ 36-86 to -96 (Repl. Vol. 1984 & Cum. Supp. 1989). The Act provides in part:

It shall be an unlawful discriminatory housing practice, because of race, color, religion, national origin, sex, elderliness, parenthood or handicap for any person having the right to sell, rent, lease, control, construct, or manage any dwelling constructed or to be constructed, or any agent, independent contractor or employee of such person:

(3) To make, print or publish, or cause to be made, printed or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation or discrimination, or an intention to make any such preference, limitation, or discrimination.

*Id.* § 36-88.

153. 237 Va. at 6, 376 S.E.2d at 57.

154. *Id.* at 12, 376 S.E.2d at 59.

155. *Id.* at 11, 376 S.E.2d at 59.

156. VA. CODE ANN. § 9-6.14:17 (Repl. Vol. 1989).

157. In addition to finding that the challenger has prevailed substantially on the merits, the court must base its judicial finding of unreasonableness on "some more stringent standard, such as, for example, evidence that responsible, supervisory personnel of the agency knew or should have known that the agency's action was arbitrary and capricious or was in bad faith and took no corrective action." 1983-84 Op. Va. Att'y Gen. at 3 (1983). Even then,

### C. Other Procedure Issues

#### 1. Timing of Filing Appeals

In *Cooper v. Occoquan Land Development Corp.*,<sup>158</sup> the trial court dismissed an appeal of a decision of the State Technical Review Board because the appeal had not been filed in time.<sup>159</sup> The Rules of the Supreme Court of Virginia, which govern the filing of a notice of appeal pursuant to the VAPA, require that the notice be filed within thirty days after the agency enters its order.<sup>160</sup> This rule is jurisdictional and thus cannot be extended.<sup>161</sup>

Although the courts grant deference to an agency decision, a court reviewing another court's decision with regard to an agency matter will not grant the same degree of deference. Here the court of appeals had little difficulty overturning the judge's ruling as to when the agency decision had been entered.<sup>162</sup> This case is curious

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the agency may excuse itself from liability by showing "special circumstances that exist which would make an award unjust." *Id.* at 4.

158. 8 Va. App. 1, 377 S.E.2d 631 (1989). The appellant development corporation had obtained building permits to construct homes on several lots. When the lots flooded after a heavy rain, the county building official revoked the permits on the ground the permit applications did not contain complete and accurate information, even though the applicant had certified that the application was in compliance with all applicable ordinances and regulations. The county board of building code appeals ordered reinstatement of the permits upon full compliance. The State Technical Review Board, to which the applicant then appealed, concluded that the permits should not have been revoked, and ordered that the permits be restored, because there was insufficient evidence that the applicant had made any false statements or misrepresentations of fact. The county then appealed this decision to the circuit court. *Id.* at 3-4, 377 S.E.2d at 632.

159. *Id.* at 1, 377 S.E.2d at 631.

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

161. *Forbes v. Kenley*, 227 Va. 55, 57, 314 S.E.2d 49 (1984) (time requirements of Part 2A of Rules mandatory and jurisdictional); *C.f. Saunders Oil Co. v. Pethtel*, 13 Va. Cir. 337 (1988), *writ denied*, \_\_\_ Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (1989). In this case, the petitioner attempted to protest a contract made by the highway department. According to VA. CODE ANN. § 11-66(A) (Repl. Vol. 1989), such protest must be filed within ten days after the bid records are made available for inspection. 13 Va. Cir. at 338. The petitioner was not able to obtain copies of the records until six weeks after the award was made, and then filed his petition within ten days after receiving the records. *Id.* at 337. The circuit court ruled that the petition was not timely filed: "the critical point in time in which the ten-day response time begins is when the records are 'available for inspection'. . . It was the petitioner's duty, not VDOT's responsibility, to ascertain the award date and to whom the award was given and to inspect the bid documents at VDOT offices, if necessary." *Id.* at 338-39.

