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Annual Survey of Virginia Law: Administrative Procedure

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ADMINISTRATIVE PROCEDURE*

*John Paul Jones***

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I. INTRODUCTION

After three years of working major changes to the Virginia Administrative Process Act (VAPA),¹ the General Assembly paid

* This article addresses legislation from the 1987 session of the General Assembly, other promulgated law published in 1987, and court decisions issued in 1986 and the first four months of 1987.

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1. VA. CODE ANN. §§ 9-6.14:1 to :25 (Repl. Vol. 1985 & Cum. Supp. 1987).

scant attention to the Commonwealth's fundamental law of administrative procedure in 1987. During its most recent session, the legislature produced only three amendments to VAPA, inserting a regulation severability provision,² modifying VAPA's impact on Voluntary Formulary changes,³ and narrowing the exemption enjoyed by the Virginia Marine Resources Commission.⁴ In two other statutory changes affecting administrative procedure, the General Assembly expressly provided for agency subdelegation⁵ and specified the method for computing time for a rule of court.⁶ While severability has evolved into an issue of some import in federal administrative law,⁷ its 1987 expression by statutory amendment is unlikely to create a controversy in Virginia administrative law. Three of the other legislative changes should give neither bench nor bar much pause. The subdelegation provision, however, does present a potential problem because of its apparent incompatibility with recent changes to the law of administrative adjudication. The problem is unlikely to be serious given the demonstrated good sense of Virginia's agency heads, but it ought to be remedied by prompt corrective legislation.

In the absence of a major legislative initiative, center stage in this report goes to the promulgations of two quasi-legislative bodies: the Executive Secretary of the Supreme Court and the Standing Committee on Legal Ethics of the Virginia State Bar. The former has issued regulations governing independent hearing officers,⁸ the latter has offered a comprehensive opinion on state agency practice by an attorney who serves as a hearing officer.⁹ These two products are of interest to attorneys contemplating occasional ser-

2. See *infra* text accompanying notes 13-20.

3. See *infra* text accompanying notes 21-34.

4. See *infra* text accompanying notes 35-51.

5. See *infra* text accompanying notes 52-67.

6. See *infra* text accompanying notes 68-73.

7. The application of the doctrine of severability to nearly two hundred federal regulatory statutes has been called in question by the Supreme Court's decision that the legislative veto is unconstitutional. *INS v. Chadha*, 462 U.S. 919, 967 (1983) (White, J., dissenting). See *Alaska Airlines v. Brock*, 107 S.Ct. 1476 (1987) (upholding against legislative veto non-severability challenge the remainder of § 43 of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1552 (1982)). See generally Comment, *Legislative Veto Provisions and Severability Analysis: A Reexamination*, 30 St. Louis U.L.J. 537 (1986); Note, *The Aftermath of Chadha: The Impact of the Severability Doctrine on the Management of Intragovernmental Relations*, 71 VA. L. REV. 1211 (1985); Note, *Resolving Challenges to Statutes Containing Unconstitutional Legislative Veto Provisions*, 85 COLUM. L. REV. 1808 (1985).

8. See *infra* text accompanying notes 74-104.

9. See *infra* text accompanying notes 105-116.

vice as hearing officers, as well as to counsel who represent public and private clients before such officers.

Meanwhile, the state bench continued to shape administrative procedure through decisional law. Five cases, three in the supreme court, one in the court of appeals, and one in circuit court, addressed the scope of a court's jurisdiction to review agency action.¹⁰ Both the supreme court and a circuit court issued decisions involving a discontented regulatee's right to a formal agency hearing.¹¹ Finally, the court of appeals twice considered the discretion of an agency head to issue a case decision without complying with statutorily created but non-binding preliminaries.¹² Of them all, the supreme court's decision to limit standing in zoning appeals to landowners, and its decision that it lacked the power to transfer an appeal to the court of appeals have perhaps the most impact. The latter is made more palatable by the likelihood of prompt legislative correction.

II. LEGISLATIVE CHANGES TO THE VIRGINIA ADMINISTRATIVE PROCESS ACT

A. *Addition of a Severability Clause*

The issue of whether the remainder of a statute should survive judicial invalidation of one or more of the statute's parts is known as severability.¹³ Sometimes the legislature will make known its preference by inserting in a statute direction that courts treat parts not invalidated as surviving, or that courts consider the section or statute as an indivisible whole.¹⁴ In 1986, the General Assembly added a general severability clause to title 1 of the Virginia Code.¹⁵ It directs that the provisions of any statute in the Code (including VAPA) be treated as severable, that is, as surviving the invalidation of any other provision or application.¹⁶ This general mandate contains two exceptions: when the statute itself provides to the contrary, or when it appears that two or more provisions

10. See *infra* text accompanying notes 117-176.

11. See *infra* text accompanying notes 177-184.

12. See *infra* text accompanying notes 185-198.

13. See *INS v. Chadha*, 462 U.S. 919, 931-35, 1013-16 (Rehnquist, J., dissenting).

14. At least twenty-five Virginia statutes have their own severability clauses. See, e.g., VA. CODE ANN. §§ 2.1-339.1 (Repl. Vol. 1987); § 18.2-374.1 (Repl. Vol. 1982); § 55-210.30 (Repl. Vol. 1986).

15. *Id.* § 1-17.1 (Repl. Vol. 1987).

16. *Id.*

must operate together or not at all.¹⁷ When either exception applies, provisions of a statute are not to be regarded as severable. In 1987, the legislature inserted an additional general severability clause, this time to VAPA.¹⁸ The 1987 severability clause does generally for regulations what the 1986 severability clause does generally for statutes. It creates a general rule of severability with exceptions for expressly contrary directions or necessarily inseverable packages.¹⁹

The breadth of their exceptions keeps both general severability sections from being controversial. Regulation-drafting agencies wanting provisions to stand or fall together are free to remove their products from the reach of the general mandate of severance simply by specifying inseverability. Reviewing judges considering claims that two or more provisions must stand or fall together will find the new statutes no less restrictive than the existing judicial rule of severability.²⁰

B. VAPA No Longer Applies to the Voluntary Formulary

The Virginia Voluntary Formulary is a list of drugs which shows for each drug equivalent products marketed by other drug manufacturers.²¹ The Formulary was compiled and is amended by the

17. *Id.*

18. *Id.* § 9-6.14:5.1 (Cum. Supp. 1987).

19. Severability.—The provisions of regulations promulgated under this chapter or the application thereof to any person or circumstances which are held invalid shall not affect the validity of other regulations, provisions or applications which can be given effect without the invalid provisions or applications. The provisions of all regulations are severable unless (i) the regulation specifically provides that its provisions are not severable; or (ii) it is apparent that two or more regulations or provisions must operate in accord with one another.

Id.

20. In *Robertson v. Preston*, 97 Va. 296, 33 S.E. 618 (1899), it was said:

Where a part of an act of assembly is unconstitutional, that fact does not authorize the courts to declare the other provisions of the act void, unless they are so connected in subject matter, depending on each other, operating for the same purpose, or otherwise connected together in meaning that it cannot be presumed that the General Assembly would have enacted the one without the other.

Id. at 300, 33 S.E. at 619; see *Harrison v. NAACP*, 360 U.S. 167, 178 (1959); *Woolfolk v. Driver*, 186 Va. 174, 181-83, 41 S.E.2d 463, 467 (1947); *New v. Atlantic Greyhound Corp.*, 186 Va. 726, 736-38, 43 S.E.2d 872, 877-78 (1947)(valid portions may survive if void portion not inducement for passage or too interwoven with remainder); *Strawberry Hill Land Corp. v. Starbuck*, 124 Va. 71, 77-78, 97 S.E. 362, 364 (1918) (where parts not distinctively separable, whole must fall); see also *Black v. Trower*, 79 Va. 123 (1884).

21. VA. CODE ANN. § 32.1-83 (Repl. Vol. 1985).

State Board of Health.²² The Board of Health acts upon recommendations of the Virginia Voluntary Formulary Board which is comprised of physicians and pharmacists, a dentist, and a consumer advocate.²³ Selection of drugs for addition to the list is based on information from the federal Food and Drug Administration, scientific testing, and clinical experience.²⁴ Use of the list by a prescriber is voluntary, but where a prescriber orders a drug generically, a pharmacist must fill the prescription with a product on the list.²⁵

Until this year, Formulary Board decisions to recommend changes to the Formulary were regulations governed by VAPA.²⁶ Additional notice requirements contained in the Formulary Act ensured that competing manufacturers were provided advance notice of proposed Formulary additions.²⁷ The 1987 amendments to VAPA and to the Virginia Voluntary Formulary Act remove Formulary recommendations from the reach of the general administrative procedure statute.²⁸ Since the Formulary Act already permits the State Board of Health to forego VAPA proceedings when it acts on Formulary Board decisions,²⁹ the 1987 amendments remove Formulary changes from VAPA entirely.

For the notice and comment guarantees VAPA in the past afforded persons interested in the Formulary, the 1987 amendments substitute the guarantee of a public meeting.³⁰ Notice of that meeting to persons other than drug manufacturers is to be made

22. *Id.* § 32.1-81.

23. *Id.* § 32.1-80.

24. *Id.* § 32.1-83.

25. *Id.* § 32.1-87.

26. 1979 VA. ACTS 1046; *see* 1976 VA. ACTS 890 (judicial review under VAPA of Board decisions).

27. VA. CODE ANN. § 32.1-81 (Cum. Supp. 1987).

28. When viewed against the panorama of bureaucratic lawmaking in the Commonwealth, Virginia's general administrative procedure statute is something less than all encompassing. Some bureaucratic agencies are removed from VAPA's reach entirely, some are within VAPA's reach for some actions and without for others. VAPA refers to exceptions of the former ilk as "exemptions," *id.* § 9-6.14:4.1(A) and exceptions of the latter as "exclusions," *id.* § 9-6.14:4.1(C). Although the 1987 amendment is inserted among the exemptions, suggesting that the Board is removed in all its works from VAPA control, the language of the amendment makes clear that the General Assembly assented only to what is functionally an exclusion. The amendment says: "The following agencies are exempted from the provisions of this Chapter . . . (11) The Virginia Voluntary Formulary Board in formulating recommendations regarding amendments to the Formulary pursuant to § 32.1-81." *Id.* § 9-6.14:4.1(A)(11).

