

1997

Annual Survey of Virginia Law: Administrative Procedure

Patricia L. McKenney

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>



Part of the [Administrative Law Commons](#)

Recommended Citation

Patricia L. McKenney, *Annual Survey of Virginia Law: Administrative Procedure*, 31 U. Rich. L. Rev. 907 (2017).

Available at: <http://scholarship.richmond.edu/lawreview/vol31/iss4/2>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

ARTICLES

ADMINISTRATIVE PROCEDURE

*Patricia L. McKenney**

I. INTRODUCTION

This article reviews recent developments in the law affecting administrative procedure in Virginia.¹ The 1997 General Assembly made no substantive changes to the Commonwealth's fundamental law of administrative procedure, but it did make numerous amendments to agency law affecting administrative case decisions. Among the major changes to agency procedures include authorizing the Commissioner of Social Services to review local board eligibility decisions,² extending the powers of health regulatory boards that govern the licensing of health professionals,³ and permitting the air, water and waste boards to implement mediation and voluntary dispute resolution proceedings.⁴

Perhaps of greater interest to those interested in developments in administrative procedure in 1997 were two requests for studies and several amendments to the Virginia Administrative Process Act (VAPA)⁵ that the General Assembly considered

* B.A., 1982, University of Virginia; J.D., 1991, College of William and Mary.

1. This article addresses legislation from the 1997 session of the General Assembly, other promulgated law published in 1997, and court decisions issued in 1996 and the first five months of 1997.

2. See *infra* text accompanying notes 22-28.

3. See *infra* text accompanying notes 29-37.

4. See *infra* text accompanying notes 38-42.

5. VA. CODE ANN. §§ 9-6.14:1-25 (Cum. Supp. 1997).

but failed to pass. The interest garnered by these bills indicate that the upcoming session may bring important changes in VAPA. The issues referred for study include a measure calling for a study of the efficacy of VAPA⁶ and a measure to study and propose model rules for the conduct of hearings by independent hearing officers.⁷ The amendments to VAPA which failed passage by the General Assembly included multiple proposals. One proposal would have required that formal hearings under VAPA authorize discovery proceedings. Another proposal would have required that agencies articulate detailed explanations of the bases of their decisions in hearings.⁸ A proposal addressing *ex parte* communications during agency adjudications also failed to pass.⁹ In addition, legislation that would have extended to public assistance cases the same standard of judicial review applicable to case decisions and legislation did not pass the General Assembly's approval. This standard of judicial review grants those individual's denied public assistance the right to challenge in court any regulation applied in their cases.¹⁰

Meanwhile, the state circuit courts and the Virginia Court of Appeals continued to shape administrative procedure through decisional law. Three cases of interest addressing procedural matters are reported below.¹¹ In addition, four circuit court opinions are reported in which the court found the agencies failed to have substantial evidence in the record for their decisions.¹² Finally, two cases are discussed in which the court of appeals found fault with the trial courts' interpretations of the controlling statute and, therefore, reversed the trial courts' decisions.¹³

In the cases discussed herein, it is interesting to note the courts' records of decision making. It appears that the Virginia Court of Appeals' decade of deciding cases has not yet fully established its role on administrative issues. In three of the

6. See *infra* text accompanying note 49.

7. See *infra* text accompanying notes 51-55.

8. See *infra* text accompanying notes 60-64.

9. See *infra* text accompanying notes 65-70.

10. See *infra* text accompanying notes 71-78.

11. See *infra* text accompanying notes 79-121.

12. See *infra* text accompanying notes 123-80.

13. See *infra* text accompanying notes 181-216.

four appeals from the circuit courts discussed herein, the court of appeals reversed the trial court decisions.¹⁴ Of even greater interest is the circuit courts' track record; in six of the seven cases originating in the circuit courts that are discussed, the circuit court reversed the agency decision.¹⁵

II. LEGISLATIVE INITIATIVES

A. *Legislation Affecting Virginia Administrative Case Deciding*

In 1997, the General Assembly passed several amendments to agency laws which affect administrative case law. One law amended was the Virginia Public Assistance and Welfare Law in Title 63.1 of the Virginia Code, which governs programs for aid to dependent children, the aged, the blind, and the disabled, and provides assistance in the form of food stamps, medical and fuel subsidies, general relief payments and social services.¹⁶ Generally, those in need of such assistance must apply to local boards that investigate and determine eligibility.¹⁷ The law affords applicants frustrated with local boards' eligibility decisions an opportunity for review at the state level.¹⁸ Until this year, a petition for such review went to the Virginia Board of Social Services.¹⁹ The Board could itself hear the case, convene a committee of three Board members to hear it, or else authorize a hearing officer to handle the case.²⁰ The Board could confer on the hearing officer the power to make a final decision, and had the discretion to review the hearing officer's decision.²¹

The 1997 General Assembly amended the Virginia Public Assistance and Welfare Law, shifting review of local board eligibility decisions from the Board to the Commissioner of Social Services.²² Under the revised law, the Commissioner

14. See cases discussed *infra* at text accompanying notes 86-104, 181-216.

15. See cases discussed *infra* at text accompanying notes 86-104, 123-80, 198-209.

16. See VA. CODE ANN. §§ 63.1-1 to -330 (Repl. Vol. 1995).

17. See, e.g., *id.* §§ 63.1-55.1 to -58.1 (Repl. Vol. 1995 & Cum. Supp. 1997).

18. See *id.* § 63.1-116 (Cum. Supp. 1997).

19. See *id.* § 63.1-116 (Repl. Vol. 1995).

20. See *id.*

21. See *id.*

22. See *id.* § 63.1-116 (Cum. Supp. 1997).

now has the authority to delegate the power to review such decisions to a hearing officer.²³ The amendment, however, did not transfer to the Commissioner the power held by the Board of Social Services under the prior codification to set aside a decision of a hearing officer to whom was delegated the power to review.²⁴