162. *Cooper*, 8 Va. App. at 4-6, 377 S.E.2d at 633-34. The order was ambiguous because it contained three different dates. The only date that claimed to be the date of entry was almost one year before the date of the hearing, and thus was clearly a typographical error. The other two dates, which were later than the first in month and date, appeared without explanation. The obvious conclusion is that the date that claimed to be the date of entry should have been treated as such, except that the year should have been corrected. Had this

because, for the most part, courts prefer to dispose of appeals on procedural grounds rather than reach the merits. In *Cooper*, on the other hand, the court reversed the procedural dismissal, and then went on to reverse the Board's reinstatement of the permit.<sup>163</sup> For this reason, the case also represents a step away from judicial deference to the agency's decision.

## 2. Timing of Hearings on Appeal

In contrast to the mandatory filing requirements of Rule 2A,<sup>164</sup> one circuit court has found that the statutory time limits for court hearings of grievances of public employees are directory. In *Blackwell v. Department of Motor Vehicles*<sup>165</sup> the grievance procedure for state employees<sup>166</sup> required that the trial court hear an appeal from the agency within thirty days of receipt of the record and render its decision no later than fifteen days from the end of the hearing.<sup>167</sup> In this case, the agency record was filed in May, but the court did not take any action until November of the same year when the grievant requested a hearing.<sup>168</sup> The hearing was then scheduled for February of the following year.<sup>169</sup> The agency contended that the time limit for conducting the hearing had long since expired, and therefore the court no longer had jurisdiction to hear the appeal.<sup>170</sup> The court rejected the agency's argument by finding that the time limits in the statute were directory rather than mandatory, and thus the failure of the court to act within these limits did not divest the court of its jurisdiction to go forward with the appeal.<sup>171</sup>

Two points can be gleaned from this case. First, the court may have felt the need to redeem itself for its delay in hearing the appeal, although it is unclear whether the employee had the responsi-

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been done, the appellant would have definitely been dilatory in its filing of the notice of appeal. Instead, the court chose the last date, which allowed the appeal to go forward. *Id.* at 5-6, 377 S.E.2d at 633-34.

163. *Id.* at 8, 377 S.E.2d at 634-35. The court found that because the applicant had certified that the application was complete when it was not, the applicant had made an affirmative, although perhaps unintentional, misrepresentation. *Id.* at 8-9, 377 S.E.2d at 634-35.

164. VA. SUP. CT. R. 2A.

165. 14 Va. Cir. at 326 (1989).

166. VA. CODE ANN. § 2.1-114.5:1 (Cum. Supp. 1987).

167. *Id.* § 2.1-114.5:1(E).

168. 14 Va. Cir. at 327.

169. *Id.*

170. *Id.*

171. *Id.* at 329.

bility to request the hearing or whether the court was obligated to contact the employee. The second point is that the court was unwilling to deny the employee his day in court because of circumstances that may have been beyond his control.

## V. CONCLUSION

The General Assembly was relatively active in the area of administrative law in 1989, although it made only minor revisions to the VAPA itself. In creating two exemptions to the VAPA and putting certain agency actions, but not entire agencies, under the control of the VAPA, the legislature further complicated the already complex applicability rules of the VAPA. The General Assembly made some progress on needed revisions to the COPN law, although the changes did not simplify this murky area of administrative procedure. Finally, by establishing a joint subcommittee to study rules and hearing officers for administrative hearings, the General Assembly raised expectations that it will introduce more organization, skill and certainty into these important forums.

Although not breaking new ground, the Virginia courts showed a willingness to examine agency decisions more closely than in the past, instead of merely affirming the agency decision with little or no comment. Although some could argue that this reduces the certainty and finality of agency decisions, it also demonstrates that challengers to agency decisions can obtain meaningful court reviews.

The General Assembly should continue its review of the COPN law during the next several sessions, and should address legislation aimed at establishing a uniform administrative hearing system. These would be welcome developments. The courts will most likely continue their cautious approach to agency actions, although there are some signs that agency decisions will receive closer scrutiny in the future.