29. *Id.* § 32.1-81(B)(Cum. Supp. 1987).

30. *Id.*

by publication thirty days in advance in the Virginia Register of Regulations and in a Richmond newspaper of general circulation.³¹ Failure to publish such notice does not affect the validity of decisions by either the Formulary Board or the State Board of Health.³²

The 1987 amendments to VAPA and the Formulary Act erode public access to government decision making. They run counter to the recent trend to increase public involvement in decisions like those involving the Formulary. Among the 1984 amendments to VAPA were several aimed at increasing public involvement before a bureaucratic decision of public import was made.³³ Removing Formulary Board recommendations from VAPA (while continuing to exclude Board of Health Formulary decisions) obscures a government program from the public which is expected to both pay for and benefit from the Voluntary. The amendments relieve the Formulary Board of the obligation to adopt public participation guidelines, or to accept data or comments from interested persons other than drug manufacturers.³⁴

C. Marine Resource Commission Habitat Management No Longer Exempt

On the plus side for advocates of open government by uniform process is the General Assembly's decision to make promulgation of habitat management guidelines and general permits subject to VAPA.³⁵ Habitat management is one of the two major responsibilities of the Virginia Marine Resources Commission (VMRC).³⁶ Habitat management includes management of state-owned subaqueous lands as well as conservation of wetlands and coastal sand dunes. These tasks are defined by separate but similar statutes in

31. *Id.*

32. *Id.*

33. *See id.* § 9-6.14:7.1 (Repl. Vol. 1985).

34. Ramifications of the supreme court's decision in Virginia Beach Beautification Comm'n v. Board of Zoning Appeals, 231 Va. 415, 344 S.E.2d 899 (1986), for judicial supervision by way of review of Board decisions make such amendments even more regrettable, as will become clearer below. *See infra* text accompanying notes 117-148.

35. VA. CODE ANN. § 9-6.14:4.1(E)(Cum. Supp. 1987).

36. VMRC's other major responsibility is regulation of all commercial and recreational fishing, and all fish, shell life, and other marine organisms below the fall line on Virginia's tidal waters. VA. CODE ANN. 1986-87 Admin. L. App. 107. VMRC also sees to the removal of abandoned boats in state waters, licenses marine archaeological operations, administers a fund for waterborne law enforcement, safety, and rescue services, and operates a marine patrol radio dispatch system. *Id.*

title 62.1.³⁷ The wetlands and sand dunes statutes direct VMRC to promulgate general conservation guidelines for local permit-issuing boards,³⁸ to review the decisions of those local authorities,³⁹ and to issue permits for areas without local boards.⁴⁰ The subaqueous land statute makes VMRC the sole permit issuing authority.⁴¹ A 1987 amendment to VAPA makes explicit and comprehensive VAPA's impact on VMRC's performance of these functions.⁴² Before 1986, VMRC was exempt from all of VAPA except for recovery of attorneys' fees, publication of final regulations in the Virginia Register, and some procedures for judicial review of wetlands permit decisions.⁴³ In 1986, VMRC was made subject to VAPA except for its rulemaking.⁴⁴ A provision in the wetlands statute nevertheless required VMRC to issue conservation guidelines "in accordance with the Administrative Process Act."⁴⁵ After the 1986 amendment to VAPA, the wetlands guideline provision could be read to mean that guidelines had to be promulgated in accordance with VAPA's rulemaking procedure despite the broader exclusion of VMRC rulemaking found in VAPA itself. The significance of this interpretation depends on the presumption that there is something in VAPA potentially applicable to guideline promulgation.

37. VA. CODE ANN. §§ 62.1-1 to -4, §§ 62.1-13.1 to -13.20, and §§ 62.1-13.21 to -13.28 (Repl. Vol. 1987). Subaqueous lands include "the beds of the bays and ocean, rivers, streams, [and] creeks." *Id.* § 62.1-3. Wetlands come in two varieties: the vegetated and the nonvegetated. These are defined in *id.* § 62.1-13.2. Coastal primary sand dunes are defined at length in *id.* § 62.1-13.22.

38. Compare *id.* § 62.1-13.4 with *id.* § 62.1-13.24.

39. Compare *id.* § 62.1-13.10 with *id.* § 62.1-13.27.

40. Compare *id.* § 62.1-13.9 with *id.* § 62.1-13.27.

41. *Id.* § 62.1-3.

42. *Id.* § 9-6.14:4.1(E) (Cum. Supp. 1987).

43. 1984 VA. ACTS 346.

44. VA. CODE ANN. § 9-6.14:4.1(E) (Cum. Supp. 1987). As Bob Craft, VMRC's Chief of Administration and Finance, recently reminded me, VMRC's freedom from the rulemaking procedures of VAPA does not mean that the agency is without constraint in its exercise of promulgative lawmaking power. For example, while not required to comply with VAPA rulemaking procedures when issuing regulations for trawling in state waters, VMRC is required to

. . . cause notice of any such action to be taken to be posted in two or more public places in each locality affected at least five days prior to the Commission meeting at which such action may be considered. Such publication shall be in lieu of any other notice and shall be the only procedure required by the Commission in exercising such authority.

Id. § 28.1-69.1.1(C) (Repl. Vol. 1985). The same legislation, 1986 VA. ACTS 52, added identical language to the laws governing VMRC's regulation of oyster harvesting, *see id.* §§ 28.1-83(2), -83(6), -85, -96(B), -124(B); fishing, *see id.* § 28.1-128.1(B); crab harvesting, *see id.* § 28.1-166, -167; and shellfish removal from polluted areas, *see id.* § 28.1-179(11).

45. *Id.* § 62.1-13.4 (Repl. Vol. 1987).

Before 1987, however, a guideline was not ipso facto a rule or regulation about which VAPA prescribed promulgating procedure.⁴⁶ The new VAPA amendment makes clearer the purpose of the wetlands guideline provision by specifying that it is guidelines to which VMRC's exclusion from VAPA rulemaking does not apply.

As to coastal sand dune conservation guidelines, the 1987 VAPA amendment plays even a greater role. Unlike the wetlands law, the sand dune law does not expressly direct VMRC to abide by VAPA in promulgating conservation guidelines.⁴⁷ Before 1987, therefore, it was possible to conclude that, whatever might be required of VMRC when it promulgated a wetlands guideline, VMRC's exclusion from VAPA rulemaking meant that VAPA procedures were not required when VMRC promulgated a sand dune guideline. From the 1987 amendment to VAPA, it seems clear that the General Assembly wants VAPA rulemaking to precede habitat management guideline promulgation whether the guideline covers wetlands or sand dunes.

As to subaqueous lands, the 1987 amendment operates differently. VMRC, not a local board, is the permit issuing authority for use or encroachment of state-owned bottom lands.⁴⁸ The subaqueous land law contains no provision for VMRC promulgation of guidelines. VMRC has, however, issued two "general permits", one for highway construction by the Virginia Department of Highways and Transportation,⁴⁹ and the other for shoreline erosion control through groin construction by riparian property owners.⁵⁰ Before 1987, whether a general permit was a license or a rule as those terms appear in VAPA was an important issue because of the continuing exclusion of VMRC action from VAPA's provisions governing rulemaking.⁵¹ Now, the 1987 amendment to VAPA makes clear that whatever general permits are, they are governed by VAPA.

46. *See id.* § 9-6.14:4(F) (Repl. Vol. 1985).

47. *See id.* § 62.1-13.24 (Repl. Vol. 1987). *But see id.* § 62.1-13.27.

48. *Id.* § 62.1-3.

49. General Permit VGP No. 1, 1:17 Va. Regs. Reg. 1422 (1985).

50. General Permit VGP No. 2, 1:17 Va. Regs. Reg. 1424 (1985).

51. VMRC itself described the general permits as regulations, 1:17 Va. Regs. Reg. 1422, 1424 (1985), a term synonymous with rule according to VAPA. VA. CODE ANN. § 9-6.14:4(F) (Repl. Vol. 1985).

III. OTHER LEGISLATIVE CHANGES

A. *Subdelegation by Agency Heads and Boards*

An amendment to section 1-17.2 of the Virginia Code expressly authorizes the chief executive officer of a state agency to delegate to any agency officer or employee the duties and responsibilities imposed on the agency by law.⁵² The same power to subdelegate is conferred upon agency supervisory boards.⁵³ The power to subdelegate extends to both discretionary and non-discretionary agency functions.⁵⁴ The statute requires the appropriate Governor's Secretary to concur with any subdelegation of an agency's substantive discretionary duties.⁵⁵ No doubt the amendment is intended to codify existing judge-made law which generally recognizes very broad powers of bureaucratic subdelegation.⁵⁶ In at least one application, however, the sweeping language of the amendment should give a reader pause. That application is to the appointment of presiders for formal adjudicative hearings.⁵⁷ By a 1986 VAPA amendment, the authority of agency heads to subdelegate presiding power was curtailed in at least two significant ways: collective bodies functioning as agency heads were barred from delegating to one member of the collective body the power to preside over formal adjudicative hearings, and agency heads (which did not already employ full-time hearing presiders) were barred from adopting the practice of delegating to subordinate agency employees the power to preside over formal adjudicative hearings.⁵⁸ Instead, the General Assembly directed the use of independent lawyer contractors for the conduct of such hearings.⁵⁹ The 1987 amendment to section 1-71.2 says agency heads can subdelegate discretionary powers to any employee. The power to preside over a formal adjudicative hearing is discretionary. The 1987 amendment thus seems to repeal by necessary implication the 1986 amendment to VAPA as far as limiting presiding power subdelegation.⁶⁰

52. VA. CODE ANN. § 1-17.2 (Repl. Vol. 1987).

53. *Id.*

54. *Id.*

55. *Id.*

56. See generally 2 AM. JUR. 2D *Administrative Law* § 221 (1962); 73 C.J.S. *Public Administrative Law and Procedure* § 56 (1983).