The new law, instead, authorizes the Commissioner to appoint a panel to review these state-level case decisions by hearing officers, but does not empower the panel to overturn or set aside the decisions.²⁵ The panel may merely consider the administrative hearing decisions to "determine if any changes are needed in the conduct of future hearings, or to policy and procedures related to the issue of the administrative appeal."²⁶ The panel is to periodically report its findings to the Commissioner.²⁷ The result of this change appears to be that hearing officers reviewing the decisions of local social services boards for the Commissioner now render judgments of greater finality than before. As before, such reviews at the state level include additional factfinding and are not limited to the record prepared for and by the local social service board.²⁸

The General Assembly in 1997 also extended the powers of health regulatory boards that govern the licensing of health professionals with two amendments to Title 54.1 of the Virginia Code. First, the General Assembly delegated to all health regulatory boards the power to summarily suspend licenses without a hearing if the regulatory board finds "a substantial danger to the public health or safety."²⁹ The boards that oversee medicine, nursing, dentistry, optometry, pharmacy, psychology, and veterinary medicine already enjoyed such power.³⁰ Now, the boards governing audiology, speech pathology, funeral services, nursing home administrators, marriage and family counseling,

23. *See id.*

24. Compare VA. CODE ANN. § 63.1-116 (Repl. Vol. 1995), with VA. CODE ANN. § 63.1-116 (Cum. Supp. 1997).

25. *See id.* § 63.1-116 (Cum. Supp. 1997).

26. *Id.*

27. *See id.*

28. *See id.* § 63.1-117 (Cum. Supp. 1997).

29. VA. CODE ANN. § 54.1-2408.1(A) (Cum. Supp. 1997).

30. *See id.* §§ 54.1-2708(B), -2920, -3009(B), -3605(7), -3217, -3317, -3808 (Repl. Vol. 1994).

and social work have the same authority.³¹ Proceedings leading to a hearing must be initiated at the same time the license is suspended, and the hearing must occur within a reasonable time thereafter.³² The boards may exercise this power by telephonic conference call.³³

The second innovation affecting health regulatory boards is the extension, to other boards, of the power now enjoyed by the boards of nursing and medicine to appoint special conference committees for informal hearings under VAPA, section 9-6.14:11.³⁴ Comprised of two or more board members, the special conference committee may exonerate, reinstate, place on probation, reprimand, or impose a fine on a practitioner, but these committees cannot suspend or revoke the license of a practitioner.³⁵ When a special conference committee disposes of a case by order, it becomes final in thirty days, unless appealed to the appropriate board.³⁶ The Board then proceeds with a formal hearing in accordance with VAPA, section 9-6.14:12.³⁷

Whether the action of a special conference committee constitutes alternate dispute resolution is debatable, but an obvious innovation of that sort occurred in the 1997 session of the General Assembly in the environmental context. The 1997 amendments to Title 10.1 of the Virginia Code authorize the air, water, and waste boards to implement non-binding mediation and voluntary dispute resolution proceedings as established under Title 8.01.³⁸ Under the new law, these environmental regulatory boards may resort to such procedures either for the purpose of rulemaking or the issuance of a permit at the board's discretion.³⁹ The statute, however, requires use of these procedures in the issuance of a permit only if the permit applicant

31. *See id.* § 54.1-2408.1(A) (Cum. Supp. 1997) (applying to all health regulatory boards), § 54.1-2500 (Repl. Vol. 1994) (defining "health regulatory board").

32. *See id.* § 54.1-2408.1(A) (Cum. Supp. 1997).

33. *See id.*

34. *See id.* § 54.1-2400(9) (Cum. Supp. 1997). This amendment specifically noted its intent that it not be construed to "affect the authority or procedures of the Boards of Medicine and Nursing pursuant to [VA. CODE ANN.] §§ 54.1-2919 and 54.1-3010." *Id.*

35. *See id.* § 54.1-2400(10) (Cum. Supp. 1997).

36. *See id.*

37. *See id.*

38. *See VA. CODE ANN.* § 10.1-1186.3 (Cum. Supp. 1997).

39. *See id.* § 10.1-1186.3(A), (B) (Cum. Supp. 1997).

consents and participates. In other words, the permit applicant is authorized to terminate the proceedings.⁴⁰ A board's decision to employ mediation or dispute resolution is not subject to judicial review.⁴¹

Curiously drafted, the Act directs the boards to consider refraining from using a mediation or dispute resolution proceeding in a number of circumstances. The language of the Act seemingly appears to permit the boards from refraining to use such proceedings in any given case. The Act states:

The Boards shall consider not using a mediation or dispute resolution proceeding if:

1. A definitive or authoritative resolution of the matter is required for precedential value, and such a [mediation or dispute resolution] proceeding is not likely to be accepted generally as an authoritative precedent;

2. The matter involves or may bear upon significant questions of state policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the Board;

3. Maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;

4. The matter significantly affects persons or organizations who are not parties to the proceeding;

5. A full public record of the proceeding is important, and a mediation or dispute resolution proceeding cannot provide such a record; and

6. The Board must maintain continuing jurisdiction over the matter with the authority to alter the disposition of the matter in light of changed circumstances, and a mediation or dispute resolution proceeding would interfere with the Board's fulfilling that requirement.⁴²

The 1997 General Assembly passed other minor amendments affecting administrative procedure. These include an amendment to Title 4.2 relating to the Alcoholic Beverage Commission, which requires the board to transmit to retail licensees

40. *See id.* § 10.1-1186.3(A)(6) (Cum. Supp. 1997).

