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## Annual Survey of Virginia Law: Administrative Law

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# ARTICLES

## ADMINISTRATIVE LAW

*James N. Christman\**

### I. INTRODUCTION

This article covers changes made to the Virginia Administrative Process Act (VAPA)<sup>1</sup> during the 1992 session of the General Assembly. It also covers selected recent cases from Virginia courts dealing with state administrative procedure decided between August 30, 1990 and September 17, 1992.

### II. STATUTES

The General Assembly made no major changes to the Administrative Process Act in 1992.<sup>2</sup> Probably the most important, or at least most useful, enactment in this area was the one authorizing a codification of Virginia administrative regulations.<sup>3</sup> An upcoming report on administrative law reform by the Joint Legislative Audit and Review Commission (JLARC) also has the potential to be significant.

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1. Administrative Process Act, VA. CODE ANN. §§ 9-6.14:1 to :25 (Repl. Vol. 1989 & Cum. Supp. 1992).

2. A list of bills affecting administrative law distributed by the Virginia Bar Association in March 1992 was invaluable in preparing this summary.

3. See *infra* notes 7-8 and accompanying text.

### A. *Administrative Law Code*

Although the Michie Company publishes an index<sup>4</sup> to the regulations of Virginia administrative agencies, there is no single compilation of the full text of state regulations. Practitioners must cull what they need from the *Virginia Register of Regulations*<sup>5</sup> or ask each agency for a copy of its regulations. In 1992 Virginia joined the majority of states<sup>6</sup> that codify agency rules. The legislature gave the Virginia Code Commission authority to publish an official code of administrative regulations, either by using state resources or by contracting with a private publisher.<sup>7</sup> The project is to be undertaken without spending general fund revenues.<sup>8</sup>

### B. *Interim Report by JLARC*

The 1991 General Assembly requested JLARC to study whether amendments to VAPA are necessary.<sup>9</sup> JLARC published an interim report early in 1992 describing the structure, features, and stages of VAPA and the historical development of the Act.<sup>10</sup> It summarizes the remarks received and issues raised at a JLARC hearing in September 1991 and identifies nine preliminary study issues, such as whether the administrative process be made more efficient without sacrificing quality of input.<sup>11</sup>

A final report is expected in the autumn of 1992.<sup>12</sup>

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4. See, e.g., CODE OF VIRGINIA 1950 ADMINISTRATIVE LAW APPENDIX 1990-1991 (published under the supervision of the Virginia Code Commission pursuant to VA. CODE ANN. §§ 9-6.19, -77.12 (Repl. Vol. 1989 & Cum. Supp. 1992)).

5. Even this will not work for regulations that were promulgated before the *Virginia Register of Regulations* began publication or that are too lengthy to be published in the *Register*. See, e.g., 7:20 Va. Regs. Reg. 3028 (1991) (summarizing regulations governing special education programs for handicapped children because of the length of the full text).

6. According to information provided to a JLARC subcommittee on September 9, 1991, Virginia was then one of only ten states that did not publish a code of regulations.

7. Act of Mar. 6, 1992, ch. 216, 1992 Va. Acts 278 (codified at VA. CODE ANN. §§ 9-6.14:22, .17, 9-77.7, .8, .10, .11, .11:01, .12 (Repl. Vol. 1989 & Cum. Supp. 1992)).

8. *Id.*

9. H.J. Res. 397, Va. Gen. Assembly, (Reg. Sess. 1991).

10. INTERIM REPORT OF THE JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION ON REVIEW OF VIRGINIA'S ADMINISTRATIVE PROCESS ACT, H. Doc. No. 32 (1992).

11. *Id.* at 30.

12. Personal communication with JLARC staff, October 12, 1992. The preface to Interim Report, *supra* note 10, predicted a final report in the summer of 1992.

### C. *Freedom of Information Act*

During the 1992 session four bills were passed amending the Virginia Freedom of Information Act.<sup>13</sup> Discussions of the expansion of an existing business or industry were added to the purposes for which a public body may conduct a closed meeting.<sup>14</sup> As befits the "Information Age," the legislation affecting the Freedom of Information Act had a distinctly high-tech flavor. The Assembly exempted from disclosure information that "describes the design, function, operation or access control features of any security system . . . used to control access to or use of any automated data processing or telecommunications system."<sup>15</sup> The legislature permanently codified the authority of public bodies to conduct official meetings by electronic means.<sup>16</sup> Political subdivisions and local governing bodies, however, still may not conduct official meetings electronically.<sup>17</sup>

Other amendments exempt from disclosure include certain specialized types of documents, namely: (1) records of neighborhood crime watch programs;<sup>18</sup> (2) papers prepared after June 30, 1992, and held by mayors and other chief executive officers of political subdivisions that deal with evaluation of performance of locally elected officials;<sup>19</sup> and (3) certain security materials of the Virginia Board of Youth and Family Services and the Virginia Department of Youth and Family Services and its juvenile facilities.<sup>20</sup>

### D. *State Corporation Commission*

The General Assembly amended provisions in section 13.1-518 of the Code of Virginia (Code) governing disclosure of information

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13. VA. CODE ANN. §§ 2.1-340 to -346.1 (Repl. Vol. 1987 & Cum. Supp. 1992).

14. Act of Mar. 23, 1992, ch. 444, 1992 Va. Acts 571 (codified at VA. CODE ANN. § 2.1-344 (Cum. Supp. 1992)).

15. Act of Feb. 26, 1992, ch. 40, 1992 Va. Acts 38 (codified at VA. CODE ANN. § 2.1-342(47) (Cum. Supp. 1992)).

16. Act of Mar. 4, 1992, ch. 153, 1992 Va. Acts 185 (codified at VA. CODE ANN. § 2.1-343.1(B) (Cum. Supp. 1992)).

17. *Id.*

18. Act of Mar. 5, 1992, ch. 207, 1992 Va. Acts 263 (codified at VA. CODE ANN. § 2.1-342(B)(2) (Cum. Supp. 1992)). However, these records may be disclosed by their custodian unless specifically prohibited by law. *Id.*

19. Act of Apr. 1, 1992 ch. 593, 1992 Va. Acts 846 (codified at VA. CODE ANN. § 2.1-342(B)(4) (Cum. Supp. 1992)).

20. Act of Mar. 4, 1992, ch. 150, 1992 Va. Acts 178 (codified at VA. CODE ANN. § 2.1-342(B)(32) (Cum. Supp. 1992)).

obtained by the State Corporation Commission (SCC) through its investigations.<sup>21</sup> The SCC is authorized to disclose information or documents to quasi-governmental entities associated with law enforcement.<sup>22</sup> Also, the Virginia Securities Act was amended to clarify that the SCC is authorized to determine whether its *rules* have been violated.<sup>23</sup> Formerly, the language referred only to violations of SCC *orders* and *injunctions*.<sup>24</sup> Also, the limitation of twenty dollars per day on SCC's cost recovery for investigators has been eliminated.<sup>25</sup>

#### E. *Public Procurement*

The Code now requires public employees having official responsibility for procurement transactions in which they participated to submit a yearly written certification that they complied with the Virginia Public Procurement Act.<sup>26</sup> Public employees having official responsibility for procurement transactions are prohibited from knowingly making or using misrepresentations.<sup>27</sup>

#### F. *Subpoenas*

The Code has been amended to provide that no fee will be charged for the service of a subpoena under VAPA.<sup>28</sup>

### III. THE COURTS

Decisions by Virginia courts on administrative law in this period were, for the most part, routine. The only real interest lies in the decisions on standing.

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21. See Act of Mar. 4, 1992, ch. 157, 1992 Va. Acts 189 (codified at VA. CODE ANN. § 13.1-518 (Cum. Supp. 1992)).

22. *Id.*

23. *Id.*

24. See VA. CODE ANN. § 13.1-518 (Repl. Vol. 1989).

25. See *id.*

26. Act of Apr. 5, 1992, ch. 761, 1992 Va. Acts 1183 (codified at VA. CODE ANN. §§ 11-79.1, .2 (Cum. Supp. 1992)).

27. *Id.*

28. Act of Apr. 3, 1992, ch. 648, 1992 Va. Acts 955 (codified at VA. CODE ANN. § 14.1-105 (Cum. Supp. 1992)).

## A. *Standing*

The law of "standing" determines who may petition a court to review agency action. Under federal law, standing is part of the "case" or "controversy" language of the United States Constitution.<sup>29</sup> The Virginia Constitution, on the other hand, contains no case or controversy requirement. Instead, court jurisdiction is prescribed entirely by statute. Historically, Virginia courts have awarded standing to challenge agency action less freely than the federal courts.