57. See VA. CODE ANN. §§ 9-6.14:12, :14.1 (Repl. Vol. 1985 & Cum. Supp. 1987).

58. *Id.* § 9-6.14:14.1 (Cum. Supp. 1987).

59. See *id.*, Jones, *Administrative Procedure: Annual Survey of Virginia Law*, 20 U. RICH. L. REV. 673, 680-88 (1986).

60. The distinction between those presiding over formal adjudicative hearings governed

What makes this implication even more troublesome is the special position of VAPA vis-a-vis other statutes. VAPA expressly says that its purpose is to supplement, not to limit other, basic laws.⁶¹ If section 1-17.2 were viewed as a basic law within the special meaning of that VAPA term,⁶² VAPA itself would be authority for the proposition that the new subdelegation law undoes at least some of last year's hearing officer reform. As used in VAPA, a basic law is, among other things, a statute containing procedural requirements for an agency to make rules or decide cases.⁶³ There is, unfortunately, some facial attraction in the view that section 1-17.2 contains procedures applicable to an agency's exercise of its powers to make rules or decide cases, and is therefore VAPA basic law.

The phrasing of the rest of the new amendment supports the view that section 1-17.2 "trumps" section 9-6.14:14.1. In the 1987 amendment, the power to subdelegate non-discretionary duties is limited by the phrase "[e]xcept as otherwise provided by law";⁶⁴ the power to subdelegate discretionary duties, on the other hand, lacks such a qualifier.⁶⁵ Had the qualifier preceded the conferral of power to subdelegate discretionary duties, section 9-6.14:14.1 could have been read into section 1-17.2 as an exception, eliminating the potential conflict and avoiding resort to section 9-6.14:3, thereby preserving the improved system for hearing officer appointment.

For so long as an agency head abides by VAPA in appointing hearing officers, the conflict between VAPA and the new section 1-17.2 will remain inchoate. In the event that further amendment to section 1-17.2 is not promptly forthcoming, the scope of an agency head's power to designate hearing officers may well require judicial demarcation. If and when the time comes, avoiding the unintended repeal of section 9-6.14:14.1 is likely to depend upon the willingness of an interpreting court to find that section 1-17.2 is not a

by § 9-6.14:12 and those presiding over formal evidentiary hearings (in anticipation of rulemaking) governed by § 9-6.14:8 ought to be noted in this context. The reforms embodied in § 9-6.14:14.1 only apply to the former, so no conflict arises in application of the broad subdelegation authorization of § 1-17.2 to the latter. *See* VA. CODE ANN. §§ 9-6.14:12; :8; :14.1; § 1-17.2 (Repl. Vol. 1985 & Cum. Supp. 1987).

61. *Id.* § 9-6.14:3.

62. As used in VAPA, "basic law" is a term of art. Basic laws are defined in VAPA as: "provisions of the Constitution and statutes of the Commonwealth of Virginia authorizing an agency to make regulations or decide cases or containing procedural requirements therefor." *Id.* § 9-6.14:4(C).

63. *Id.*

64. *Id.* § 1-17.2 (Repl. Vol. 1987).

65. *Id.*

VAPA basic law. Could it be said with a straight face that, according to the VAPA definition, a basic law is one containing procedural requirements for the making of regulations or deciding of cases, but not one containing requirements for the appointment of those who do the case deciding? This interpretation has more to say for it in terms of conforming to the intention of the legislature, than in terms of keeping faith with the plain meaning of words.⁶⁶

If the threshold question of whether section 1-17.2 is VAPA basic law can be answered in the negative, VAPA need no longer be seen as expressly subordinated to the conflicting statute. Absent express subordination, it is reasonable to hold that the hearing officer designation procedures created by the 1986 VAPA amendment are not repealed by implication of the 1987 title 1 amendment, given the broad and general language of the latter and the considerable study and debate preceding the former.⁶⁷

B. Specification of the Method for Computing Time in Court Rules

A person dissatisfied by the decision of an administrative agency governed by VAPA is entitled by VAPA to have that decision reviewed by a Virginia circuit court.⁶⁸ How that person obtains direct

66. University of Richmond law students Carolyn Marsh, Michael McKenney, and Michael Roach recently offered me an alternative interpretation which would obviate further amendment of § 1-17.2, yet reaffirm the limits on hearing officer selections. Marsh, McKenney, and Roach suggest that the 1986 amendment to VAPA changed the nature of the hearing officer appointing function. Before 1986, the agency head's appointing was discretionary; after the VAPA amendment adding § 9-6.14:1, VAPA's direction that the appointee "shall" be from the list maintained by the Executive Secretary of the Supreme Court makes the appointing non-discretionary. Hearing officer appointing is therefore subject to the limited subdelegation authorization in the second sentence of the 1987 amendment to § 1-17.2. This interpretation leads to the conclusion that the 1987 amendment to § 1-17.2 does not jeopardize the reforms embodied in the 1986 amendment to VAPA.

67. The 1986 amendment which produced VAPA's new § 9-6.14:14.1 governing formal adjudication hearing officers was the result of an initiative of the Governor's Regulatory Reform Advisory Board. The Board was created by Exec. Order No. 20 (1982), with the general mission of improving the regulatory climate in Virginia. Its specific responsibilities included holding public hearings to identify citizen and private sector concerns related to regulatory reform. 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. Interest in hearing officer reform was high. *See generally* Final Report; Jones, *supra*, note 59. The Board's chairman was Delegate Ralph Axselle Jr. *See* 1983 Final Report at unnumbered page following title page. Delegate Axselle sponsored House Bill 6, the vehicle for the amendment to VAPA providing hearing officer reform.

68. VA. CODE ANN. § 9-6.14:16 (Cum. Supp. 1987).

review is set forth in Part Two A of the Supreme Court Rules.⁶⁹ One rule in Part Two A establishes a thirty day deadline by which the person seeking judicial review must notify the agency of the appeal petition.⁷⁰ Another rule establishes a second deadline thirty days after the delivery of such notice to the agency by which time the petition for appeal must be filed.⁷¹ The circuit courts have made it abundantly clear that they regard failure to meet either deadline as a jurisdictional defect barring review.⁷² If there was any doubt about how to calculate the thirty-day periods, it should be eliminated by the 1987 amendment to section 1-13.3 of the Virginia Code, which states that computing days for court rules is just like computing days for statutes.⁷³

IV. ADMINISTRATIVE DEVELOPMENTS IN ADMINISTRATIVE PROCEDURE

A. *Rules for the Selection, Training, and Regulation of Independent Hearing Officers*

In 1986, the General Assembly amended VAPA by adding a section governing the use of hearing officers in formal adjudicatory hearings.⁷⁴ The new law codified the existing practice by which independent contractors were used by some agencies to preside over such hearings.⁷⁵ At the same time, the new law withdrew from agency heads much of their discretion to select for assignment to specific controversies preferred individuals from among the list of volunteers.⁷⁶ The 1986 amendment also established minimal qualifications for admission to the list, and set educational and performance standards for continued eligibility.⁷⁷ The Executive Sec-

69. *Id.*

70. VA. SUP. CT. R. 2A:2 (Repl. Vol. 1987).

71. VA. SUP. CT. R. 2A:4 (Repl. Vol. 1987).

72. *Southwest Va. Health Sys., Inc. v. Kenley*, 5 Va. Cir. 270 (Salem 1985), *aff'd sub nom. Roanoke Memorial Hosps. v. Kenley*, 3 Va. App. 599, 352 S.E.2d 525 (1987); *Health Sys. Agency of N. Va. v. State Dep't of Health*, 5 Va. Cir. 196 (Fairfax County 1984); *Roberts v. Virginia State Bd. of Medicine*, 5 Va. Cir. 116 (Loudoun County 1983).

73. VA. CODE ANN. § 1-13.3 (Repl. Vol. 1987).

74. VA. CODE ANN. § 9-6.14:14.1 (Cum. Supp. 1987).

75. *See Jones*, *supra* note 59, at 680-88.

76. *Id.*; *see supra* text accompanying notes 52-67 concerning the potential impact of a 1987 amendment to VA. CODE ANN. § 1-17.2 generally authorizing subdelegation of any agency duty to any agency employee (presumably including the duty to preside over formal adjudicatory hearings).

77. VA. CODE ANN. § 9-6.14:14.1 (Cum. Supp. 1987).

retary of the Supreme Court was put in charge of this system, and authorized to issue rules necessary for its administration.⁷⁸ In 1987, the Executive Secretary promulgated Hearing Officer System Rules of Administration (Rules) affecting hearing officer appointment, qualifications, training, and retention.

To be eligible for appointment as a hearing officer, the statute requires an applicant to be an active member in good standing of the Virginia State Bar and to have actively practiced law for at least five years.⁷⁹ Rule Two defines active practice.⁸⁰ Rule Two also requires two of the five active practice years to have been in Virginia practice.⁸¹ This second condition appears *ultra vires*. It makes Rule Two more stringent than the statute from which the rule must draw its authority.⁸² The statute permits one experienced by five years of practice outside Virginia to qualify as a hearing officer on the day she is admitted to active Virginia bar membership.⁸³ The Rule does not.

Rule Two (B) imposes three other qualifications arguably beyond the scope of the basic law. Applicants for appointment to the hearing officer list must have prior knowledge of administrative law, demonstrated writing ability, and a willingness to travel anywhere in the state to conduct a hearing.⁸⁴ The statute imposes no such qualifications; it only requires applicants to have at least five years of law practice under their belt. Presumably, the General Assembly intended this requirement as a means for improving hearing officer expertise and performance, and not to restrict entry into

78. *Id.*

79. *Id.* § 9-6.14:14.1(A).