41. *See id.* § 10.2-1186.3(B).

42. *Id.* § 10.2-1186.3(A)(1)-(6) (Cum. Supp. 1997).

notices of decisions by hearing officers by both regular and certified mail with a returned receipt requested.⁴³ The licensee has thirty days from the day notice was sent to appeal the hearing officer's decision.⁴⁴ Also, in its amendments to the Virginia Gas and Oil Act, the General Assembly extended to gas owners, gas operators, and gas storage field operators the right of review de novo in the circuit courts.⁴⁵ Under the existing code, only coal owners and operators enjoyed this privilege.⁴⁶

The 1997 General Assembly also granted more exemptions from the standard procedures that comprise VAPA. At its inception, the new Cotton Board was given an exemption from the Article 2 requirements for rulemaking.⁴⁷ In addition, the exemption from Article 2 mine inspection policies enjoyed by coal mining was extended to mineral mining.⁴⁸

B. Studies Requested by 1997 General Assembly Portending Future Changes to VAPA

Two requests for studies made in the 1997 session of the General Assembly indicate that upcoming legislative sessions may bring important changes in VAPA. First, a bill calling for a comprehensive legislative study of the efficacy of VAPA was introduced and referred for study.⁴⁹ The bill's underlying assumption is that, while case deciding and judicial review procedures are by and large satisfactory, rulemaking has become too cumbersome and time consuming.

Second, the Administrative Law Advisory Committee (ALAC)⁵⁰ was requested to study and propose model rules for

43. See VA. CODE ANN. § 4.1-111(B)(5) (Cum. Supp. 1997).

44. See *id.*

45. See VA. CODE ANN. § 45.1-361.9(A) (Cum. Supp. 1997).

46. Compare *id.* § 45.1-361.9(A) (Cum. Supp. 1997), with *id.* § 45.1-361.9(A) (Repl. Vol. 1995).

47. See VA. CODE ANN. § 3.1-1084 (Cum. Supp. 1997).

48. See VA. CODE ANN. § 9-6.14:4.1(C)(10) (Cum. Supp. 1997).

49. See S.J. Res. 285, Va. Gen. Assembly, (Reg. Sess. 1997). The subject matter of this resolution was referred by letter from the Chairman of the Senate Committee on Rules to the Chairman of the Senate Committee on General Laws, requesting that a study be conducted.

50. The Administrative Law Advisory Committee is a standing committee of the Virginia Code Commission.

the conduct of hearings by independent hearing officers under section 9-6.14:14.1 of VAPA.⁵¹ With many agencies of the Commonwealth holding trial-type adjudications and with each agency following its own set of practice and procedure rules for those adjudications, it had been suggested that uniformity among these rules would be beneficial. Many of the adjudicatory proceedings of Virginia agencies are formal, while others are conducted informally.⁵² All state agencies and departments use their own employees to conduct informal hearings, although the VAPA allows parties to informal fact finding pursuant to section 9-6.14:11 to opt for an independent hearing officer instead of an agency employee.⁵³ While the State Corporation Commission, the Workers' Compensation Commission, and the Employment Commission also use employees to conduct formal adjudications, VAPA directs most other state agencies and departments to use independent hearing officers to conduct formal hearings.⁵⁴ These independent hearing officers are selected by the Executive Secretary of the Supreme Court of Virginia from a list of volunteers and are provided to state agencies on request. Minimum qualifications for these hearing officers are set forth in section 9-6.14:14.1 of VAPA.⁵⁵

This legislative effort follows another recent initiative in Virginia to impart some uniformity in the administrative hearing process.⁵⁶ At its November 13, 1996, meeting, the Associa-

51. See REPORT OF THE HEARING OFFICER RULES SUBCOMMITTEE, at 1 (Oct. 15, 1997).

52. In a casual survey of Virginia State agencies conducted by the ALAC, 35 of the 48 agencies responding reported that they conduct informal hearings. Of those 35, 27 also reported conducting formal hearings. See REPORT OF THE *EX PARTE* COMMUNICATIONS SUBCOMMITTEE OF THE ADMINISTRATIVE LAW ADVISORY COMMITTEE, S. DOC. NO. 14, at Appendix (1995).

53. See VA. CODE ANN. § 9-6.14:14.1 (Cum. Supp. 1997).

54. See *id.* Section 9-6.14:14.1 of the Virginia Code provides that all hearings conducted in accordance with section 9-6.14:12 (formal hearing) shall be presided over by a hearing officer selected from a list prepared and maintained by the Executive Secretary of the Supreme Court of Virginia. This section also sets minimum standards for the hearing officers and provides that parties to proceedings conducted pursuant to 9-6.14:11 (informal fact-finding) may agree to have a hearing officer preside at the proceeding. See *id.*

55. See *id.*

56. In addition to the recent initiatives discussed *infra*, in the last decade much attention has been placed on the use of hearing officers in Virginia agency adjudications. In 1986, the General Assembly amended VAPA by adding section 9-6.14:14.1 governing the use of hearing officers in formal adjudicatory hearings, establishing

tion of Virginia Hearing Officers (AVHO) adopted the Model Rules of Practice for Hearing Officers Conducting Formal Hearings Pursuant to the Virginia Administrative Process Act.⁵⁷ This organization, comprised largely of hearing officers on the supreme court's list, adopted these model rules as a public service for the discretionary use by hearing officers whose names appear on the supreme court's list. According to the President of AVHO, these model rules were "not intended to impose a uniform body of rules upon agencies functioning under existing rules," but were offered to "serve as a basis for amendment of existing agency rules as well as providing a resource for newly created agencies with adjudicatory functions."⁵⁸