The law of standing in Virginia varies depending on whether one is challenging "case decisions" or "regulations." VAPA provides for judicial review of a *case decision* by any "party aggrieved by and claiming unlawfulness of a case decision" and of an agency *rule* by "[a]ny person affected by and claiming the unlawfulness of any regulation."<sup>30</sup> The "basic law"<sup>31</sup> can, however, further limit the opportunity to challenge an agency action.

### 1. Standing to Challenge a "Case Decision"

The principal issue regarding standing to challenge case decisions is whether a public interest group or members of the public can challenge the granting of an environmental permit, either on their own behalf or perhaps as "private attorneys general" on behalf of the public. At the federal level, this issue has been fought out many times before such agencies as the Nuclear Regulatory Commission.

Two 1991 cases by the Virginia Court of Appeals present an obstacle to environmental groups and members of the public who seek to challenge a case decision.

In *Environmental Defense Fund v. Virginia State Water Control Board*<sup>32</sup> the court of appeals found that an environmental group, the Environmental Defense Fund (EDF), lacked standing to

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29. U.S. CONST. art. III, § 2; see 2 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 10.3 (1985).

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

31. VA. CODE ANN. § 9-6.14:4(C) (Repl. Vol. 1989) defines "basic law" 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."

32. 12 Va. App. 456, 404 S.E.2d 728 (1991).

challenge the State Water Control Board's issuance of a Virginia Pollution Discharge Elimination System (VPDES) permit.<sup>33</sup>

The owners of a poultry processing plant in Shenandoah County applied for an amendment to their VPDES permit in order to allow amounts of effluent discharged to vary depending on the flow of the receiving river.<sup>34</sup> EDF commented on the proposed amendment, both at the public hearing and in writing.<sup>35</sup> The Water Board authorized reissuance of the amended permit, and EDF appealed to the Circuit Court of the City of Richmond.<sup>36</sup>

The water control law gives standing to an "owner aggrieved;"<sup>37</sup> VAPA gives standing, as noted above, to a "party aggrieved by and claiming unlawfulness of a case decision."<sup>38</sup> EDF argued that even if it wasn't an "owner aggrieved" under the water control law, it was a "party aggrieved" under VAPA.<sup>39</sup> The circuit court agreed that EDF might qualify under either provision, since the water law does not "specifically exclude appeal under the APA."<sup>40</sup> However, the circuit court found that in this case, EDF did not have standing under either statute.<sup>41</sup>

The court of appeals did not agree with the trial court that EDF had two distinct statutory chances for standing.<sup>42</sup> It noted that VAPA states that its "purpose is to supplement . . . basic laws,"<sup>43</sup> and that the "owner aggrieved" language would be meaningless if EDF's argument were accepted.<sup>44</sup> It held that "where the basic law contains a specific standing requirement . . . [it] is controlling over the standardized court review" provided by VAPA.<sup>45</sup>

Thus, EDF had standing as an owner aggrieved under the basic law or not at all. The court of appeals agreed with the trial court that EDF was not an owner aggrieved as defined by the basic law<sup>46</sup>

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33. *Id.* at 465, 404 S.E.2d at 733-35.

34. *Id.* at 458, 404 S.E.2d at 729.

35. *Id.*

36. *Id.* at 459, 404 S.E.2d at 730.

37. VA. CODE ANN. § 62.1-44.29 (Repl. Vol. 1992).

38. *Id.* § 9-6.14:16 (Repl. Vol. 1989).

39. *Environmental Defense Fund*, 12 Va. App. at 459, 404 S.E.2d at 730.

40. *Id.*

41. *Id.* at 460, 404 S.E.2d at 730.

42. *Id.* at 461, 404 S.E.2d at 731.

43. *Id.* (quoting VA. CODE ANN. § 9-6.14:3 (Repl. Vol. 1989)).

44. *Environmental Defense Fund*, 12 Va. App. at 462, 404 S.E.2d at 731-32.

45. *Id.* at 462, 404 S.E.2d at 732.

46. VA. CODE ANN. § 62.1-44.3 (Repl. Vol. 1992).

and was therefore denied standing to challenge the final Board decision.<sup>47</sup>

Finally, the court of appeals held that EDF's lack of standing to challenge the final Board decision necessarily barred it from appealing the Water Board's denial of its request for a formal hearing.<sup>48</sup> Appeal was unavailable under VAPA because section 9-6.14:16 provides only for appeal of a "case decision"<sup>49</sup> which, in turn, means a determination of the rights of a "named party."<sup>50</sup> EDF was not a "named party" before the Water Board.<sup>51</sup> Similarly, EDF had no appeal under the Water Control Law because the Water Board's Procedural Rule 1 does not provide for appeal from a denial of a formal hearing and the water control legislation limits review to an "owner."<sup>52</sup>

The outcome was the same when a permittee's neighbors attempted to claim standing in *Town of Fries v. State Water Control Board*.<sup>53</sup> This time a downstream town (Fries), a civic association, a sand and gravel operator, and fifteen downstream riparian land owners sought review of a Water Board case decision granting a VPDES permit to the City of Galax for an enlarged sewage treatment plant upstream from the plaintiffs.<sup>54</sup> The court of appeals again denied standing on the basis that the plaintiffs were neither "parties aggrieved"<sup>55</sup> nor "owners aggrieved."<sup>56</sup>

Relying on the *Environmental Defense Fund* decision, the *Town of Fries* court ruled that the VAPA judicial review section does not create a basis for jurisdiction in addition to the basic water control law.<sup>57</sup> Moreover, the water control law provides court review only to an "owner aggrieved" and therefore implicitly denies that right to others.<sup>58</sup>

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47. *Environmental Defense Fund*, 12 Va. App. at 463, 404 S.E.2d at 732.

48. *Id.*

49. VA. CODE ANN. § 9-6.14:16(A) (Repl. Vol. 1989).

50. *Id.* § 9-6.14:4(D).

51. *Environmental Defense Fund*, 12 Va. App. at 464, 404 S.E.2d at 733-35.

52. *Id.* at 464-65, 404 S.E.2d at 733-35 (citing VA. CODE ANN. § 62.1-44.29(1) (Repl. Vol. 1992)).

53. 13 Va. App. 213, 409 S.E.2d 634 (1991).

54. *Id.* at 215, 409 S.E.2d at 635.

55. *Id.* at 216, 409 S.E.2d at 636.

56. *Id.* at 217, 409 S.E.2d at 637.

57. *Id.* at 216, 409 S.E.2d at 636.

58. *Id.*



Interpreting the review provision in the water control law, the *Town of Fries* court emphasized that the term "aggrieved" has specific meaning in Virginia law.<sup>59</sup> A petitioner "must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest."<sup>60</sup> A petitioner must also establish a denial of a "personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally."<sup>61</sup>

Consequently, there was no standing for the town, which represented citizens who intended to use the New River for drinking water; for the Fries Civic League, which the court said had "no identified specific interest" in the Galax permit; or for the downstream riparian owners.<sup>62</sup>

Interestingly, the court found that the sand and gravel company, which had its own VPDES permit to discharge into the same river, also had not shown an immediate, pecuniary, and substantial interest in the Galax permit.<sup>63</sup> Yet one discharger's effluent can certainly affect another's permit, particularly when permit limits are based on water quality standards and "wasteload allocations."<sup>64</sup>

The effect of these two cases is that under state law no one can challenge a Water Board permit except the permittee.<sup>65</sup> There is still an open issue, however, whether an environmental group might challenge a permit in federal court. Under the federal Clean Water Act, all state-issued VPDES permits are subject to review by the Environmental Protection Agency (EPA).<sup>66</sup> If the EPA determines that a permit is not in accordance with law, it can disap-

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59. *Id.* at 217, 409 S.E.2d at 637.

60. *Id.* (quoting *Virginia Beach Beautification Comm'n v. Board of Zoning Appeals*, 231 Va. 415, 419, 344 S.E.2d 899, 902 (1986)) (quoting *Nicholas v. Lawrence*, 161 Va. 589, 593, 171 S.E. 673, 674 (1933)).

61. *Town of Fries*, 13 Va. App. at 217, 409 S.E.2d at 637 (quoting *Virginia Beach Beautification Comm'n v. Board of Zoning Appeals*, 231 Va. 415, 419-20, 344 S.E.2d 899, 903 (1986)).

62. *Town of Fries*, 13 Va. App. at 217, 409 S.E.2d at 637.

63. *Id.* at 217-18, 409 S.E.2d at 637.