80. Hearing Off. Sys. Rules of Admin., R. Two (B)(2):

Active practice of law for at least five years. In order to satisfy this requirement, the applicant must have completed five years of active practice of law with two of these years in Virginia. For purposes of these rules, the active practice of law exists when, on a regular and systematic basis, in the relation of attorney and client one furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge and skill. If not presently engaged in the active practice of law, the applicant must, in addition to the requirements of this section, have previously served as a hearing officer, administrative law judge, or possess extensive prior experience with administrative hearings

81. *Id.*

82. See *Kohlberg v. Virginia Real Estate Comm'n*, 212 Va. 237, 183 S.E.2d 170 (1971); *Richmond Food Stores v. State Milk Comm'n*, 204 Va. 46, 55, 129 S.E.2d 35, 41-42 (1963); see also *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607 (1944).

83. VA. CODE ANN. § 9-6.14:14.1 (Cum. Supp. 1987).

84. Hearing Off. Sys. Rules of Admin., R. Two (B). The required knowledge of administrative law is demonstrable by evidence of prior hearing experience. *Id.*

the market for such services. If that is so, the Rule Two (B) requirement of administrative law knowledge seems more closely related to the statutory purpose than that requiring two years of Virginia lawyering. On the other hand, the General Assembly could have specified lawyering experience more closely related to the problems identified with existing hearing officer employment practices. It did not. The words of the statute are equally satisfied by practice as a criminal trial lawyer, an estate planner, and a tax advisor, in Virginia or elsewhere.

The absence from the statute of any specifics such as procedural knowledge or writing skills argues for the view that the General Assembly was willing to presume that five years of lawyering meant possession of the knowledge and skill expected of a neophyte hearing officer. In this context, it is well to recall that the Executive Secretary's power to promulgate hearing officer rules is limited by the statute to such rules as are "necessary for the administration of the hearing officer system."⁸⁵

An additional ultra vires objection arises from the travel undertaking required of hearing officer applicants by Rule Two (B). VAPA provides hearing officers with the opportunity to specify geographic assignment preference when the agency demonstrates a need for such an arrangement.⁸⁶ The Rule makes peripateticism a prerequisite. While the go-anywhere volunteer makes the task of hearing officer assignment efficient for the system's administrator, the 1986 amendment does not authorize such efficiency. The travel rule may well operate to deter able volunteers from among the class defined by statute, the class presumably acceptable to the General Assembly. Its goal is worthy, but the qualification rule goes too far.

The Rules also detail what keeps a hearing officer on the list, once appointed. Rule Two (D) provides for a performance evalua-

85. VA. CODE ANN. § 9-6.14:14.1 (Cum. Supp. 1987). On old and respected authority, of course, "necessary" (as it describes the scope of delegated lawmaking power) can be construed to mean that which is convenient in the eye of the delegate, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), but such a generous view is more appropriate to construing the public lawmaking powers of a legislative assembly acting within political constraints. A narrower definition seems more appropriate to rulemaking by an administrator, particularly rulemaking removed from the desirable influences of public notice and comment. See *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 39 (D.C. Cir. 1974); see also *Virginia Agric. Growers' Ass'n v. Donovan*, 579 F. Supp. 768, 773 (W.D. Va. 1984), *aff'd*, 756 F.2d 1025 (4th Cir. 1985).

86. VA. CODE ANN. § 9-6.14:14.1(B) (Cum. Supp. 1987).

tion after each three year term. According to the Rule, reappointment depends on receipt of a satisfactory performance evaluation.⁸⁷ The statute is silent as to both term appointment and periodic evaluation. The performance review established by the Rule includes consideration of the timeliness of the hearing officer's decisions as well as her temperament and professional demeanor.⁸⁸ Presumably the reviewing authority is the Executive Secretary.

Coupled with the power to refuse future assignment, the power to review is a formidable threat to the hearing officer's independence.⁸⁹ Moreover, it is vested in a government employee who is himself no adjudicator.⁹⁰ The better tool for protecting parties from administrative justice delayed is the writ of mandamus. It places in the hands of a fellow adjudicator the decision of when a hearing officer's delay in delivering her report is unreasonable.⁹¹ To the extent that competent authority also concludes that a grouchy hearing officer is therefore an undesirable hearing officer, sanctions for unacceptable temperament or professional demeanor should also be placed in the hands of experienced adjudicators. In the meantime, the statute is silent on standards for hearing officer conduct except in the matter of bias,⁹² and the Executive Secretary's rulemaking power should not be viewed as the power to set standards for the conduct of administrative judges.

VAPA expressly provides for two hearing officer disciplinary devices: removal and disqualification. Removal takes a volunteer's name off the list, preventing future assignment. The statute is silent as to whether or when a removed volunteer may reapply for listing. The General Assembly has vested removal power in the Executive Secretary.⁹³ According to the statute, removal follows a hearing and a showing of cause, and is judicially reviewable as a

87. Hearing Off. Sys. Rules of Admin., R. Two (D).

88. *Id.*

89. *Cf. Harlow v. Clatterbuck*, 230 Va. 490, 339 S.E.2d 181 (1986)(in order to avoid chilling effect on their performance, corrections department employees get judicial immunity for decisions adjudicative in nature).

90. *See* VA. CODE ANN. §§ 17-111.1, -111.2, -116.3 (Repl. Vol. 1982).

91. Compare The Judicial Inquiry and Review Commission Act, VA. CODE ANN. §§ 2.1-37.1 to -37.18 (Repl. Vol. 1987) which delegates to a commission comprised of seven members, including three judges, the power to investigate judicial misconduct. *Id.* § 2.1-37.3, -37.4. The power to judge judges in Virginia remains exclusively in the hands of judges. VA. CONST. art. VI, §§ 1, 10; VA. CODE ANN. § 2.1-37.2 (Repl. Vol. 1987).

92. VA. CODE ANN. § 9-6.14:14.1(C) (Cum. Supp. 1987).

93. *Id.* § 9-6.14:14.1(D).

VAPA case decision.⁹⁴ The Rules set forth the procedures for the conduct of such a hearing, and the grounds for which removal may be requested. Among the grounds listed are a continuous pattern of untimely decisions, unprofessional demeanor, inability to conduct orderly hearings, and unjustified refusal to accept assignments.⁹⁵ Removal of a quasi-judicial officer by the Executive Secretary is as inappropriate as authorizing performance review by that functionary, but, unlike performance review, removal at least has the cachet of being expressly vested by the General Assembly. Besides, VAPA review of removal decisions ensures that a judge can be called on to pass on judging conduct.⁹⁶

Beyond the question of whether such power should vest in the Executive Secretary at all is still the question of whether the statute authorizes removal for reasons of unprofessional demeanor or refusal to accept an assignment. The statute fails to articulate a removal standard. Moreover, it nowhere suggests that volunteering for the list results in a duty to accept individual assignment. As to what constitutes grounds for removal, legislative silence should not be taken as prospectively approving what the Executive Secretary has adopted, because the broad removal power created by the Rules detracts from the hearing officer's independence from extraneous influence. Because the insulation of hearing officers from even the appearance of improper influence by government agencies was a goal of those recommending hearing officer reform to the Governor's Board,⁹⁷ it ought to be a goal ascribed to the General Assembly.

Disqualification takes a hearing officer from a particular hearing. It may be *sua sponte*.⁹⁸ Otherwise, the statute, although obscure, seems to vest the power of involuntary disqualification in the Ex-

94. *Id.*

95. Hearing Off. Sys. Rules of Admin., R. Four (A).

96. Reviewing courts ordinarily pay great deference to the decisions of administrative agencies. *See, e.g.,* Virginia ABC Comm'n v. York St. Inn, 220 Va. 310, 257 S.E.2d 851 (1979). The Code provides in pertinent part: "[T]he court shall take due account of the presumption of official regularity, the experience and specialized competence of the agency, and the purposes of the basic law under which the agency has acted." VA. CODE ANN. § 9-6.14:17 (Repl.Vol. 1985). Such deference ought to be inappropriate to the review of a hearing officer removal decision both because proper adjudicator conduct is a subject with which the reviewing court is obviously well-informed, and because the deciding official can demonstrate no special competence or expertise. The statute's command of "due account" provides authority for this departure from the general rule of deference.

97. *See* Jones, *supra* note 59, at 682-83.

98. VA. CODE ANN. § 9-6.14:14.1(C) (Cum. Supp. 1987).

ecutive Secretary.⁹⁹ The standard for disqualification is set forth in the statute.¹⁰⁰ As to involuntary disqualifications, the Executive Secretary has ruled out *ore tenus* hearings.¹⁰¹ Like the powers to review and to remove, the power to disqualify is inappropriately vested in a non-adjudicative official; like the power to remove, the power to disqualify is so vested at the express direction of the General Assembly.

Neither the statute nor the rules speak to court review of involuntary disqualification decisions. Involuntary disqualification ought to be a case decision subject to court review. While the decision is likely to be found within the scope of VAPA's definition of case decision,¹⁰² the decider is likely to be found beyond VAPA's reach. VAPA affords an exemption to any agency of the supreme court.¹⁰³ This omission should not control the issue of whether review is available, in light of the consequences for the hearing officer presumed to follow disqualification. If disqualification jeopardizes his rights under the contract for the hearing at issue, as well as his continued eligibility for future assignment from the list, the notion of due process ought to guarantee him such a hearing as a constitutional matter.¹⁰⁴

B. *Hearing Officer Conflict of Interest Standards*

On April 1, 1987, the Virginia State Bar's Standing Committee on Legal Ethics issued an advisory opinion¹⁰⁵ addressing several

99. *Id.*

100. The pertinent section reads:

A hearing officer shall voluntarily disqualify himself and withdraw from any case in which he cannot accord a fair and impartial hearing or consideration, or when required by the applicable rules governing the practice of law in the Commonwealth. Any party may request the disqualification of a hearing officer by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded, or the applicable rule of practice requiring disqualification. The issue shall be determined not less than ten days prior to the hearing by the Executive Secretary of the Supreme Court.