The legislative initiative and AVHO's rule modeling are both moving formal case adjudication in Virginia in the direction of procedural uniformity.⁵⁹ When state agencies consider creating

minimum qualifications for the use of independent contractors as hearing officers, and placing the Executive Secretary in charge of the system. In 1987, the Executive Secretary promulgated Hearing Officer System Rules of Administration affecting hearing officer appointment, qualifications, training, and retention. In 1987, the Virginia State Bar's Standing Committee on Legal Ethics issued an advisory opinion addressing aspects of certain Virginia Code of Professional Responsibility disciplinary rules on the independent hearing officer system. See John Paul Jones, *Administrative Procedure*, 21 U. RICH. L. REV. 611, 622-29 (1987).

57. See *Are Model Practice and Procedure Rules for Virginia Agency Adjudications a Possibility*, ADMIN. L. NEWS (Va. State Bar Sec. on Admin. L., Richmond, Va.), Winter 1996, at 1, 2.

58. Letter from Joseph B. Kennedy, President, Association of Virginia Hearing Officers, to Patricia McKenney (Dec. 10, 1996) (on file with author).

59. These separate activities geared toward providing some uniformity in hearing procedures fall along the same lines of action taken by the former Administrative Conference of the United States (ACUS) several years ago. During the 1980s, ACUS began examining the feasibility and practicality of preparing model rules for federal agency adjudications. In 1993, an ACUS Working Group adopted the Model Adjudication Rules of practice and procedure for use in formal adjudications before federal government agencies, and the rules were submitted and adopted by the Administrative Conference. The Administrative Conference circulated the Model Rules to all federal agencies and encouraged them to review the rules with a view toward adopting them either in toto or individually as the need arose, in order to effect a reduction of the differences among federal agency formal adjudication practice and procedure rules. See generally, Michael P. Fox, *The Model Adjudication Rules*, 11 T.M. COOLEY L. REV. 75 (1994). In fact, several agencies adopted portions of the rules when modifying their agency's rules. See, e.g., 61 Fed. Reg. 18,866, 18,872 (1996) (to be codified in scattered sections of 49 C.F.R.) (proposed April 29, 1996); 61 Fed. Reg. 28,021, 28,022 (1996) (to be codified at 12 C.F.R. pt. 747).

or revising their adjudication rules, these models will be helpful references.

C. *Legislative Measures to Amend VAPA which Failed*

Several bills to amend VAPA were considered in the 1997 General Assembly. Although the measures failed, the interest that accompanied the bills indicates that the issues may be raised again in upcoming sessions.

1. Discovery for Formal Hearings

A bill carried over from the 1996 session of the General Assembly, which would have amended Article 3 of the VAPA, was left in the Senate General Laws Committee in the 1997 session.⁶⁰ This bill would have authorized (for formal hearings under section 9-6.14:12 of VAPA) the full scope of discovery proceedings provided in Title 8.01 of the Virginia Code and the Rules of the Supreme Court of Virginia.⁶¹ Since section 9-6.14:13 of VAPA already permits depositions and requests for admissions when good cause is shown, it appears this amendment would have freed parties from the requirement for prior agency approval and would have introduced interrogatories in administrative cases.⁶²

This legislation also would have required agencies to articulate detailed explanations of the factual or procedural bases of decisions or recommended decisions based on evidence in the record of both informal⁶³ and formal hearings.⁶⁴ This would have added to the requirement currently found in VAPA sections 9-6.14:11 and 9-6.14:12 that the agency supply a factual and procedural basis for adverse action.

60. See H.B. 1421, Va. Gen. Assembly, (Reg. Sess. 1997). Article 3 of VAPA governs case decisions, that is, the outcomes of administrative adjudication. See VA. CODE ANN. § 9-6.14:4 (Cum. Supp. 1997).

61. See H.B. 1421; see also REPORT OF THE ADMINISTRATIVE LAW ADVISORY COMMITTEE ON THE DISCOVERY IN APA CASE DECISIONS SUBCOMMITTEE, H. Doc. No. 53 (1997).

62. See VA. CODE ANN. § 9-6.14:13 (Repl. Vol. 1993).

63. See *id.* § 9-6.14:11 (Cum. Supp. 1997).

64. See *id.* § 9-6.14:12 (Cum. Supp. 1997).

2. Ex parte Communications During Agency Adjudications

Another bill that would have affected agency decision making that was carried over from the 1996 session of the General Assembly, failed in committee in the 1997 session. After proposals in 1994 and 1995 to prohibit or limit ex parte communications during administrative agency proceedings, the ALAC recommended legislation to the 1996 General Assembly that would have simply required that agencies promulgate policies to address ex parte communications during agency adjudications.⁶⁵ Although this proposal did not advance out of committee in the 1997 session, the interest that ex parte communications has garnered over the past years makes it likely that the topic will continue to be debated in upcoming sessions of the legislature.

At present, neither statute nor case decision prohibits ex parte communications in administrative adjudications conducted under VAPA. In contrast, section 554(c) of the Federal Administrative Procedure Act, section 4-213 of the 1981 Model State Administrative Procedure Act, and the Administrative Procedure Acts in three of the five states located in the Fourth Circuit all prohibit ex parte communications in agency adjudicatory settings.⁶⁶

A subcommittee of the ALAC studied the issue beginning in 1995 and found that few Virginia agencies had written policies to govern ex parte communications during agency hearings and appeals.⁶⁷ The subcommittee study also found that Virginia agencies vary greatly in the function and format of their admin-

65. See REPORT OF THE *EX PARTE* COMMUNICATIONS SUBCOMMITTEE OF THE ADMINISTRATIVE LAW ADVISORY COMMITTEE, H. Doc. No. 53, at 1-2 (1996).