64. See Clean Water Act § 303(d), 33 U.S.C.A. § 1313(d) (West 1986 & Supp. 1992), which provides for the establishment of "total maximum daily loads" of pollutants.

65. H.B. 450, Va. Gen. Assembly (Reg. Sess. 1992) carried over from the 1992 session of the General Assembly, would amend both the water control and the air control laws to allow an appeal by "any person aggrieved" by a final permitting decision of the Air Pollution Control Board or the State Water Control Board.

66. See Clean Water Act § 402(d)(1), 33 U.S.C.A. § 1342(d)(1) (West 1986).

prove the permit and issue a federal permit instead.<sup>67</sup> In theory, at least, a citizens' group might attempt to challenge EPA's failure to disapprove a state permit and obtain judicial review in that manner.

Environmentalists seeking standing under the State Air Pollution Control Law<sup>68</sup> encountered similar difficulties. In *Citizens for Clean Air v. State Air Pollution Control Board*,<sup>69</sup> an environmental group (CCA) sought standing to appeal the Air Board's granting of a permit to a poultry processing plant in Rockingham County. The plant wanted to enlarge its plant and asked the Air Pollution Control Board for a modification to its air permit for this purpose.<sup>70</sup> Members of CCA appeared at the hearing and offered evidence against the proposed modification; nevertheless, the Board granted the permit.<sup>71</sup> CCA requested and was denied a formal hearing.<sup>72</sup> CCA appealed the Board's decision to the Circuit Court of Rockingham County and then to the court of appeals.<sup>73</sup>

The State Air Pollution Control Law allows an appeal by "[a]ny owner aggrieved by a final decision of the Board. . . ."<sup>74</sup> The court of appeals held that CCA did not have standing, since "owner" refers to an owner of an actual or potential source of air pollution.<sup>75</sup> Likewise, CCA had no standing to appeal under the "other person aggrieved" provision of the Air Board's regulations<sup>76</sup> because the state cannot be sued without its consent and section 10.1-1318 of

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67. *Id.* This federal check on state permits was cited by the *Town of Fries* court. *Town of Fries*, 13 Va. App. at 216 n.1, 409 S.E.2d at 636 n.1.

68. VA. CODE ANN. §§ 10.1-1300 to -1326 (Repl. Vol. 1989 & Cum. Supp. 1992).

69. 13 Va. App. 430, 412 S.E.2d 715 (1991).

70. *Id.*

71. *Id.* at 432, 412 S.E.2d at 717.

72. *Id.* at 433, 412 S.E.2d at 717.

73. *See id.* at 432-34, 412 S.E.2d at 716-17.

74. VA. CODE ANN. § 10.1-1318 (Repl. Vol. 1989). Virginia standing requirements may have to be changed to some limited extent because of § 502(b)(6) of the federal Clean Air Act. By the terms of that section, one of the minimum elements of the state's permitting program for sources of air pollutants is "an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law." Clean air Act § 502(b)(6), 42 U.S.C.A. § 7661a(b)(6) (West Supp. 1992).

75. *Citizens for Clean Air*, 13 Va. App. at 440, 412 S.E.2d at 721.

76. VR 120-01, § 120-02-09. The Air Pollution Control Board has recently proposed an amendment to this regulation which would provide "any party significantly affected" by an action of the Board to request a formal hearing. 8:21 Va. Regs. Reg. 3629, 3643 (July 13, 1992).

the Air Pollution Control Law<sup>77</sup> limits standing to an "owner aggrieved."<sup>78</sup>

## 2. Standing to Challenge Regulations

As noted above, VAPA authorizes "[a]ny person affected by and claiming the unlawfulness of any regulation" to seek judicial review of the regulation.<sup>79</sup> In 1991 the Circuit Court for the City of Richmond interpreted this "person affected" standard and gave some insight into how it differs from the "party aggrieved" standard for reviewing case decisions.

In *Environmental Defense Fund v. State Water Control Board*,<sup>80</sup> Judge Markow held that both riparian owners<sup>81</sup> and the Environmental Defense Fund<sup>82</sup> (EDF) had standing to challenge a water quality standard for dioxin.

The State Water Control Law provides that the validity of any regulation may be determined by judicial review in accordance with VAPA.<sup>83</sup> Judge Markow held that a water quality standard<sup>84</sup> is a "regulation" for this purpose.<sup>85</sup> VAPA provides judicial review for any "person affected by and claiming the unlawfulness of any regulation."<sup>86</sup>

Judge Markow relied on *Continental Baking Co. v. City of Charlottesville*<sup>87</sup> in holding that riparian owners were "persons affected" and had standing because of their special interest in water quality.<sup>88</sup> Moreover, EDF was granted standing in its representative capacity for its individual members.<sup>89</sup> The court found that

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77. VA. CODE ANN. § 10.1-1318 (Repl. Vol. 1989).

78. *Citizens for Clean Air*, 13 Va. App. at 440, 412 S.E.2d at 721.

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

80. 22 Va. Cir. 412 (Richmond City 1991).

81. *Id.* at 418.

82. *Id.* at 420.

83. VA. CODE ANN. § 62.1-44.24(1) (Repl. Vol. 1992).

84. A water quality standard is an ambient standard that specifies an acceptable level of a pollutant in the receiving stream. See, e.g., Clean Water Act § 303, 33 U.S.C.A. § 1313 (West 1986 & Supp. 1992). For example, a water quality standard might prescribe that the average daily concentration of total residual chlorine in freshwater should not exceed eleven parts per billion. See 7:15 Va. Regs. Reg. 2220, § 680-21-01.11(1)(A) (1991).

85. *Environmental Defense Fund*, 22 Va. Cir. at 412.

86. VA. CODE ANN. § 9-6.14:16(A) (Repl. Vol. 1989).

87. 202 Va. 798, 120 S.E.2d 476 (1961).

88. *Environmental Defense Fund*, 22 Va. Cir. at 414.

89. *Id.* at 419.

EDF met the representative standing test established by the United States Supreme Court in *Sierra Club v. Morton*.<sup>90</sup>

### B. VAPA as Backstop to the Basic Law

In *School Board of York v. Nicely*,<sup>91</sup> the Court of Appeals of Virginia considered whether the basic law or VAPA would determine the statute of limitations. In *Nicely*, a state review officer, in an administrative due process hearing, directed the school board to pay the cost of placing a handicapped man in an expensive private treatment facility.<sup>92</sup> Eighty-one days later, the school board filed a motion for judgment in circuit court for review of the finding of the review officer.<sup>93</sup> The Nicelys argued that the thirty-day limitation prescribed by VAPA barred the school board's action.<sup>94</sup> The school board countered that the one-year statute of limitations in Virginia Code section 8.01-248 applied<sup>95</sup> since there is no statute of limitations in the Virginia special education statutes.<sup>96</sup>

The court held that the one-year catch-all statute applied instead of the VAPA thirty-day limitation, stating that VAPA is intended to supplement the basic law and provide a default where the basic law fails to provide process.<sup>97</sup> Here the basic law did not provide a statute of limitations; nevertheless, the court found that under *Forbes v. Kenley*,<sup>98</sup> the VAPA limitation did not apply.<sup>99</sup> Applying *Forbes v. Kenley*, the court of appeals held that Virginia

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90. *Id.* See *Sierra Club v. Morton*, 405 U.S. 727 (1972), in which the Court held that under § 10 of the federal Administrative Procedure Act, 5 U.S.C. § 702, the environmental group lacked standing to challenge the construction of a ski resort in Mineral King Valley in the Sequoia National Forest. *Id.* at 727. The *Sierra Club* Court used the following two-part test for standing: (1) the party must allege "injury-in-fact" and (2) the injury must be to an interest "arguably within the zone of interests to be protected or regulated" by the statutes that the agency is claimed to have violated. *Id.* at 733.

The Sierra Club demonstrated an "injury-in-fact" by alleging injury to aesthetic or environmental well-being. *Id.* at 734. The court found, however, that the Club had failed to allege that it was among the injured, because it did not allege that it or its members would be affected by the resort development. *Id.* at 735.

91. 12 Va. App. 1051, 408 S.E.2d 545 (1991).

92. *Id.* at 1054, 408 S.E.2d at 546.

93. *Id.* at 1054, 408 S.E.2d at 547.

94. *Id.*

95. VA. CODE ANN. § 8.01-248 (Repl. Vol. 1992).

96. *Id.*; see VA. CODE ANN. §§ 22.1-213 to -221 (Repl. Vol. 1985 & Cum. Supp. 1992).

97. 12 Va. App. at 1058, 1065, 408 S.E.2d at 549, 553.