Id.

101. Hearing Off. Sys. Rules of Admin., R. Four (B).

102. See VA. CODE ANN. § 9-6.14:4(D) (Repl. Vol. 1985); see also Virginia ABC Comm'n v. York St. Inn, 220 Va. 310, 312-13, 257 S.E.2d 851, 852-53 (1979).

103. VA. CODE ANN. § 9-6.14:4.1(A)(2) (Repl. Vol. 1985).

104. See 2 F. COOPER, STATE ADMINISTRATIVE LAW 676-77 (1965). See also Johnson v. Robison, 415 U.S. 361 (1974) (holding statutory non-reviewability provision did not reach constitutional claims). But see Thomas v. State Highway Comm'r, 166 Va. 512, 186 S.E. 172 (1936) (holding due process does not include the right of appeal).

105. VSB Comm. on Legal Ethics, Legal Ethics Op. No. 847 (1987).

aspects of the impact of Disciplinary Rules 8-101 and 9-101 of the Virginia Code of Professional Responsibility on the independent hearing officer system.¹⁰⁶ In light of those Rules, the Committee opined that a lawyer who is not currently representing clients before a board or agency is not barred from accepting a hearing officer assignment for that agency or board simply because of his past representation.¹⁰⁷ By the same token, an attorney could represent clients before a regulatory board or agency for which he also served as a part-time hearing officer, so long as the subject matter¹⁰⁸ of his client's case was substantially unrelated to that under his consideration as a hearing officer.¹⁰⁹ Regardless of subject matter, the Committee saw as unethical client representation before a board or agency for which the lawyer was at the same time serving as a hearing officer.¹¹⁰ The same limitation was found to apply to client representation in a law suit against the agency for which the lawyer was at the same time acting as a hearing officer.¹¹¹ When not appearing on behalf of a client, an attorney could advise a client on matters within the jurisdiction of an agency or board for which the attorney also served as a hearing

106. *Id.* Disciplinary Rule 8-101 states as follows:

Action as a Public Official

(A) A lawyer who holds public office shall not:

(1) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.

(2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.

(3) Accept any thing of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.

VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 8-101 (1984). Disciplinary Rule 9-101 states as follows:

Avoiding Even the Appearance of Impropriety

(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.

(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

Id. DR 9-101.

107. VSB Comm. on Legal Ethics, Legal Ethics Op. No. 847 (1987).

108. The opinion defined subject matter as factual or legal issues. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

officer, provided that the attorney did not jeopardize the confidentiality of information to which he was privy by reason of his hearing officer service.¹¹²

The new opinion also addressed potential conflicts of interest issues raised by hearing officer service by one of several lawyers in a single law firm. The Committee concluded that another member of the same firm cannot represent a client before an agency when one member would be ethically disqualified from doing so by reason of hearing officer service.¹¹³ To this principle, the Committee added a limiting corollary. A previous opinion, declaring that a lawyer could represent a client before a board for which another member of the lawyer's firm was serving as a hearing officer in an unrelated matter was affirmed in Legal Ethics Opinion 847.¹¹⁴

The new opinion also found it to be unethical for an attorney to act as a hearing officer in a hearing in which the Attorney General's office appears when the same attorney is representing a client in another action prosecuted by the Attorney General's office.¹¹⁵

The new opinion results from Committee reconsideration of issues first resolved in an opinion of the same number issued October 15, 1986. In the earlier version, the Committee had concluded that an attorney who served an agency, even one comprised of a number of different regulatory boards,¹¹⁶ could not ethically represent a client before that agency, or in litigation against that agency. The 1986 opinion set no limit as to the time an attorney would be so disqualified or as to the subject matter of the two controversies. Therefore, the new opinion evidences the Committee's decision to embrace an interpretation of the rules permitting more agency practice by attorneys also taking hearing officer assignment.

112. *Id.*

113. *Id.*

114. VSB Comm. on Legal Ethics, Legal Ethics Op. No. 617 (May 31, 1984), *clarified*, Oct. 24, 1984.

115. *Id.*

116. Within the Board of Commerce are found seventeen licensing boards covering professions ranging from accountancy to wastewater works operation. VA. CODE ANN. 1986-87 Admin. L. App. 29. The Department of Health Regulatory Boards oversees ten health professional licensing boards. *Id.* at 93.

V. JUDICIAL DECISIONS AFFECTING ADMINISTRATIVE PROCEDURE

A. *Jurisdiction to Review Agency Action*

In *Virginia Beach Beautification Commission v. Board of Zoning Appeals*,¹¹⁷ a public interest non-profit corporation (Commission) appealed to the supreme court a circuit court's denial of the Commission's petition for writ of certiorari to a board of zoning appeals.¹¹⁸ The board had issued a height and setback variance permitting construction of a freestanding sign advertising a local hotel. The circuit court found that the Commission lacked standing to obtain review of the board's decision.¹¹⁹ On appeal, the hotel also argued that review of the circuit court's action properly lay in the court of appeals, and not in the supreme court. The supreme court found that it had jurisdiction over the subject matter, but affirmed the circuit court's decision that the Commission lacked standing to obtain court review of the variance.

Whether the appeal from the circuit court belonged in the supreme court or in the court of appeals depended on whether or not the board of zoning appeals was an administrative agency. The Code provides the Virginia Court of Appeals with exclusive jurisdiction to review the decision of a circuit court reviewing the decision of an "administrative agency."¹²⁰ The jurisdictional statute does not define administrative agency. To do so, the supreme court turned to VAPA where agency is defined as "any . . . board . . . of the state government empowered by the basic laws to make regulations or decide cases."¹²¹ Because a board of zoning appeals is created by local government, said the court, it is not a board of state government, hence, not an agency under VAPA, and therefore not an agency under the jurisdictional statute.¹²²

It is black letter law that in order for the same words to be presumed to have the same meaning in different statutes, the statutes

117. 231 Va. 415, 344 S.E.2d 899 (1986).

118. VA. CODE ANN. § 15.1-497 (Repl. Vol. 1981) provides for circuit court review of zoning appeal board decisions by writ of certiorari.

119. The facts are taken from the supreme court's opinion. *Beautification Comm'n*, 231 Va. at 416-17, 344 S.E.2d at 900-01.

120. The Code says in pertinent part: "Any aggrieved party may appeal to the Court of Appeals from: 1. Any final decision of a circuit court on appeal from a decision of an administrative agency." VA. CODE ANN. § 17-116.05(1) (Cum. Supp. 1987).

121. *Id.* § 9-6.14:4(A) (Repl. Vol. 1985).

122. *Beautification Comm'n*, 231 Va. at 417, 344 S.E.2d at 901.

must be *in pari materia*.¹²³ For the supreme court to find that “administrative agency” in the court of appeals jurisdictional statute means the same as the statutory definition of “agency” in VAPA, the *pari materia* prerequisite was apparently satisfied by the fact that VAPA involved the “general field of administrative decisions.”¹²⁴ One must assume that the jurisdictional statute is similarly regarded by the supreme court. A better reason for the same conclusion followed. Because the supreme court has appellate jurisdiction over circuit court review of land use decisions by the governing bodies of municipalities and counties,¹²⁵ jurisdiction over the same sorts of decisions by local zoning boards ought to be found in the same appellate court. Concentrating review of zoning decisions in this way made so much sense to the supreme court that it was unwilling to assume that the General Assembly intended otherwise when it wrote the court of appeals jurisdictional statute.¹²⁶

The second issue of whether the Commission had standing to obtain review of the board’s decision, depended on whether the Commission was a “person aggrieved” within the meaning of the statute governing certiorari to review decisions of a board of zoning appeals.¹²⁷ The issue arose not from the Commission’s corporate status in light of the statute’s reference to “persons,”¹²⁸ but from the fact that the Commission neither owned nor occupied any real property, much less real property near that for which the variance was issued.¹²⁹ For want of an ownership or possessory interest, the Commission was viewed by the supreme court as having as its “sole interest . . . advanc[ing] some perceived public right or . . . redress[ing] some anticipated public injury when the only wrong [the Commission] has suffered is in common with other persons simi-

123. *Boulevard Bridge Corp. v. City of Richmond*, 203 Va. 212, 217-18, 123 S.E.2d 636, 640 (1962) (citing 50 AM. JUR. *Statutes* § 543 (1944)); see also *Prillaman v. Commonwealth*, 199 Va. 401, 406, 100 S.E.2d 4, 7 (1957); 73 AM. JUR. 2D *Statutes* § 233 (1974); 82 C.J.S. *Statutes* § 365 (1953); 17 MICHIE’S JUR. *Statutes* § 40 (1979).

124. *Beautification Comm’n*, 231 Va. at 417, 344 S.E.2d at 901.

125. VA. CODE ANN. § 8.01-670(A)(3) (Repl. Vol. 1984).

126. *Beautification Comm’n*, 231 Va. at 418, 344 S.E.2d at 901-02.

127. VA. CODE ANN. § 15.1-497 (Repl. Vol. 1981).

128. As the court noted, the General Assembly had amended § 15.1-430 by adding subsection (f) in 1962, following *Citizens Ass’n v. Schumann*, 201 Va. 36, 109 S.E.2d 139 (1959), in which the court had raised but not resolved the issue of whether corporations not holding property could be persons aggrieved by a zoning board decision. Subsection (f) defined person as individual, firm, corporation or association. VA. CODE ANN. § 15.1-430(f) (Cum. Supp. 1987).

129. *Beautification Comm’n*, 231 Va. at 420, 344 S.E.2d at 903.

larly situated."¹³⁰ Affirming the court below, the supreme court found this to be an insufficient interest to afford standing.