66. *Id.* at 2.

67. *Id.* The ALAC *Ex parte* Communications Subcommittee conducted a survey in 1995 and found that of the 52 agencies that issue case decisions, only six have written policies prohibiting ex parte communications, 15 have informal policies prohibiting ex parte communications and 19 have no policies on the matter at all. The survey also revealed that five agencies freely permit ex parte communications in case decisions. See REPORT OF THE *EX PARTE* COMMUNICATIONS SUBCOMMITTEE OF THE ADMINISTRATIVE LAW ADVISORY COMMITTEE, at Appendix (1995). See also *ALAC Completes Admin. Process Studies*, ADMIN. L. NEWS (Va. State Bar Sec. on Admin. L., Richmond, Va.), Fall 1995, at 5, 6.

istrative proceedings. The subcommittee expressed concern that prescribing one method to address *ex parte* communications could "hamper informal efforts at conflict resolution and . . . disrupt the beneficial flow of information during the early administrative process of developing and issuing case decisions."⁶⁸

Thus, ALAC proposed legislation that simply offered a definition of *ex parte* communication which was more precise than that currently utilized in Virginia and which required agencies to promulgate their own policy on *ex parte* communications.⁶⁹ The legislation defined *ex parte* communication as

an oral or written communication not in the agency's or board's record regarding substantive, procedural, or other matters which could be reasonably expected to influence the outcome of the case or the case decision pending before the agency or board and for which reasonable notice to all parties is not given at the time of the communication.⁷⁰

This proposal took into account the differences among Virginia agencies in their administrative proceedings, while ensuring public participation in the development of *ex parte* policies by requiring that the policies be promulgated as regulations subject to notice and comment.

3. Extension of Substantial Evidence Standard of Judicial Review to Public Assistance Cases

In the 97th Session of the General Assembly, legislation that would have extended to public assistance cases in Virginia the same standard of judicial review applicable to case decisions made by agencies, other than those deciding public assistance cases, did not pass.⁷¹ The bill also proposed granting persons denied public assistance the right to challenge in court any

68. REPORT OF THE *EX PARTE* COMMUNICATIONS SUBCOMMITTEE OF THE ADMINISTRATIVE LAW ADVISORY COMMITTEE, at 2 (1996).

69. In Virginia, an *ex parte* communication has been defined as "one in which an advocate for but one of two or more parties presents his views upon the controversy to the decision maker." 1982-83 Op. Va. Att'y Gen. 4-5.

70. See S.B. 479, Va. Gen. Assembly, (Reg. Sess. 1997).

71. See S.B. 937, Va. Gen. Assembly, (Reg. Sess. 1997).

regulation applied in their cases, specifically on the ground that the regulation exceeds the scope of the department's authority.⁷² This bill initially faced opposition in both houses of the legislature because members were concerned the measure would affect the state's welfare reform laws.⁷³ Subsequent support this measure obtained in the form of amendments alleviated those concerns, making it likely that the changes proposed by this measure will be raised again in the future.⁷⁴

The bill proposed two changes to section 9-6.14:16(B) of VAPA. In its present form, section 9-6.14:16(B) limits a court's review of denials for public assistance to "ascertaining whether there was evidence in the agency record to support the case decision of the agency acting as the trier of fact."⁷⁵ This standard requires a court to sustain a decision that an applicant is ineligible if the Department of Medical Assistance Services (DMAS) or the Department of Social Services (DSS), the two state agencies handling public assistance cases, can point to *any evidence at all* in the record.

Under this "any evidence at all" standard, a reviewing court must uphold a decision by DSS or DMAS even when the record is so weak or conflicting as to be irrational. So long as the department can point to one piece of evidence that, when considered in isolation from all the rest, supports the decision, that decision must be allowed to stand.

Currently, for case decisions made by agencies other than DSS or DMAS, VAPA section 9-6.14:17 requires a reviewing court to ascertain "whether there was *substantial evidence* in

72. *See id.*

73. Tyler Whitley, *Beyer's Vote Passes Welfare Reform Measure*, RICH. TIMES-DISPATCH, Feb. 5, 1997, at A7.

74. S.B. 937 was closely contested in the Senate, necessitating, not once, but twice, a tie-breaking vote by Lt. Governor Donald S. Beyer, Jr. to pass the bill. After the House voted for an amendment that would have rendered the bill ineffective, the House requested a conference committee on the bill and the Senate acceded. The conference amended the bill to the satisfaction of the House; the bill passed in the House with a vote of 92-3. A series of mishaps prevented the conference report from being forwarded to the Senate in a timely fashion. When the Senate finally voted, the measure failed by only one vote, and other Senate business prevented the matter from being reconsidered before the House adjourned for the session. *See APA Amendment Just Misses in 97th Session*, ADMIN. L. NEWS (Va. State Bar Sec. on Admin. L., Richmond, Va.), Spring 1997, at 2, 3.

75. VA. CODE ANN. § 9-6.14:16(B) (Repl. Vol. 1993).

the agency record upon which the agency as the trier of the facts could reasonably find them to be as it did."⁷⁶ Ordinarily, this is not a difficult test for an agency. For example, it prohibits a court from reversing an agency decision whenever the weight of the evidence supports the applicant. Courts reviewing the fact finding of agencies according to this standard look to the record only for substantial evidence, not to see if the balance or preponderance of the evidence favors the agency's decision. Thus, making this standard of review applicable to public assistance cases arguably would not significantly jeopardize reasonable agency fact-finding in welfare and Medicaid cases.