98. 227 Va. 55, 314 S.E.2d 49 (1984).

99. See *Nicely*, 12 Va. App. at 1059, 408 S.E.2d at 549.

Code section 22.1-214(D) provided sufficient due process to forestall application of the VAPA thirty-day statute of limitations.<sup>100</sup>

### C. *Emergency Regulations*

When a regulation is found by a court to be invalid, the agency will sometimes try to remedy the situation by repromulgating the regulation as an "emergency" provision. The State Water Control Board (SWCB) made such an effort in 1988<sup>101</sup> after the Circuit Court of the City of Roanoke invalidated the board's water quality standard for chlorine.<sup>102</sup>

In that case, *State Water Control Board v. Appalachian Power Co.*,<sup>103</sup> the Court of Appeals of Virginia, upon rehearing en banc held that the SWCB could not use an emergency regulation to cure the deficient adoption process.<sup>104</sup> The court found that if an agency could simply enact an emergency regulation to moot the questions about the permanent regulation's validity, then "every challenged regulation which the agency has deemed it necessary to keep in force by emergency measures would be placed beyond [judicial] review."<sup>105</sup>

### D. *Mootness*

In the same case, *State Water Control Board v. Appalachian Power Co.*,<sup>106</sup> Appalachian Power argued that whether the SWCB standards were valid was a moot question because (1) the disputed standard had been long since replaced and (2) the General Assembly had since amended the basic law such that a formal hearing was no longer required prior to the enactment of a standard.<sup>107</sup>

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100. *Id.* at 1061, 408 S.E.2d at 552.

101. *See State Water Control Bd. v. Appalachian Power Co.*, 9 Va. App. 254, 261 n.4, 386 S.E.2d 633, 637 n.4 (1989), *aff'd on reh'g en banc*, 12 Va. App. 73, 402 S.E.2d 703 (1991).

102. *See id.* at 259, 386 S.E.2d at 635. The circuit court found the SWCB's water quality standard to be invalid because the board had not held a formal evidentiary hearing before amending the standard as required by the basic law. *Id.* In 1989, while this case was pending, the General Assembly amended the basic law to provide a formal evidentiary hearing is not required unless requested. *State Water Control Bd. v. Appalachian Power Co.*, 12 Va. App. 73, 76 n.2, 402 S.E.2d 703, 705 n.2. (1991).

103. 12 Va. App. 73, 402 S.E.2d 703 (1991).

104. *Id.* at 76, 402 S.E.2d at 705.

105. *Id.*

106. 12 Va. App. 73, 402 S.E.2d 703 (1991).

107. *Id.* at 74, 402 S.E.2d at 704. The failure to conduct a formal evidential hearing prior to the enactment of the standard was the basis of the original dispute. *Id.*

The court of appeals disagreed and held that the Water Control Board's action in adopting the original regulation was *not* moot, notwithstanding the fact that the basic law governing the SWCB had been amended and that the disputed standard had been replaced.<sup>108</sup> The majority determined, under the doctrine of "capable of repetition, but evading review," that a real controversy continued to exist to the extent that the validity of the regulation might affect pending controversies or enforcement proceedings implemented by the State Water Control Board against Appalachian Power Company or others who might have been subject to the regulation from the time of its initial adoption until the adoption of the emergency regulation.<sup>109</sup>

#### E. *Hearing Officers*

In *Virginia Board of Medicine v. Fetta*,<sup>110</sup> the Court of Appeals of Virginia affirmed the trial court's finding that the Board of Medicine (Board) had violated its statutory authority with procedures used at an evidentiary hearing. The Board allowed three of its members to preside at the evidentiary hearing along with the hearing officer.<sup>111</sup> The court held that the basic law authorizes an evidentiary hearing before a hearing officer alone or before a quorum of the Board, but not before a panel comprised of just three members of the Board.<sup>112</sup> The purpose of the statute is to allow the board members to receive information on an equal basis, and this purpose was violated by the Board's procedure.<sup>113</sup>

#### F. *Remedies*

In the same case, *Virginia Board of Medicine v. Fetta*,<sup>114</sup> the trial court and the court of appeals simply ordered the Board to dismiss the complaints against Dr. Fetta instead of remanding the case to the Board.<sup>115</sup> The trial court found that the Board had been tainted by the practice of having three of its members sit

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108. *Id.*

109. *Id.* at 75-76, 402 S.E.2d at 705.

110. 12 Va. App. 1173, 408 S.E.2d 573 (1991), *aff'd*, No. 911526 (Va. Sept. 18, 1992). The supreme court opinion says that *four* Board members sat with the hearing officer.

111. *Id.* at 1175, 408 S.E.2d at 574.

112. *Id.* at 1175, 408 S.E.2d at 575; *See* VA. CODE ANN. § 54.1-110(A) (Repl. Vol. 1991).

113. 12 Va. App. at 1175-76, 408 S.E.2d at 575.

114. 12 Va. App. 1173, 408 S.E.2d 573 (1991), *aff'd*, No. 911526 (Va. Sept. 18, 1992).

115. *Id.* at 1177, 408 S.E.2d at 575.

with the hearing officer during the hearing.<sup>116</sup> The appellate court affirmed on the ground that the trial court's decision was discretionary and that it had not abused that discretion.<sup>117</sup> The Commonwealth subsequently noted its appeal to the Supreme Court of Virginia, which affirmed the court of appeals on September 18, 1992.<sup>118</sup>

One way of compelling an agency to do its duty is a writ of mandamus, but such a writ is not readily granted, as illustrated by a 1988 circuit court case, *Homestretch Corp. v. Board of Supervisors of Culpeper County*.<sup>119</sup> There the plaintiffs sought alternatively a declaratory judgment or a writ of mandamus directing the State Water Control Board to cease consideration of an application for a centralized sewer system; the plaintiffs claimed that there were deficiencies in the certificate required under Code section 62.1-44.15:3 pertaining to the application for a certificate for a sewage discharge permit.<sup>120</sup> The court refused, saying that mandamus clearly would not lie to order the SWCB to cease considering an application that was within its discretion.<sup>121</sup> Moreover, the court said that a declaratory judgment cannot be substituted for an appeal under VAPA.<sup>122</sup>

The plaintiff in *Evans v. Chief of Police*<sup>123</sup> had more success. In this case of alleged violations of the Privacy Protection Act of 1976,<sup>124</sup> for which mandamus is specifically authorized,<sup>125</sup> the court held that a writ of mandamus is the appropriate legal remedy for requiring the police to show an employee her personal file.<sup>126</sup> The court discussed the three elements of a mandamus action and found that the plaintiff had satisfied all three at least for the purpose of defeating a demurrer:

- (1) a clear legal right in the petitioner to the relief sought,

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116. *Id.*

117. *Id.*

118. See *Virginia Bd. of Medicine v. Fetta*, No. 911526 (Va. Sept. 18, 1992).

119. 22 Va. Cir. 549 (Culpeper County 1988).

120. *Id.* at 550.

121. *Id.*

122. *Id.*

123. 20 Va. Cir. 487 (Fairfax County 1990).

124. VA. CODE ANN. §§ 2.1-377 to -386 (Repl. Vol. 1987 & Cum. Supp. 1992).

125. *Id.* § 2.1-386 (Repl. Vol. 1987)

126. *Evans*, 20 Va. Cir. at 487; see VA. CODE ANN. § 2.1-382.3(a) (Repl. Vol. 1987).

(2) a clear legal duty on the part of the respondent to do the thing the petitioner seeks to compel (there being no mandamus for a discretionary act), and

(3) the absence of another adequate remedy at law.<sup>127</sup>

#### G. *Written Standards for Agency Decisionmaking*

In *Dotti v. Virginia Board of Medicine*,<sup>128</sup> the Court of Appeals of Virginia overturned a reprimand issued by the Board of Medicine to a chiropractor who had held himself out as a specialist in sports medicine.<sup>129</sup> The reprimand was held to be a violation of the chiropractor's First Amendment right to free speech because the board had set no standards by which to judge whether the advertisement was untruthful or misleading.<sup>130</sup>

#### H. *Policy Statements, "Guidance" Documents, and Interpretive Rules*

An agency's use of written guidelines, which it claims are not "rules," to guide agency decisions continues to be controversial. Usually the issue arises when an agency applies a "policy statement," "guidance document," or "interpretive rule." If such informal guidelines are applied too rigidly, they run afoul of a principle addressed in *McLouth Steel Products Corp. v. Thomas*<sup>131</sup> and must be promulgated with proper notice and comment procedures.<sup>132</sup>

In *Virginia Board of Medicine v. Virginia Physical Therapy Ass'n*,<sup>133</sup> the Board of Medicine followed three opinions of the Attorney General<sup>134</sup> in finding that non-physician-supervised electromyographic (EMG) examinations were beyond the scope of the licenses of physical therapists.<sup>135</sup> Since this determination was

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127. *Evans*, 20 Va. Cir. at 487-88.