As authority for this decision, the supreme court cited two Virginia cases, *Nicholas v. Lawrence*¹³¹ and *Insurance Association v. Commonwealth*,¹³² as well as a more recent United States Supreme Court decision, *Sierra Club v. Morton*.¹³³ In *Nicholas*, individual taxpayers lacked standing to petition for the removal of the tie breaker appointed to a board of supervisors.¹³⁴ In *Insurance Association*, the association lacked standing to obtain court review of State Corporation Commission orders approving certain insurance rates on policies sold by the association's agent members.¹³⁵ In *Sierra Club*, the environmental interest club lacked standing under the Federal Administrative Procedure Act (APA)¹³⁶ to obtain review of a Forest Service decision to permit development of a ski resort in a national forest.¹³⁷

Taken with the authorities cited, the supreme court's decision in *Beautification Commission* evidences judicial reluctance to acquiesce in the trend elsewhere recognizing a wider set of interests sufficient for standing.¹³⁸ The Commission's lack of an ownership or possessory interest in neighboring land was found to be a lack of the "immediate pecuniary and substantial interest" required for standing.¹³⁹

The importance of issue articulation by genuine adversaries--adversaries whose interests are sufficiently immediate and substantial to give them a real stake in the outcome—to the art of careful judging makes sense and is generally acknowledged.¹⁴⁰ Where the

130. *Id.* at 419, 344 S.E.2d at 902.

131. 161 Va. 589, 171 S.E. 673 (1933).

132. 201 Va. 249, 110 S.E.2d 223 (1959).

133. 405 U.S. 727 (1972).

134. 161 Va. at 592, 171 S.E. at 674.

135. 201 Va. at 253, 110 S.E.2d at 226.

136. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-59, 701-06 and other scattered sections of Title 5 (1982)).

137. 405 U.S. at 741.

138. See Connelly, *Congressional Authority to Expand the Class of Persons with Standing to Seek Judicial Review of Agency Rulemaking*, 39 ADMIN. L. REV. 139 (1987); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Nichol, *Rethinking Standing*, 72 CAL. L. REV. 68 (1984); Scott, *Standing—A Functional Analysis*, 86 HARV. L. REV. 645 (1973); see also *Flast v. Cohen*, 392 U.S. 83, 118-20 (1968) (Harlan, J., dissenting) (citing L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 483 (1965)).

139. 231 Va. at 419, 344 S.E.2d at 902 (quoting *Nicholas v. Lawrence*, 161 Va. 589, 593, 171 S.E. 673, 674 (1933)).

140. See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975); *Flast v. Cohen*, 392 U.S. 83 (1968).

Beautification Commission decision goes too far is in limiting the set of immediate and substantial interests to the pecuniary, or at least to ownership or possession of neighboring realty. Other stakes can motivate a litigant to present the sort of case necessary for adequate ventilation of an issue acknowledged to be otherwise justiciable. The history of environmental interest group involvement in land use decisions ought to be sufficient support for the conclusion that such groups make adequate plaintiffs.¹⁴¹

The *Beautification Commission* decision augurs ill for judicial recognition of the environmental interests of non-landowners. The supreme court has previously acknowledged that article XI, section 1 of the Constitution of Virginia creates interests which can afford a basis for court review of agency actions that environmental groups believe will jeopardize scenic and environmental assets.¹⁴² It would be a shame to see this constitutionally identified public interest rendered unenforceable by volunteer attorneys general for want of a landowning involvement.

Federal law, despite lacking a similar constitutional recognition of the public's interest in environmental integrity, is not so discriminating, the decision in *Sierra Club* notwithstanding. That decision was followed shortly in the United States Supreme Court by *United States v. SCRAP*¹⁴³ which held that an unincorporated association of five law students could challenge an Interstate Commerce Commission order setting the rate for railroad transportation of nearly all freight. The association had claimed that the increased rate would deter the shipment of recyclable materials, thereby contributing to litter pollution of the "forests, mountains, and streams of the Washington area" in which the association's members had an aesthetic and recreational interest by reason of their use.¹⁴⁴ The Supreme Court found this to be an interest on the part of the association sufficient to satisfy the standing requirements for judicial review of agency action found in the APA.¹⁴⁵ The Court distinguished its prior decision denying standing to the *Sierra Club* by the presence in *SCRAP*'s complaint of a specific

141. See also *Blue Cross v. Kenley*, 7 Va. Cir. 472 (Henrico County 1977) (holding that one who furnishes prepaid hospital plans, and submitted letters to the Commissioner opposing issue of a hospital construction license, is not a "party aggrieved" under VAPA for standing to obtain court review of the licensing decision).

142. *Rappahannock League v. VEPCO*, 216 Va. 774, 777, 222 S.E.2d 802, 805 (1976).

143. 412 U.S. 669 (1973).

144. *Id.* at 676, 678.

145. *Id.*; see 5 U.S.C. § 702 (1982).

allegation of injury to its members.¹⁴⁶ Both federal cases, however, are in harmony as to what is sufficient to make one a "person aggrieved," with standing to obtain judicial review of agency action under the APA. Injury other than to economic interests, including injury to aesthetic and environmental interests, can be sufficient, despite being broadly shared.¹⁴⁷

In an era largely unencumbered by the old judicial pleading barriers, *Sierra Club* would seem to be the sport and *SCRAP* the authority more illuminating of what "person aggrieved" means as a federal standing prerequisite. It is regrettable that, in construing identical language as a Virginia standing prerequisite, the Virginia Supreme Court relied upon the one federal case without attempting to distinguish the other.¹⁴⁸

Relying on *Beautification Commission*, the court of appeals held in *Schwartz v. Highland County School Board*¹⁴⁹ that it lacked jurisdiction to review a county school board's decision denying a religious exemption from compulsory public school attendance. Because a county school board is an entity of local government, and therefore not embraced by the definition of agency in VAPA, a county school board cannot be an administrative agency under the jurisdictional statute.¹⁵⁰

In *Allstar Towing, Inc. v. City of Alexandria*,¹⁵¹ the supreme court decided what it had assumed in *Beautification Commission*: that the action in circuit court was an appeal. In a pleading entitled "Appeal from Erroneous Denial of Award of Contract for Towing," Allstar had complained to the circuit court of the city's contract award to a competitor alleged to have tendered a nonconforming bid.¹⁵² The Virginia Public Procurement Act¹⁵³ permits a

146. *SCRAP*, 412 U.S. at 686-87.

147. *Id.* at 686.

148. It is possible, of course, to discount the influence of *Beautification Commission* beyond its immediate context of zoning disputes, suggesting that the narrow construction of "person aggrieved" in § 15.1-497 today need not jeopardize standing as a "person aggrieved" under VAPA tomorrow. The persuasiveness of such a view of precedent is undermined, however, by the court's willingness in *Beautification Commission* to treat the court of appeals' jurisdictional act *in pari materia* with an administrative procedure act when construing "administrative agency." The zoning statute seems no more remote from VAPA when it addresses review of appeal board decisions than the jurisdictional act when it addresses review of circuit court decisions.

149. 2 Va. App. 554, 346 S.E.2d 544 (1986).

150. *Id.* at 556, 346 S.E.2d at 545.

151. 231 Va. 421, 344 S.E.2d 903 (1986).

152. *Id.* at 423, 344 S.E.2d at 904.

disgruntled bidder to protest an award either through administrative channels or by an action at law in circuit court.¹⁵⁴ On its own motion, the supreme court raised the issue of whether the bidder's appeal from the circuit court lay properly to the court of appeals as an appeal from a circuit court decision reviewing an administrative agency decision.¹⁵⁵ The supreme court answered its own question in the negative, finding that the court remedy provided the bidder by the Procurement Act is "an independent action at law."¹⁵⁶

Because the supreme court concluded that appellants had picked the right court in both *Beautification Commission* and *Allstar Towing*, it did not have to decide what to do when an appellant guessed wrongly. In granting a motion to dismiss the appeal in *Schwartz*, the court of appeals did not address whether transfer to the supreme court would have been a viable alternative. Transfer in the other direction is not an option, as the supreme court in *Commonwealth v. Yeatts, Inc.*¹⁵⁷ found itself without the power to send to the court of appeals a petition for review which should have been filed there.

In *Yeatts*, the Virginia Department of Highways and Transportation (VDH&T) appealed to the supreme court from a circuit court's award of additional compensation in a contractor's action on a grading and excavation contract. The Virginia Code permits a contractor dissatisfied with VDH&T's resolution of such a claim to bring a civil action in circuit court.¹⁵⁸ Circuit court jurisdiction depends upon prior and timely exhaustion of the administrative remedy.¹⁵⁹ On its own motion, the supreme court raised the issue of whether appeal from the circuit court properly lay to the court of

153. VA. CODE ANN. §§ 11-35 to -80 (Repl. Vol. 1985 & Cum. Supp. 1987).

154. *Id.* §§ 11-66, -70 (Repl. Vol. 1985).

155. 231 Va. at 423, 344 S.E.2d at 905. The court of appeals' jurisdictional statute is set out in pertinent part, VA. CODE ANN. § 17-116.05(1) (Cum. Supp. 1987), *supra* note 121.

156. 231 Va. at 423-24, 344 S.E.2d at 905. Following its decision in *Beautification Commission* (issued the same day), the supreme court also found that the bidder had guessed the right appellate court because the city was not an administrative agency. See *ESWL Investors v. Kenley*, Ch. No. 85312, February 5, 1987 (Lynchburg) (adopting a very thorough analysis by staff of the Court Legal Research Assistance Project and holding that nonsuit was not available as a matter of right to a party seeking review of a Health Commissioner's case decision denying a certificate of need, because the action in circuit court was an appeal).

157. 233 Va. 17, 353 S.E.2d 717 (1987).

158. VA. CODE ANN. § 33.1-387 (Repl. Vol. 1984).

159. *Id.*

appeals as an appeal from a circuit court review of agency action.¹⁶⁰ The answer depended on whether VDH&T was an agency, and whether a petition for writ of certiorari was an appeal.