In its present form, paragraph B of section 9-6.14:16 also bars those refused public assistance from appealing to a court the administrative regulation applied in their cases, even when the regulation exceeds the scope of the department's authority under statute.⁷⁷ The statute currently states: "The validity of any statute, regulation, standard or policy, federal or state, upon which the action of the agency was based shall not be subject to review by the court."⁷⁸ This prohibition of court review of the statutes, regulations, standards and policies also sets judicial oversight of DMAS and DSS action apart from judicial oversight of the actions of other state agencies. The legislation proposed in the 1997 General Assembly would have removed this insulation of welfare legislation, applying instead the checks and balances provided by judicial review elsewhere in the regulatory context.

III. JUDICIAL DECISIONS AFFECTING ADMINISTRATIVE PROCEDURE

A. Court of Appeals Addresses Procedural Issues: Is Remand Appealable? When Do Time Limits Begin to Run? What Constitutes an Agency Record?

In 1996-97, the Virginia Court of Appeals addressed several procedural issues arising in the context of agency adjudication.

76. See *id.* § 9-6.14:17 (Repl. Vol. 1993) (emphasis added).

77. See *id.* § 9-6.14:16(B) (Repl. Vol. 1993).

78. *Id.*

In *Hoyle v. Virginia Employment Commission*,⁷⁹ the court of appeals held that the order of the Prince William County Circuit Court, remanding a proceeding to the Virginia Employment Commission (VEC), was not appealable when the order directed the commission to conduct a complete hearing, receive additional evidence, and render a further decision. The case involved a decision by the VEC that Hoyle was qualified for unemployment benefits following her discharge from employment by the United States Postal Service. Upon a petition for judicial review of that decision, the circuit court remanded the case to the commission pursuant to Virginia Code section 9-6.14:19. Hoyle appealed, contending that the circuit judge lacked jurisdiction to remand the case and that the evidence in the record supported the commission's finding that she was not discharged for misconduct connected with her work.⁸⁰

The court of appeals in *Hoyle* did not discuss the reviewability of the remand in the context of the VAPA, indicating that it seemed clear to the court that a remand pursuant to VAPA is not reviewable as a final decision. Instead, the court of appeals based its decision on the description of jurisdiction in Virginia Code section 17-116.05(1). This section authorizes the court of appeals to review "any final decision of a circuit court on appeal from a decision of an administrative agency."⁸¹ The court cited *Southwest Virginia Hospitals v. Lipps* for the proposition that a "final decision" referred to in the statute was a decision "which disposes of the whole subject, gives all the relief that is contemplated and leaves nothing to be done by the court."⁸² The *Hoyle* court explained that the trial judge's remand order "did not resolve any factual or legal issues concerning the merits of the case[]"⁸³ and was simply "an interlocutory ruling that required further action" which did not necessitate an immediate appeal.⁸⁴

79. 24 Va. App. 533, 484 S.E.2d 132 (1997).

80. See *id.* at 537, 484 S.E.2d at 134.

81. VA. CODE ANN. § 17-116.05(1) (Repl. Vol. 1996).

82. *Hoyle*, 24 Va. App. at 537, 484 S.E.2d at 133 (citing *Southwest Va. Hosps. v. Lipps*, 193 Va. 191, 193, 68 S.E.2d 82, 83 (1951)).

83. *Id.* at 537, 484 S.E.2d at 133-34 (citing *Canova Elec. Contracting Inc. v. LMI Ins. Co.*, 22 Va. App. 595, 600, 471 S.E.2d 827, 830 (1996)).

84. *Id.* at 537, 484 S.E.2d at 134.

In *Virginia Retirement System v. Rizzo*,⁸⁵ the issue on appeal was at what point in the adjudication process did the time limitations of section 9-6.14:11 of VAPA began to run. At issue in the case was the Virginia Retirement System's (VRS's) denial of disability benefits to Rizzo. Pursuant to section 9-6.14:11(D), Rizzo contended that VRS's failure to resolve the issue of benefits within the time limits prescribed in the statute resulted in a decision in Rizzo's favor.⁸⁶

Section 9-6.14:11 provides time limits for agency decision making for various types of hearings. Specifically, section 9-6.14:11(D) is applicable to the situation in Rizzo's case. In an informal fact-finding proceeding in which a hearing officer is not rendering the decision, the agency personnel or commission responsible for the decision must make that decision "within ninety days from the date of the informal fact-finding proceeding."⁸⁷ The section further provides that if the decision is not made within the prescribed time frame, then the party to the case decision can make a written notification to the agency that a decision is due. If the agency fails to make a decision within thirty days of its receipt of the notice, then "the decision is deemed to be in favor of the named party."⁸⁸

In *Rizzo*, VRS's denial of disability benefits was appealed by Rizzo, and the case was remanded for further proceedings.⁸⁹ On remand, the VRS held a hearing, at which time Rizzo incorporated all of his evidence from the previous administrative proceeding and introduced further medical evidence from his psychiatrist to establish his disability.⁹⁰ The VRS representative at the hearing forwarded the transcript of Rizzo's psychiatrist's testimony to VRS after receiving it and requested VRS forward it to the Medical Board for comment on the medical evidence.⁹¹ The Medical Board requested and obtained permission from the VRS to forward the evidence to a doctor for

85. 23 Va. App. 698, 479 S.E.2d 535 (1997).

86. *Id.* at 704, 479 S.E.2d at 538.

87. VA. CODE ANN. § 9-6.14:11(D) (Repl. Vol. 1993).

88. *Id.*

89. *See Rizzo*, 23 Va. App. at 699-700, 479 S.E.2d at 535.