128. 12 Va. App. 735, 407 S.E.2d 8 (1991).

129. *Id.* at 737, 407 S.E.2d at 10.

130. *Id.* at 742, 407 S.E.2d at 13.

131. 838 F.2d 1317 (D.C. Cir. 1988). In *Thomas*, the District of Columbia Circuit Court of Appeals expanded upon the two-prong test for distinguishing between rules and policies promulgated in *Community Nutrition Inst. v. Young*, 818 F.2d 943 (D.C. Cir. 1987).

132. See generally *McLouth Steel Products Corp.*, 838 F.2d at 1320-23.

133. 13 Va. App. 458, 413 S.E.2d 59 (1991).

134. *Id.* at 461, 413 S.E.2d at 61-62; see also 1989 VA. ATT'Y GEN. ANN. REP. 281 (1989); 1984-85 VA. ATT'Y GEN. ANN. REP. 231 (1985); 1984-85 VA. ATT'Y GEN. ANN. REP. 172 (1984).

135. *Virginia Bd. of Medicine*, 13 Va. App. at 461, 413 S.E.2d at 61-62.



neither a "rule" nor a "case decision" the court of appeals held that it was not reviewable.<sup>136</sup> The court recognized that parties who are adversely affected by "de facto rules" before such rules are applied in a case decision are denied relief and that Virginia law contains a "gap" in this respect.<sup>137</sup>

A private party in the case of *W. v. Jackson*<sup>138</sup> denied a complaint of child abuse levied against him.<sup>139</sup> A social worker advised him by letter that the charges against him were "founded" and that his name and his child's name would be placed in the central registry in Richmond.<sup>140</sup> After a hearing officer affirmed the initial "founded" finding, the man appealed to the circuit court.<sup>141</sup>

The principal issue was the lawfulness of regulations adopted by the Commissioner of the Department of Social Services.<sup>142</sup> Central to the court's analysis was the Virginia Code's definition of child "abuse," which includes "mental injury."<sup>143</sup> The Commissioner adopted regulations defining "mental abuse" to include threatening "to inflict injury to the mental functioning of the child;" such might be demonstrated by "significant mental difficulty which is caused or perpetuated by a pattern of identifiable behavior by the caretaker."<sup>144</sup>

The court held that the Commissioner had "overstepped the bounds of administration and entered the arena of legislation" by enacting his own definition of child abuse and neglect.<sup>145</sup> The court also agreed that the Department's guidelines were impermissibly vague.<sup>146</sup> The court was of the view that "[u]nder these exceedingly broad and vague guidelines, it is very easy for any lay person, not to mention the skilled, experienced professional social worker, to conceive of innumerable situations in which most any parent could be deemed guilty of child abuse."<sup>147</sup> The court pointed out that

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136. *Id.* at 466-69, 413 S.E.2d at 65.

137. *Id.* at 469, 413 S.E.2d at 65-66.

138. 22 Va. Cir. 114 (Washington County 1990), *rev'd*, 14 Va. App. —, 419 S.E.2d 385 (1992).

139. *Id.* at 115.

140. *Id.*

141. *Id.* at 115-16.

142. *Id.* at 120-22.

143. VA. CODE ANN. § 63.1-248.2 (Repl. Vol. 1991).

144. Virginia Dept. of Social Services, *Protective Services Handbook*, § 3, ch. A.

145. *W. v. Jackson*, 22 Va. Cir. at 122.

146. *Id.* at 123.

147. *Id.*

“for an administrative regulation to pass muster under the due process clause, it must give a person of ordinary intelligence fair notice of what is required.”<sup>148</sup>

The court rejected the Commissioner’s argument that there was no due process deprivation because no liberty or property interest was at stake.<sup>149</sup> It agreed that more than mere injury to reputation is necessary to implicate due process, because there must be “stigma-plus.”<sup>150</sup> The court did, however, recognize numerous ways in which the parent’s liberty or property interest might be adversely affected by the agency action to label him as a child abuser, such as being denied employment in a day care center or being denied a position as a youth leader in church or little league baseball.<sup>151</sup>

The Virginia Court of Appeals reversed,<sup>152</sup> holding that the guidelines are not regulations, but interpretive rules, the adoption of which is within the Commissioner’s authority.<sup>153</sup> The court noted that the General Assembly authorized the Commissioner to “supervise the administration” of the Welfare and Social Services provisions of the Code and to see that the laws “are carried out to their true intent and spirit.”<sup>154</sup> Since the guidelines did not “purport to be a substitute for the statute” but were merely intended to assist local social services workers in administering the statute, the court found that the guidelines do not have the force of law and did not, therefore, affect any right of W.<sup>155</sup> The court also found that the guidelines were not inconsistent with the statute.<sup>156</sup>

The court of appeals also rejected the trial court’s ruling that the guidelines are overly broad or void for vagueness. Because W. did not argue that the guidelines affected his “exercise of a protected first amendment activity,” the court ruled that a constitutional overbreadth analysis was unnecessary.<sup>157</sup> Additionally, because the guidelines were adjudged to be interpretive rules lacking the force and effect of law, the court applied a less strict standard of preci-

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148. *Id.* (citing *Papachriston v. City of Jacksonville*, 405 U.S. 156 (1972)).

149. 22 Va. Cir. at 129.

150. *Id.* at 131.

151. *Id.* at 131-32.

152. *Jackson v. W.*, 14 Va. App. \_\_\_\_, 419 S.E.2d 385 (1992).

153. *Id.* at \_\_\_\_, 419 S.E.2d at 389-90.

154. *Id.* at \_\_\_\_, 419 S.E.2d at 389 (quoting VA. CODE ANN. § 63.1-4 (Repl. Vol. 1991)).

155. *Jackson*, 14 Va. App. at \_\_\_\_, 419 S.E.2d at 389.

156. *Id.* at \_\_\_\_, 419 S.E.2d at 391.

157. *Id.* at \_\_\_\_, 419 S.E.2d at 393 n.10.

sion and clarity, and on the facts found the definition of "mental abuse" was "not so ambiguous as to require W. to guess at their meaning."<sup>158</sup>

Finally, in addressing W.'s contention that the guidelines deprived him of due process, the court applied the two-step analysis of *Klimko v. Virginia Employment Commission*.<sup>159</sup> The *Jackson* court conceded merit in the Commissioner's argument that due process analysis was unwarranted because protective services proceedings are investigations rather than adjudications. However, it also noted that findings of child abuse are "binding determination[s] that a party did abuse a child."<sup>160</sup> The court ruled that in any event, the procedures afforded W. were constitutionally adequate.<sup>161</sup>

### I. *Deference to Agency Expertise*

Reviewing courts commonly defer to agency expertise, particularly on complex technical issues. The more esoteric the issue and the more expert the agency, the more likely is the court to defer.

An example of a situation in which a court is *not* likely to defer is noted in *Fairfax Surgical Center v. State Health Commissioner*.<sup>162</sup> The State Health Commissioner determined that a surgery center would need a Certificate of Public Need before constructing an out-patient operating room.<sup>163</sup> The operating room required review by the Commissioner if it was a "significant change" to a "project."<sup>164</sup> A "project" is, among other things, an expenditure that increases the total number of beds.<sup>165</sup> The Commissioner determined that adding an operating room was a significant change because an operating room was "synonymous with a bed" and the addition of an operating room therefore increased the number of beds.<sup>166</sup>

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158. *Id.* at \_\_\_\_, 419 S.E.2d at 392.

159. 216 Va. 750, 222 S.E.2d 559, *cert. denied*, 429 U.S. 849 (1976).

160. *Jackson*, 14 Va. App. at \_\_\_\_, 419 S.E.2d at 395.

161. *Id.* at \_\_\_\_, 419 S.E.2d at 397.

162. 12 Va. App. 576, 405 S.E.2d 430 (1991).

163. *Id.* at 577, 405 S.E.2d at 431.

164. *See id.* at 577-78, 408 S.E.2d at 431.

165. VA. CODE ANN. § 32.1-102.1 (Repl. Vol. 1992).

166. *Fairfax Surgical Ctr.*, 12 Va. App. at 578, 405 S.E.2d at 432.