VDH&T claimed it was not a state agency, at least when acting on additional compensation claims from public construction contracts. Arguing for a functional definition of "administrative agency," VDH&T relied on *Beautification Commission* for the proposition that jurisdiction did not lie in the court of appeals. VDH&T argued that, because its actions with respect to public construction contract claims are excluded from VAPA,¹⁶¹ VDH&T, like the Board of Zoning Appeals in *Beautification Commission*, is not a VAPA agency in such matters and therefore is not an administrative agency for the court of appeals jurisdictional statute.¹⁶²

The supreme court was unpersuaded by VDH&T's theory of the "sometime" agency. Following its decision in *Beautification Commission*, the supreme court held that because both VDH&T and the Highway Commission were state lawmaking bodies, they met VAPA's definition of agency, and were therefore administrative agencies under the court of appeals jurisdictional statute.¹⁶³ To buttress that conclusion, the supreme court also noted that VDH&T publishes its regulations in the Virginia Register of Regulations which is governed by a statute having the same definition of agency as VAPA.¹⁶⁴ Finally, the court noted that the opposite conclusion—that it, not the court of appeals, was the appropriate appellate forum—would lead to the bifurcation of appellate power over circuit court decisions in which VDH&T is a party.¹⁶⁵

Although relying on *Beautification Commission* as a basis for its one appellate forum theory, the *Yeatts* court was really taking a different approach to distributing review of agency action. In *Beautification Commission*, the goal was coherent jurisdiction over the same kinds of decisions, regardless of what entity did the deciding. In *Yeatts*, the goal was coherent jurisdiction over an agency, regardless of what types of decisions it made. The approaches offer a similar advantage: development of a special expertise. The *Beautification Commission* approach offers expertise

160. *Yeatts*, 233 Va. at 19, 353 S.E.2d at 718.

161. VA. CODE ANN. § 9-6.14:4.1(B)(1)-(3) (Repl. Vol. 1985).

162. 233 Va. at 20-22, 353 S.E.2d at 719-20.

163. *Id.*

164. *Id.*

165. *Id.*

through repeated exposure to a category of decisions, while the *Yeatts* approach offers expertise through repeated exposure to the actions of a particular bureaucratic organism.¹⁶⁶

Once it decided in *Yeatts* that jurisdiction for review of the circuit court lay in the court of appeals, the supreme court was faced with the question of how to dispose of VDH&T's appeal. The high court found itself without the power to transfer the appeal to the intermediate court, and dismissed the appeal.¹⁶⁷ The power to put the right appeal in the right appellate court without prejudice to the appellant is certainly desirable, if not inherent.¹⁶⁸ Early statutory provision of such power to both the supreme court and the court of appeals ought to be forthcoming. Meanwhile, caveat petitioner.¹⁶⁹

The question of what is an appeal from agency action for purposes of review jurisdiction also came before the Circuit Court of

166. VDH&T, in the person of the State Highway and Transportation Commissioner, has been delegated the power to acquire land by eminent domain. VA. CODE ANN. § 33.1-89 (Repl. Vol. 1984). By statute, appeals from the condemnation of property in circuit court lie to the supreme court. *Id.* § 8.01-670 (Repl. Vol. 1984); *see also id.* § 25-46.26 (Repl. Vol. 1985). While it might be contended that answering which appellate court properly reviews condemnation actions involving the VDH&T will force a choice between the review-of-one-question and review-of-one-agency theories, the real issue in such an appeal ought to be whether the circuit court is reviewing the final decision of an administrative agency. *See id.* § 17-116.05(1) (Cum. Supp. 1987). In this instance, VDH&T exercises neither rulemaking nor case-deciding powers, but simply the authority to negotiate with a property owner. *See id.* §§ 33.1-89, -90, -98; *cf. id.* §§ 25-46.2, -46.4, -46.5 (Repl. Vol. 1983). VDH&T is not acting as an agency in the sense contemplated by either VAPA or the court of appeals' jurisdictional statute. VAPA defines agency action as rulemaking or case deciding. *Id.* § 9-6.14:4(B). Without going so far as to say that VAPA is *in pari materia* with the court of appeals' jurisdictional statute, it is possible to say that sometimes an agency does not act as only an agency can. In such instances, there could be no special expertise on which a reviewing appellate court should draw, hence no reason to allocate review so that such an expertise can be developed. Condemnation actions by VDH&T, because they do not involve the exercise of an agency power of VDH&T, ought to be seen as involving something other than agency decisions as that term is used in the court of appeals' jurisdictional statute.

167. *Yeatts*, 233 Va. at 24, 353 S.E.2d at 721.

168. *Cf. Devlin v. Flying Tiger Lines, Inc.*, 220 F. Supp. 924 (S.D.N.Y. 1963) (action found improperly removed from state court without jurisdiction could be transferred by federal court from its law to its admiralty docket, despite lack of derivative jurisdiction or legislative direction).

169. Where there is a question as to which appellate forum has jurisdiction, I have been unable to discover any prohibition on filing in both courts. *But cf. U.S. v. United Continental Tuna Corp.*, 425 U.S. 164, 172-73 (1976) (one with money claim against the federal government but unsure whether jurisdiction lay in district court under admiralty claims acts or in Court of Claims under the Tucker Act, could not file in both because the Court of Claims was denied jurisdiction by 28 U.S.C. § 1500 over any claim pending in another court).

Richmond in *Latney v. Lukhard*.¹⁷⁰ In *Latney*, a welfare recipient challenged the decision of the Commissioner of the Department of Social Services that her receipt of the settlement proceeds from a personal injury suit rendered her ineligible for Aid to Dependent Children and medical benefits. She sought declaratory and injunctive relief on the grounds that the Department and the State Board of Social Services had failed to adopt reasonable standards of need. Among the defenses raised by the Commissioner was the procedural objection that the court lacked jurisdiction because the plaintiff had failed to comply with the prerequisites to court review of agency action contained in VAPA¹⁷¹ and the Supreme Court Rules.¹⁷² Without citing the supreme court's decision in *Kenley v. Newport News Hospital Association*,¹⁷³ the circuit court nevertheless found both VAPA and the Supreme Court Rules inapplicable to an action for declaratory and injunctive relief.¹⁷⁴ In doing so, the circuit court noted that the adoption of a regulation was not being challenged, and that the plaintiff did not become subject to the existing regulation until the time permitted for direct appeal of a newly adopted regulation had run.¹⁷⁵

This case illustrates a drawback to limiting judicial review of new rules to direct appeals complying with the short deadlines in the Supreme Court Rules. Such a limit burdens those who engage in regulated conduct much less than those who depend on public disbursements. One who only begins to engage in regulated conduct long after an agency rule is promulgated, and then wants to challenge the validity of the rule itself, is not injured by a short post-promulgation deadline for seeking court review of conduct-limiting rules. When the agency subsequently seeks to enforce the rule against the latecomer by court action, the latecomer is guaranteed the right to challenge the rule itself as a defense to its enforcement.¹⁷⁶ The person applying for benefits long after an eligibility rule is promulgated, on the other hand, has no such second

170. No. 2459-1 (Richmond Nov. 20, 1986) (to be reported in 9 Va. Cir. — (Richmond 1986)).

171. See VA. CODE ANN. § 9-6.14:16 (Repl. Vol. 1985).

172. See VA. SUP. CT. R. 2A:1 to :4 (Repl. Vol. 1987).

173. 227 Va. 39, 314 S.E.2d 52 (1984). See Jones, *Administrative Procedure: Annual Survey of Virginia Law*, 19 U. RICH. L. REV. 657, 674-77 (1985).

174. No. 2459-1 (Richmond Nov. 20, 1986).

175. *Id.*

176. VA. CODE ANN. § 9-6.14:16 (Repl. Vol. 1985) reads in pertinent part: "In addition, 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 defence to the action"

chance. The agency's application of its rule in denying benefits does not require agency-initiated court action, so the guarantee of an enforcement defense opportunity is of no comfort. The latecomer's only vehicle for review of a rule resulting in benefit denial is an action such as that filed in *Latney*.

B. *Right to a Formal Agency Hearing*

In cases before the Virginia Supreme Court and the Circuit Court of Chesterfield County, parties raised issues relating to the right to a formal hearing. The former involved rulemaking, the latter involved case decision.

In *Beneficial Finance Co. v. State Corporation Commission*,¹⁷⁷ a regulated lender challenged the State Corporation Commission's (SCC) refusal to repeal regulations forbidding the sale of insurance on personal property used as additional collateral for mortgage loans. Among other objections, the lender claimed that it had been denied the opportunity to present evidence in a formal hearing as guaranteed by the SCC's Rules of Practice and Procedure.¹⁷⁸

When the SCC's Bureau of Financial Institutions advised the lender that its insurance sales violated SCC rules, the lender proposed by letter that the SCC rescind the rules in question and substitute new ones drafted by the lender. Three months later, the SCC issued an order calling for notice to other lenders, and an opportunity for them to be heard on Beneficial's proposal. The order also directed that a proceeding be established, and that a date be reserved for a hearing, if required. Persons interested in a hearing were directed to request it and supply a basis for that request by a certain deadline. The request was also to specify whether an evidentiary hearing was being requested. The lender did not make any request in response to the SCC's order, although the SCC allowed the lender to develop further evidence informally two months after the order's deadline had passed.¹⁷⁹

On appeal, the lender contended that it had initiated an informal proceeding and thereafter been denied its right to present evidence at a formal proceeding before final SCC action, as guaran-

177. 230 Va. 529, 339 S.E.2d 192 (1986).

178. State Corporation Commission Rules of Practice and Procedure (1986). Having the powers of a court of record, see VA. CODE ANN. § 12.1-13 (Repl. Vol. 1985), the SCC is exempted from VAPA. *Id.* § 9-6.14:4.1(A)(2) (Repl. Vol. 1985).