90. *See id.* at 700-03, 479 S.E.2d at 536-37.

91. *See id.* at 703, 479 S.E.2d at 537.

review.⁹² The transfer of the transcript through these channels delayed consideration of the evidence for more than ninety days and the VRS did not issue a decision in the required time frame. On two occasions after ninety days had elapsed, Rizzo notified the agency that a decision was due.⁹³

The agency did not render a decision within thirty days of Rizzo's notice, as it had not received the doctor's evaluation of Rizzo's medical evidence. After receipt of the doctor's evaluation, VRS issued its decision denying Rizzo benefits. Rizzo appealed the decision and requested the Circuit Court of Orange County to enter summary judgment on the matter because VRS had failed to issue its decision within the time limit prescribed by the statute.⁹⁴ The circuit court granted summary judgment and the court of appeals reversed the trial court decision.⁹⁵

The court of appeals found that the time limitations in the VAPA section 9-6.14:14.1 governed the agency's decision-rendering responsibility and were not applicable to the fact-gathering role of the agency.⁹⁶ The court of appeals determined that the fact-gathering stage, whether accomplished informally or formally, provides the basis for which a case will be decided and compared this process to the making of the record in a court of law or equity.⁹⁷ The court distinguished the fact-gathering stage from the decision-rendering stage and found that the time limitations of section 9-6.14:11(D) began "to run *from* the date the fact-finding proceeding is completed."⁹⁸

In determining when the fact gathering process of an agency is complete, the court stated that the nature of the case, the case record and the basic law governing the agency encompass the scope of the fact-gathering proceeding in each case.⁹⁹ In this regard, the court determined that an agency's fact-gathering process could encompass more than a hearing.¹⁰⁰ The

92. *See id.*

93. *See id.* at 704, 479 S.E.2d at 538.

94. *See id.*

95. *See id.* at 705, 708, 479 S.E.2d at 538, 540.

96. *See id.* at 706-07, 479 S.E.2d at 539.

97. *See id.* at 706 & n.5, 479 S.E.2d at 539 & n.5.

98. *Id.* at 707, 479 S.E.2d at 539 (emphasis added).

99. *See id.*

100. *See id.*

court found support for this proposition in the Reviser's Note to section 9-6.14:11, which states that, in addition to conferences or consultations, "[t]o the extent that basic laws permit, agencies may also proceed on the basis of inspections, tests, or elections, followed by such conference-consultation procedures as the case issues may require."¹⁰¹

The court held that in Rizzo's case the basic law governing the agency did not authorize VRS to render its decision until it had received the report of the Medical Board on the medical evidence upon which Rizzo had based his application.¹⁰² The court held that VRS' receipt of this report was a necessary part of the fact-gathering aspect of the case, not the decision-rendering process.¹⁰³ Thus, the court held that the time requirements of section 9-6.14:11(D) did not begin to run until VRS received the report. Based on this statement, the court of appeals reversed the trial court's grant of Rizzo's motion for summary judgment.¹⁰⁴

In *Snyder v. Virginia Employment Commission*,¹⁰⁵ the court of appeals made an interesting determination of what constituted an agency record in a hearing before the Virginia Employment Commission (VEC). In this case, Snyder appealed the VEC's denial of unemployment benefits contending, inter alia, that she did not receive a fair hearing because the appeals examiner and the VEC relied upon "investigatory" documents compiled by a deputy of the VEC in reaching its decision.¹⁰⁶ The VEC and the appeals examiner relied upon documents included in the "Record of Facts Obtained by Deputy" in making their findings of fact.¹⁰⁷ Snyder contended that these documents were not part of the record because they were not introduced into evidence nor expressly made part of the record by the appeals examiner during the evidentiary hearing.¹⁰⁸ As a

101. *Id.* (citing the Reviser's Note to VA. CODE ANN. § 9-6.14:11 (Repl. Vol. 1993)).

102. *See id.* at 707-08, 479 S.E.2d at 540.

103. *See id.* at 708, 479 S.E.2d at 540.

104. *See id.*

105. 23 Va. App. 484, 477 S.E.2d 785 (1996).

106. *See id.* at 486, 477 S.E.2d at 786.

107. *See id.* at 487, 477 S.E.2d at 787.

108. *See id.*

result, Snyder claimed she was denied the opportunity to confront or rebut this evidence.¹⁰⁹

The court of appeals noted that the manner in which disputed claims are presented before the VEC is prescribed by VEC regulations and not common law or statutory rules of evidence; therefore, the court of appeals looked to the VEC rules.¹¹⁰ The VEC rule regarding a claimant's appeal to the VEC provides that, except for specified exceptions, "all appeals to the VEC shall be decided on the basis of a review of *the record*."¹¹¹ The court found that the VEC rules used the term "record" in two different instances: (1) the record that is sent to the appeals examiner which contains the record of facts of the proceeding before the deputy;¹¹² and (2) the record which includes the transcript and exhibits offered during the evidentiary hearing before the appeals examiner.¹¹³ Although Snyder argued that the term "record" was limited to the latter, the court rejected that view.¹¹⁴

The court instead found that the "Record of Facts Obtained by Deputy" was a part of the record properly considered by the appeals examiner and the VEC in making their findings of fact.¹¹⁵ The court stated that "[t]he documents were placed in the VEC's file and became part of the VEC record for purposes of the VEC's determination of the claim."¹¹⁶

Although the court stated that its decision was based on its interpretation of the agency's rules, the court also found important for its determination that the record of the hearing indicated that Snyder had notice of the documents at issue and, in fact, that her attorney may have had the actual documents in his possession. The court noted that the appeals examiner at the hearing had introduced for the record a letter submitted by

109. *See id.* at 487, 477 S.E.2d at 786.