The court disagreed.<sup>167</sup> Since "bed" is a non-technical word, the court construed it in its ordinary sense, and ordinarily "bed" does not mean "operating room."<sup>168</sup> The court noted that if an issue falls outside the specialized competence of an agency (such as constitutional and statutory interpretation issues), little deference is owed to the agency.<sup>169</sup> In short, courts are unlikely to give much deference to the agency's interpretation of a statute when an agency decision is (1) an issue of law, such as a constitutional or statutory interpretation issue; (2) a non-technical issue; and (3) outside the specialized competence of the agency.<sup>170</sup>

Another factor that increases the deference given an agency is the agency's adherence to its interpretation for an extended period. In *Cruz v. Virginia Employment Commission*,<sup>171</sup> a former employee claimed the right to file an untimely appeal from a decision by the Virginia Employment Commission Claims Deputy because an appeal request by the hospital was lost in the mail.<sup>172</sup> The examiner accepted this explanation as "good cause shown" for a late appeal.<sup>173</sup> The court held that because the Commission had treated a document lost in the mail as "good cause" for at least the last twenty years, "great weight" should be given to this position.<sup>174</sup>

In *Metropolitan Cleaning Corp. v. Crawley*,<sup>175</sup> the Court of Appeals of Virginia affirmed a Virginia Workers' Compensation Commission finding that Crawley was an "employee," rather than an independent contractor, in her employment as a domestic worker.<sup>176</sup> The court therefore agreed with the Commission's decision to count her earnings from similar employment in determining her average weekly wage.<sup>177</sup>

The court said that "[w]hat constitutes an 'employee' is a question of law; however, whether a specific person falls within that

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167. *Id.* at 579, 405 S.E.2d at 432.

168. *Id.* at 579-80, 405 S.E.2d at 432. The court did not address what would seem to be a more straightforward analysis, which is that the operating room would increase the number of beds if the operating table in the room is called a "bed." *See id.*

169. *Id.* at 579, 405 S.E.2d at 432 (citations omitted).

170. *See id.*

171. 25 Va. Cir. 525 (Fairfax County 1991).

172. *Id.* at 525-26.

173. *Id.* at 526.

174. *Id.*

175. 14 Va. App. \_\_\_, 416 S.E.2d 35 (1992) (en banc).

176. *Id.* at \_\_\_, 416 S.E.2d at 37.

177. *Id.*

definition 'is usually a question of fact.'"<sup>178</sup> Although the evidence was conflicting, there was credible evidence to support the Commission's finding that Crawley was an employee, and the court could not disturb this finding.<sup>179</sup> The court noted that the scope of judicial review of fact-finding by the Workers' Compensation Commission "is severely limited, partly in deference to the agency's expertise in a specialized field."<sup>180</sup> The court emphasized the experience developed by the Commission in deciding such questions and said that its findings of fact would be upheld so long as its decisions were "reasonable and rational."<sup>181</sup>

### J. *Standard of Review*

Several recent cases applied the familiar standards of review used by courts in reviewing agency action. By and large these cases added nothing remarkable to existing law.

*Wolfe v. University of Virginia*<sup>182</sup> was a circuit court case in which the court was called upon to review the University of Virginia's decision that a student was not entitled to pay lower, in-state tuition.<sup>183</sup> Because this was the second time the student had petitioned, the University argued that its earlier decision had res judicata effect.<sup>184</sup> The court rejected this argument, finding that the legislature in effect intended to allow students to petition more than once when circumstances change.<sup>185</sup>

Describing the court's role, the court said that review is not de novo, but rather is based solely on an established administrative record.<sup>186</sup> The court is not to assess the merits of petitioners' claims but is to determine "whether the appellate determination was at least supportable and not arbitrary, capricious, or contrary

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178. *Id.* at \_\_\_, 416 S.E.2d at 37 (quoting *Intermodal Servs., Inc. v. Smith*, 234 Va. 596, 600, 364 S.E.2d 221, 223 (1988)).

179. *Crawley*, 14 Va. App. at \_\_\_, 416 S.E.2d at 37.

180. *Id.* at \_\_\_, 416 S.E.2d at 38 (quoting *Brown v. Workmen's Compensation Appeal Bd. (Transworld Airlines)*, 505 Pa. 35, 38, 476 A.2d 900, 902 (1984)).

181. *Id.* at \_\_\_, 416 S.E.2d at 38.

182. 22 Va. Cir. 191 (Albemarle County 1990).

183. *See id.* at 191.

184. *Id.* at 192.

185. *Id.*

186. *Id.* at 193.

to law."<sup>187</sup> The court exercises a quasi-appellate function, similar to an appellate court applying a "clearly erroneous" standard.<sup>188</sup>

In the accompanying case, also called *Wolfe v. University of Virginia*,<sup>189</sup> the court rejected Wolfe's appeal, holding that the decision by the University was supported by "substantial evidence" and neither "arbitrary, capricious, nor otherwise contrary to law."<sup>190</sup>

In another case where a petitioner was claiming the right to in-state tuition (which turns on domiciliary intent), *Wickham v. Virginia Commonwealth University*,<sup>191</sup> the circuit court held that the student had in fact established the intent to reside in Virginia and was entitled to the lower tuition.<sup>192</sup> Here again the standard of review was whether the decision "could reasonably be said, on the basis of the record, to be supported by substantial evidence and not to be arbitrary, capricious, or otherwise contrary to law."<sup>193</sup> Under the "substantial evidence" test, said the court, the University's determination could be rejected only if a reasonable mind would necessarily come to a different conclusion after a review of the record.<sup>194</sup> The court then held that the student had established her intent to live in Virginia by "clear and convincing evidence."<sup>195</sup>

In *Southerland v. ABC Stores, III, Inc.*,<sup>196</sup> the plaintiff was fired from her job as a sales associate for Miller & Rhoads in the downtown Richmond department store.<sup>197</sup> The Virginia Employment Commission concluded that she had been insubordinate.<sup>198</sup>

The standard of review as to the Commission's findings of fact would be conclusive if supported by evidence and in the absence of fraud, and the jurisdiction of the court would be confined to questions of law.<sup>199</sup> The plaintiff argued that the "substantial evidence"

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187. *Id.*

188. *Id.*

189. 25 Va. Cir. 223 (Albemarle County 1991).

190. *Id.* at 226.

191. 23 Va. Cir. 479 (Richmond City 1991).

192. *Id.* at 483.

193. *Id.* at 480 (quoting VA. CODE ANN. § 23.7-4(H) (Cum. Supp. 1992)).

194. *Id.* at 480-81 (citing *Virginia Real Estate Comm'n v. Bias*, 226 Va. 264, 269, 308 S.E.2d 123, 125 (1983)).

195. *Id.* at 481.

196. 23 Va. Cir. 263 (Richmond City 1991).

197. *See id.* at 263-64.

198. *Id.* at 265.

199. *Id.* at 263 (quoting VA. CODE ANN. § 60.2-625(A) (Repl. Vol. 1992)).

test should be applied in reviewing the Commission's decision.<sup>200</sup> The court opined that although the substantial evidence test does not apply to Virginia Code section 60.2-625(A), in any event, substantial evidence did support the decision of the Commission.<sup>201</sup>

In another case on employment benefits, *Extra's, Inc. v. Virginia Employment Commission*,<sup>202</sup> the court held that whether an employee was discharged for misconduct is a mixed question of law and fact that is reviewable by the court notwithstanding a statutory provision that factual findings are conclusive.<sup>203</sup> Under the standard of review, the court decides whether the facts are "sufficient in law to constitute misconduct."<sup>204</sup> Here, the court found that the employee was guilty of misconduct and not qualified for benefits.<sup>205</sup>

In *Armstrong v. Williams*,<sup>206</sup> a young man who had a motorcycle accident and subsequently failed to provide evidence of insurance had his driver's license suspended by the Department of Motor Vehicles.<sup>207</sup> Under Code section 9-6.14:17, judicial review is limited to (1) whether the agency acted in accordance with the law, (2) whether the agency made a procedural error, and (3) whether the agency had sufficient evidential support for its findings of fact.<sup>208</sup> Only the third test was involved in this case. The determination of factual issues in such a case is to be "made on the record, and the inquiry is whether there is substantial relevant evidence in the record so that a reasonable mind might accept it as adequate to support the agency's decision."<sup>209</sup> A reviewing court may reject the agency's findings of fact only if, considering the record as a whole, a reasonable person would necessarily come to a different conclusion.<sup>210</sup> The court noted that it was not allowed to substitute its

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200. *Id.* at 265.

201. *Id.*

202. 23 Va. Cir. 348 (Albemarle County 1991).