179. *Beneficial Fin.*, 230 Va. at 536, 339 S.E.2d at 197.

ted by the SCC's Rules of Practice and Procedure. The court held that the SCC's order amounted to an invitation for an evidentiary hearing request, and that the lender's failure to respond cost it the right to demand a formal hearing. As for the opportunity to present evidence, the court found it available both in a written response to the SCC's order and at a subsequent evidentiary hearing, had the lender requested one in reply to the SCC's order. The lender would not be allowed to rely on the SCC's failure to explicitly identify as "formal" the proceeding referred to in its order as a basis for asserting a continuing option to go formal. Given the lender's inaction after receipt of the order, and the lender's later willingness to present evidence informally, such an estoppel decision seems well warranted.

In *Johnston-Willis, Ltd. v. State Health Commissioner*,¹⁸⁰ the circuit court held that a hospital seeking a license for renovation of its outpatient surgery facilities was not denied its right to cross-examine, because the hearing in which the opportunity was sought was an informal proceeding in which cross-examination is not permitted. While no authority is offered for this conclusion, it seems to follow logically from the provision in the basic law for application of VAPA to the Commissioner's decision to license.¹⁸¹ If VAPA applies, then the case may be dealt with in an informal proceeding in which the parties are not afforded any right to cross-examination.¹⁸² Amendment to the basic law in 1984 substituted general reference to VAPA for prior explicit references to the VAPA sections governing informal and formal adjudicative proceedings.¹⁸³ The result of such amendment is to leave to the Commissioner's discretion whether to take evidence in a formal proceeding at which cross-examination is statutorily guaranteed.¹⁸⁴

C. *Preliminary Consultation and Conformity in Case Decisions*

In *Courtesy Motors, Inc. v. Ford Motor Co.*,¹⁸⁵ the court of appeals found that, where a statute directs the agency head to con-

180. 6 Va. Cir. 370 (Chesterfield County 1986).

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

182. *Id.* § 9-6.14:11 (Repl. Vol. 1985).

183. Act of April 10, 1982, ch. 388, 1982 VA. ACTS 637-38 (codified at VA. CODE ANN. § 32.1-102.6 (Repl. Vol. 1985)).

184. See VA. CODE ANN. § 9-6.14:12 (Repl. Vol. 1985).

185. 1 Va. App. 366, 339 S.E.2d 202 (1986). Judge Baker wrote the court's opinion, in which Judges Barrow and Hodges concurred.

sult with an advisory board before issuing a case decision, the improper composition of the board renders the agency decision invalid. The Virginia Motor Vehicle Franchise Dealer Licensing Act¹⁸⁶ affords a dealer the right to obtain review of certain decisions by the franchising auto manufacturer including, inter alia, termination of the franchise, refusal to permit its transfer, and establishment of another, encroaching franchise.¹⁸⁷ The statute vests this review power in the Commissioner of Motor Vehicles,¹⁸⁸ who exercises it by adopting or rejecting recommended findings and conclusions from a hearing officer. The Act directs the Commissioner to appoint the Motor Vehicle Dealers' Advisory Board, and to consult it on matters brought before the Commissioner under the Act.¹⁸⁹ The Act specifies that no two members of the Dealers' Board can be franchisees of the same manufacturer.¹⁹⁰

A Buena Vista Ford dealer sought review by the Commissioner of Ford's decision to grant a Ford franchise in Lexington, six miles away. When the Commissioner approved the new franchise, the Buena Vista dealer sought court review, arguing that because the Dealers' Board contained two Ford franchisees, it was improperly constituted, rendering invalid the advice it delivered the Commissioner and thus his decision. One of the dealers on the Dealers' Board had three Mazda franchises and a Ford franchise. The manufacturer argued that this dealer ought to be viewed as a Mazda, not a Ford franchisee, that because the Commissioner was free to disregard the Board, its improper composition did not affect his decision, and finally, that the consequence of an invalid decision was that no further impediment existed to Ford's proceeding with its new dealership. The circuit court affirmed the Commissioner's decision. The court of appeals reversed and remanded, holding that the plain language of the basic law could not be ignored in disregarding the Ford franchise held by the Dealers' Board member who also dealt in Mazdas, or in examining a decision by the Commissioner rendered without the advice of a properly constituted Dealers' Board.¹⁹¹

186. VA. CODE ANN. §§ 46.1-515 to -550.5 (Repl. Vol. 1986).

187. *Id.* § 46.1-547.

188. *Id.*

189. *Id.* § 46.1-550.2.

190. *Id.*

191. *Courtesy Motors*, 1 Va. App. at 369, 339 S.E.2d at 204.

This case can be contrasted with *Roanoke Memorial Hospitals v. Kenley*¹⁹² in which the court of appeals upheld a decision by the State Health Commissioner granting a certificate of need (CON) for a proposed radiation therapy program despite an apparent inconsistency between his decision and the State Health Plan. Before a medical facility can make certain capital expenditures, acquire new equipment, or introduce new services, state law requires the facility to obtain a certificate of need from the State Health Commissioner, who is required to make a finding of public need.¹⁹³ The statute obliges the Commissioner to make CON decisions consistent with the State Health Plan.¹⁹⁴ The Plan included a standard for megavoltage radiation therapy units which said: "There should be no additional megavoltage units opened unless each existing megavoltage unit in a given health service area is performing at least 6000 treatment visits per year."¹⁹⁵ The Commissioner's decision to grant the CON was based on his finding that, although each existing unit was not performing 6000 treatment visits each year, the average usage for the existing units in the medical service area was 6000 visits per year. Against a challenge that the Commissioner's finding was contrary to the Health Plan standard, and that his issuance was therefore unlawful, the circuit court affirmed the Commissioner's decision.

The court of appeals affirmed the circuit court. Adopting the decision of the Kentucky Court of Appeals in *Starks v. Kentucky Health Facilities*,¹⁹⁶ the Virginia intermediate court found the word "should" in the Health Plan Standard as indicative of an intent to provide the Commissioner with discretion. The Virginia

192. 3 Va. App. 599, 352 S.E.2d 525 (1987). Judge Cole wrote the court's opinion, in which Chief Judge Koontz and Judge Hodges concurred. Interestingly, Judge Hodges also concurred in the court's opinion in *Courtesy Motors*, 1 Va. App. 366, 339 S.E.2d 202 (1986).

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

194. The basic law says in pertinent part:

Any decision to issue or approve the issuance of a certificate shall be consistent with the most recent applicable provisions of the State Health Plan . . . provided, however, if the Commissioner finds, upon presentation of appropriate evidence, that the provisions of . . . such plan are inaccurate, outdated, inadequate or otherwise inapplicable, the Commissioner, consistent with such finding, may issue or approve the issuance of a certificate and shall initiate procedures to make appropriate amendments to such plan.

Id. The commissioner did not make the finding necessary to application of the proviso. *Kenley*, 3 Va. App. at 601, 332 S.E.2d at 526.

195. Virginia State Health Plan 1980-84 and 1982 amendment, quoted in *Roanoke Memorial Hosps.*, 3 Va. App. at 603, 352 S.E.2d at 527.

196. 684 S.W.2d 5 (Ky. Ct. App. 1984).

court also construed the basic law as requiring CON decisions "holding to the same principles" as the Plan, and "in harmony with" the Plan but not "the same in every detail."¹⁹⁷ The Commissioner's use of an area average was seen as consistent with the State Health Plan as a planning and development blueprint because the average allowed for interim usage growth at the historic rate.¹⁹⁸

Issued by the same court so proximately, these two decisions send contrary signals about the deference to be paid an agency's interpretation of its basic law, and a reviewing court's willingness to let the agency be about its business. Given the General Assembly's intention that the Dealers' Board advise but not bind the Commissioner in franchise disputes, it would not have been unreasonable to find in *Courtesy Motors* that judicial nullification of his decision was an inappropriate remedy for an unintentionally misassembled advisory board. Such a conclusion would have been more harmonious, certainly, with the decision in *Roanoke Memorial Hospitals* that the State Health Commissioner can license without satisfying either of the statutory alternatives of Health Plan conformity or an explicit finding of justifiable nonconformity.

VI. CONCLUSION

In 1987, the General Assembly made few changes to Virginia's promulgated law of administrative procedure. Of the few that were affected this session, only that authorizing very broad subdelegation of agency discretionary powers presents a serious problem. The 1987 subdelegation authorization was not intended to repeal by implication the removal of agency head discretion in the appointment of hearing officers to formal adjudicative proceedings. It should not be permitted to have that effect.

The recent promulgation of Rules of Administration for the new hearing officer system was well-intended but overly ambitious. The rules create for the Executive Secretary of the Supreme Court disciplinary powers contrary to the goal of greater hearing officer insulation from outside control, and beyond the contemplation of the General Assembly when it established the system and authorized him to administer it. The rules should be revised, and the power to discipline administrative judges placed in the hands of fellow pro-

197. *Roanoke Memorial Hosps.*, 3 Va. App. at 606, 352 S.E.2d at 529.

198. *Id.* at 607-08, 352 S.E.2d at 530.

fessional adjudicators.

A new Legal Ethics Opinion addresses conflict of interest concerns among attorneys wishing to forego neither agency practice nor service as an independent hearing officer. It is broad-minded and responsive to reality. It establishes the proper balance between incentive and detachment, ensuring opportunity for the best to serve.

The appellate courts have worked overtime lately, establishing the parameters of court of appeals review of circuit court decisions involving administrative agency action. The decisions share a common starting place: that VAPA definitions inform the construction of the court of appeals' jurisdictional statute. Regrettably, the supreme court found itself without the power to correct forum selection errors by transfer to the intermediate court, placing the burden of guessing on the petitioner. Also regrettably, the supreme court has found that an environmental group cannot challenge zoning variances when it neither owns nor possesses nearby realty. While the decision does not directly involve VAPA, its reasoning could easily be applied to VAPA in the future, given the court's willingness to treat *in pari materia* statutes related by their reference to administrative agencies.

Other state court decisions have reasonably limited a party's right to demand formal administrative proceedings in both rulemaking and case decisions, and sent ambivalent signals about what noncompulsory consultation or conformity provisions mean for agency action.