203. *Id.* at 349 (citing *Barkley v. Peninsula Transp. Dist. Comm'n*, 11 Va. App. 317, 398 S.E.2d 94 (1990)).

204. *Id.* (quoting *Virginia Employment Comm'n v. Gantt*, 7 Va. App. 631, 635, 376 S.E.2d 808, 811, *aff'd en banc*, 9 Va. App. 225, 385 S.E.2d 247 (1989)).

205. *Id.* at 351.

206. 24 Va. Cir. 173 (Spotsylvania County 1991).

207. *Id.* at 173-74.

208. *Id.* at 174; VA. CODE ANN. § 9-6.14:17 (Repl. Vol. 1989).

209. *Id.* (citing *Virginia Real Estate Comm'n v. Bias*, 226 Va. 264, 308 S.E.2d 123 (1983); *State Bd. of Health v. Godney*, 223 Va. 423, 290 S.E.2d 875 (1982)).

210. *Id.* at 174-75 (citing *Bio-Medical Applications v. Kenley*, 4 Va. App. 414, 358 S.E.2d 722 (1987)).

judgment for that of the administrative hearing officer and agency on a purely factual issue and concluded that the record supported the Commissioner's factual conclusion.<sup>211</sup>

#### K. *Evidence at Administrative Hearings*

The rules of evidence are typically relaxed in administrative hearings, but not to the point where lawyers can afford to disregard basic tenets.

In *Coy v. Virginia Employment Commission*,<sup>212</sup> a floor sweeper at Philip Morris was denied unemployment compensation benefits due to misconduct (stealing cigarettes).<sup>213</sup> Certain key facts came out at the hearing only through a Philip Morris investigator's report of his findings and another person's affidavit stating that the employee had sold him cigarettes.<sup>214</sup> The evidence before the Commission regarding the employee's involvement with the cigarettes was based entirely on hearsay.<sup>215</sup> Without the hearsay there was nothing to tie him to bringing out or receiving the cigarettes with guilty knowledge.<sup>216</sup>

The court said that, because experience has shown hearsay to be unreliable, when hearsay is present, there should be a "modicum" of first-hand evidence — in this case evidence that the employee was a participant in the crime.<sup>217</sup> In short, there must be non-hearsay evidence sufficient to support the Commission finding.<sup>218</sup>

#### L. *Waiver of Objection*

*In re Grievance of Ashley*<sup>219</sup> involved a review of a determination by the Acting County Executive that two men who did not file grievances in a timely manner were not entitled to a final and binding hearing by the Fairfax County Civil Service Commission.<sup>220</sup> The court held that the county had waived its rights to object by processing the tardy grievances to the fourth step of the

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211. *Id.* at 175.

212. 23 Va. Cir. 428 (Richmond City 1991).

213. *Id.* at 428.

214. *Id.* at 429.

215. *Id.* at 430.

216. *Id.*

217. *Id.*

218. *See id.* at 431.

219. 25 Va. Cir. 359 (Fairfax County 1991).

220. *Id.* at 359.



Grievance Procedure without objecting on the basis of Personnel Regulation section 17.5-1, which requires a grievance to be brought within fifteen workdays of the occurrence giving rise to the grievance.<sup>221</sup> The decision of the acting County Executive was reversed.<sup>222</sup>

### M. *Freedom of Information Act; Executive Sessions*

In *Taylor v. Worrell Enterprises, Inc.*,<sup>223</sup> the Supreme Court of Virginia noted that, while the General Assembly has tried to ensure public access to government records and meetings, this policy is not absolute.<sup>224</sup> The court noted that the General Assembly has identified forty-four instances in which certain information need not be disclosed.<sup>225</sup> In particular, an itemized list of long-distance phone calls placed by the governor's office was exempt from disclosure.<sup>226</sup>

Two cases addressed the manner in which agencies may hold meetings under the Virginia Freedom of Information Act.<sup>227</sup> *Little v. Virginia Retirement System*<sup>228</sup> addressed the conditions under which an agency may go into "executive session" and exclude the public.<sup>229</sup> In order to have such an executive session, an agency must first vote in open session to convene the executive session.<sup>230</sup> Then, at the conclusion of the executive session, the agency must certify that it considered only matters lawfully exempted from open meeting requirements.<sup>231</sup> Among the matters that can be discussed in executive session are personnel matters,<sup>232</sup> legal matters,<sup>233</sup> and the "investing of public funds where competition or bargaining is involved, where if made public initially the financial interest of the governmental unit would be adversely affected."<sup>234</sup>

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221. *Id.* at 360.

222. *Id.* at 359.

223. 242 Va. 219, 409 S.E.2d 136 (1991).

224. *Id.* at 224, 409 S.E.2d at 139.

225. *Id.*

226. *See id.*

227. VA. CODE ANN. § 2.1-340 to -346.1 (Repl. Vol. 1987 & Cum. Supp. 1992).

228. 21 Va. Cir. 248 (Richmond City 1990).

229. *See id.* at 248.

230. *Id.* (citing VA. CODE ANN. § 2.1-344.1(A) (Cum. Supp. 1992)).

231. *Id.* at 248-49 (citing VA. CODE ANN. § 2.1-344.1(A) (Cum. Supp. 1992)).

232. *Id.* at 250 (citing VA. CODE ANN. § 2.1-344(A)(1) (Cum. Supp. 1992)).

233. *Id.* (citing VA. CODE ANN. § 2.1-344(A)(7) (Cum. Supp. 1992)).

234. *Id.* (citing VA. CODE ANN. § 2.1-344(A)(6) (Cum. Supp. 1992)).

The Board of Trustees of the Virginia Retirement System (VRS) and two of its committees had held a number of executive sessions, and the plaintiff claimed that these meetings were improper.<sup>235</sup> Since no minutes had been taken at any of the executive sessions, the court ordered minutes to be prepared from the recollections of the members who attended, and all members in attendance were required to certify under oath that the reconstructed minutes were accurate and complete.<sup>236</sup> After examining the minutes of the meetings in camera, the court directed the Board and its committees to keep minutes of all future executive sessions until otherwise ordered.<sup>237</sup>

The court found that the Code had indeed been violated.<sup>238</sup> In some cases, votes to go into executive session were not reflected in the minutes and certifying votes were not taken after the executive sessions were concluded.<sup>239</sup>

The affirmative vote to go into executive session requires that the motion state specifically the purpose of the session and reasonably identify the substance of matters to be discussed.<sup>240</sup> The petitioner argued that the agency should have been more specific than merely reciting "personnel matters," "legal matters," and "divestment" of the VRS holdings in companies doing business in or with the Republic of South Africa as the topics to be discussed.<sup>241</sup>

Relying on the earlier cases of *Marsh v. Richmond Newspapers, Inc.*<sup>242</sup> and *Nageotte v. King George County*,<sup>243</sup> the court noted that, when going into executive sessions to discuss "personnel matters," it is not necessary to identify the personnel involved.<sup>244</sup> The court recognized that giving details about the personnel matters would be tantamount to disclosing the names of employees at issue.<sup>245</sup> As for "legal matters," the court noted that *Marsh v. Richmond Newspapers* requires more than a bare reference to "legal

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235. *Id.* at 248.

236. *Id.* at 249-50.

237. *Id.* at 249.

238. *Id.* at 251.

239. *Id.*

240. *Id.* at 251-52 (citing VA. CODE ANN. § 2.1-344.1(A) (Cum. Supp. 1992)).

241. *Id.* at 252.

242. 223 Va. 245, 288 S.E.2d 415 (1982).

243. 223 Va. 259, 288 S.E.2d 423 (1982).

244. *Little*, 21 Va. Cir. at 250.

245. See *id.* at 255.

matters."<sup>246</sup> The specific agenda item, or at least a statement of the subject matter which requires the discussion of legal matters, must be stated.<sup>247</sup> The court found that the Investment Advisory Committee had violated the Freedom of Information Act at a meeting where it called an executive session for discussing "legal matters."<sup>248</sup> Where calling an executive session to discuss legal matters involving the proposed "CSX/RF&P merger" would have been a sufficient disclosure, simply referring to "legal matters" was not.<sup>249</sup>

With respect to investing public funds, the court opined that normally matters to be discussed under the "investing of public funds" exemption, like the "personnel matters" exemption, cannot be identified in any greater detail than by quoting the language of the exemption itself.<sup>250</sup> "To hold otherwise would inform keen investors of the particular investments involved," thus affecting the market.<sup>251</sup>

In short, the court held that

where identification or explanation of matters to be discussed in executive session would amount to [public] disclosure of matters which are exempt from such disclosure, or where such identification or explanation would defeat the very purpose for going into executive sessions in the first place, more than a citation to the statutory exemption and a general statement of the exemption is not required.<sup>252</sup>

The court viewed this as the "common sense" approach approved in the *Marsh* case.<sup>253</sup>

Although there were violations of the Act, the court declined to issue an injunction.<sup>254</sup> The violations were "purely technical," and the court was assured by legal counsel that the procedural violations were already well on the way to being corrected.<sup>255</sup> The Board now had legal counsel at its meetings, and more recent minutes of

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246. *Id.* at 257.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 254.

251. *Id.*

252. *Id.* at 255.

253. *Id.*

254. *Id.* at 258.

255. *Id.*

meetings reflected that the voting requirements were being complied with.<sup>256</sup>

In a later development, the Circuit Court of the City of Richmond concluded that RF&P is a "public body" subject to the Virginia Freedom of Information Act owing to the "peculiar relationship" between the VRS Board and the RF&P Board.<sup>257</sup> The court also found that VRS was therefore obligated to provide the petitioner with notice of RF&P Board meetings. Further, the court characterized the FOIA violations as willful, knowing, and substantial on the part of both the VRS Board and its chairperson.<sup>258</sup>

In *American Civil Liberties Union of Virginia v. Andrews*,<sup>259</sup> the ACLU charged that thirteen members of the Senate Finance Committee had held a closed meeting at Senator Gray's hunting lodge in Chesterfield County.<sup>260</sup> At the meeting, the committee staff made a presentation to the members about the state budget.<sup>261</sup> It was obvious that the meeting, though characterized as a "holiday get-together," was conceived, planned, and conducted for the purpose of performing the business of the Senate Finance Committee of the General Assembly.<sup>262</sup>

Virginia Code section 2.1-343 requires generally that all meetings be public meetings and that notice of all meetings be given to any citizen who requests it.<sup>263</sup> However, it also refers to exceptions "specifically provided by law."<sup>264</sup> Code section 2.1-341 specifically exempts from the Act's notice requirements "informal meetings or gatherings of the members of the General Assembly."<sup>265</sup> The court concluded that the holiday get-together was an "informal meeting."<sup>266</sup>

Reviewing the legislative history of the Virginia Freedom of Information Act, the court noted that the Act recognizes three distinct types of gathering among public officials: (4) formal meetings,

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256. *Id.*

257. *Little v. Virginia Retirement System*, No. HB-1298 (Richmond City Cir. Ct. Aug. 5, 1992).

258. *See* VA. LAW. WKLY., August 31, 1992, at 18.

259. 24 Va. Cir. 443 (Richmond City 1991).

260. *Id.* at 443.

261. *Id.* at 446.

262. *Id.*

263. VA. CODE ANN. § 2.1-343 (Cum. Supp. 1992).

264. *Id.*

265. VA. CODE ANN. § 2.1-341 (Cum. Supp. 1992).

266. 24 Va. Cir. at 448.

(5) informal meetings, and (6) gatherings at which officials do not discuss or transact any public business and which are not called or arranged for the purpose of discussing or transacting any public business.<sup>267</sup> The third category is not covered by the Act at all.<sup>268</sup> Before and after 1977, formal and informal meetings of all public entities other than the General Assembly were and are equally subject to the Act, there being no distinction between formal and informal meetings as to notice requirements or anything else.<sup>269</sup>

In 1977, however, the General Assembly placed itself on an equal footing with other public entities with respect to two of these categories.<sup>270</sup> The legislature made its formal meetings, and those of its committees, subject to all the requirements, notice and otherwise, that apply to all public bodies subject to the Act.<sup>271</sup> The legislature excluded from the Act's coverage gatherings of its members and of its committees where the purpose is not to discuss or transact any public business.<sup>272</sup> The one difference that the General Assembly made for itself was with respect to informal meetings.<sup>273</sup> Thus, while the legislature decided to treat its formal meetings and non-business gatherings like those of other public bodies, it elected to treat its informal meetings differently.<sup>274</sup> Specifically, while the informal meetings of all other public bodies subject to the Act must conform with the Act's notice requirements and other provisions, informal meetings of the General Assembly and its committees need not conform to the notice provisions of the Act.<sup>275</sup>

Looking at the December 28 meeting and noting that it had no written agenda, no notebooks of written material provided, no list of speakers to be heard, no gaveling of the meeting to order or calling of the roll, no minutes taken, and no votes being cast, the court decided that this was in fact an "informal meeting" and that the respondents did not violate the Act by failing to give notice of it.<sup>276</sup>

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267. *Id.* at 449.

268. *See id.*

269. *See id.*

270. *See id.* at 448-49.

271. *See id.*

272. *Id.* at 450.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 451.

## N. *Public Procurement*

In *Michael, Harris & Rosato Brothers v. Fairfax Redevelopment & Housing Authority*,<sup>277</sup> the court held that it had no jurisdiction over a contract dispute decision issued by a public body after the expiration of the six-month appeal period specified in Virginia Code section 11-69(D).<sup>278</sup> The Virginia Public Procurement Act regulates all stages of the public procurement process and prescribes the administrative and judicial remedies available to contractors involved in disputes with public bodies.<sup>279</sup>

The Michael, Harris firm contracted with the Fairfax Redevelopment and Housing Authority to build townhouses. A dispute arose, and the Authority denied the builder's claim for money to pay sewer availability fees.<sup>280</sup> The builder filed an action with the court more than six months after the Authority's decision.<sup>281</sup> Virginia Code section 11-69(D) provides that a contractor must appeal within six months of the date of the agency's final decision.<sup>282</sup> Because the complaint had not been timely filed, the court had no jurisdiction.<sup>283</sup>

## O. *Jurisdiction: Judicial Review of the State Corporation Commission*

In *Pendergraph v. Woodlawn Country Club, Inc.*<sup>284</sup> Judge Jamborsky held that the circuit court cannot review the validity of an act by the State Corporation Commission.<sup>285</sup> Code section 13.1-614(B) provides that no court, except the Virginia Supreme Court by way of appeal as authorized by law, has jurisdiction to review, reverse, correct, or annul any action of the State Corporation Commission.<sup>286</sup> The SCC had issued a Certificate of Amendment, which

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277. 23 Va. Cir. 272 (Fairfax County 1991).

278. *Id.* at 274.

279. VA. CODE ANN. §§ 11-35 to -80 (Repl. Vol. 1989 & Cum. Supp. 1992); *see also* W.M. Schlosser Co. v. Fairfax County Redevelopment & Housing Auth., No. 90-2177(L) (E.D. Va. Sept. 17, 1992) (parties may not validly contract contrary to the plain terms of the Procurement Act).

280. *Michael, Harris & Rosato Bros.*, 23 Va. Cir. at 272.

281. *See id.*

282. VA. CODE ANN. § 11-69(D) (Repl. Vol. 1989).

283. *Michael, Harris & Rosato Bros.*, 23 Va. Cir. at 274.

284. 22 Va. Cir. 203 (Fairfax County 1990).

285. *See id.* at 203-04.

286. *Id.* at 203 (citing VA. CODE ANN. § 13.1-614(B) (Repl. Vol. 1989)).

the plaintiff then claimed in circuit court was null and void.<sup>287</sup> The certificate was clearly within the SCC's authority, and it was acting in a "purely ministerial matter."<sup>288</sup> Thus, the circuit court had no jurisdiction.<sup>289</sup>

P. *Agency's Compliance With Its Own Rules*

In *Virginia Committee for Fair Utility Rates v. Virginia Electric & Power Co.*,<sup>290</sup> the Virginia Supreme Court reversed the SCC's grant of expedited rate relief. The SCC allowed the power company to include an accounting adjustment for projected future "construction work in progress" even though it had discontinued this adjustment in 1986. The SCC had relied on language in its rules allowing it to "take appropriate action" when there is a "substantial change in circumstances." The SCC is not empowered, said the court, to waive rules that emanate from a grant of power conferred by Article IX, Section 3 of the Virginia Constitution and Code sections 12.1-25 and -28.<sup>291</sup>

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287. *Id.* at 204.

288. *Id.* at 203-04.

289. *See id.*

290. 243 Va. 320, 414 S.E.2d 834 (1992).

291. *Id.* at 437, 414 S.E.2d at 837. *See* VA. CONST. art. IX, § 3; VA. CODE ANN. §§ 12.1-25, -28 (Repl. Vol. 1989). For a commentary on the implications of this decision, see ADMIN. L. News, Winter 1991-92/Spring 1992, at 4.