110. *See id.* at 487, 477 S.E.2d at 786-87.

111. *Id.* at 487, 477 S.E.2d at 787 (citing VR 300-01-8 § 3.B (1994)) (emphasis added).

112. *See id.* at 488, 477 S.E.2d at 787 (citing VR 300-01-8 § 1.B (1994)).

113. *See id.* (citing VR 300-01-8 §§ 2.F, 2.F.4 (1994)).

114. *See id.* at 487, 477 S.E.2d 787.

115. *See id.*

116. *Id.* at 488, 477 S.E.2d at 787.

the employer that referred to the documentation.¹¹⁷ Although the hearing examiner did not explicitly identify the documents at issue, the court stated that the examiner's purpose for introducing the employer's letter was to put Snyder on notice that the employer was relying on documents already in the VEC's files.¹¹⁸ The court noted that Snyder's attorney had the opportunity to object to these documents, but did not object.¹¹⁹ Additionally, the court stated that the record indicated that Snyder's attorney had the documents, contradicting Snyder's argument that she did not have the opportunity to review nor rebut them.¹²⁰ Finally, the court pointed out that Snyder could have chosen to inspect the file before or during the hearing and object to any documents in the file as well as offer rebuttal evidence.¹²¹

2. The Circuit Courts Find Fault with Agency Decision Making: No Support in the Record

In the four circuit court opinions reported below, the circuit courts indicate their unwillingness to uphold an agency decision when the agency record fails to support the findings of the agency. This supervision by the circuit courts can be presented as either evidence supporting or evidence opposing the legislation (calling for articulation of agency decisions based on the record) that was introduced but failed to pass.¹²² These decisions indicate the courts' willingness to reverse agency decisions based on the law as it stands; these decisions also indicate that the agencies failed to articulate the basis for their decisions on the record.

In *Convalescent Care, Inc. v. Commonwealth*,¹²³ the Richmond Circuit Court reviewed an appeal of a decision of the Department of Medical Assistance Services (DMAS) and found that, in several instances, the agency's determination was arbi-

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.* at 489, 477 S.E.2d at 787.

121. *See id.*

122. *See supra* text accompanying notes 60-64.

123. 40 Va. Cir. 107 (Richmond City 1996).

trary and capricious or unsupported by substantial evidence in the record. Convalescent Care, Inc. (CCI), a corporation that has ownership interest in and administers five nursing home facilities in Virginia, challenged DMAS's adjustments to the cost reports of CCI, which resulted in a reduction in the reimbursement paid to CCI under the Commonwealth's Medicaid program.¹²⁴ DMAS is the state agency responsible for administering the state's Medicaid program and operates an auditing program to determine the reimbursable costs for participating providers.¹²⁵

On appeal, CCI challenged, *inter alia*, DMAS's method for determining the allowable salaries of CCI's home office executives.¹²⁶ The court rejected several of the DMAS methods used to determine the allowable salaries.¹²⁷ First, the court held that DMAS's practice of limiting reimbursement for executive salaries to a percentage range of an Executive Compensation Service (ECS) survey was an arbitrary and capricious application of the Provider Reimbursement Manual (PRM), which applies to reimbursements under Medicaid.¹²⁸ The ECS survey was a national survey of salaries of executives in similar positions.¹²⁹ DMAS limited reimbursement for executive salaries to the salaries found in the ECS survey between the 25th and 75th percentiles.¹³⁰ After DMAS rated an executive based on a point system, the agency placed the executive, based on the rating, on a scale within the 25th and 75th percentiles of the ECS survey. DMAS justified this practice by stating that "Virginia's

124. *See id.* at 108.

125. *See id.*

126. Other issues on appeal, not discussed herein, included whether DMAS properly disallowed interest costs on certain loans incurred by CCI and whether DMAS properly limited the allowable compensation of CCI's medical director. *See id.* The court affirmed DMAS' determination on the majority of these issues. *See id.* at 113-18.

127. The court affirmed one method DMAS utilized in determining an executive's allowable salary not discussed herein. That method involved adjusting the reimbursement of the salary based on an allocation of the executive's salary to six facilities in which he was involved. *See id.* at 113.

128. *See id.* at 111-12.

129. *See id.*

130. *See id.* at 110.

taxpayers should not be expected to pay 'top dollar' for Medicaid-related services.¹³¹

The court noted that no statute nor regulation presently exists in Virginia to limit a provider's reimbursable executive compensation, as DMAS was attempting to do.¹³² In the absence of such guidance, the court held DMAS to the language in the agency's existing PRM. This manual allowed for the reimbursement of reasonable compensation, defined as that amount which "would ordinarily be paid for comparable services by comparable institutions depending on the facts and circumstances of each case."¹³³ The manual further discussed reasonable compensation as being "limited to the fair market value of services rendered by the owner in connection with patient care,"¹³⁴ and defined fair market value as "the value determined by the supply and demand factors of the open market."¹³⁵ The court found DMAS's method of limiting executives' reimbursable salary to a percentage range of the salaries in the ECS survey was "directly at odds with such open market determination" as set forth in the PRM.¹³⁶ The court reversed DMAS determination as arbitrary and capricious.¹³⁷

Based on the absence of supporting evidence in the record, the court also reversed two other methods employed by the agency for reducing CCI's reimbursement for executive salaries. First, the court agreed with CCI that DMAS failed to produce any support for the accuracy of the figures that the agency used in deflating an executive's salary for inflation/deflation.¹³⁸ The agency had taken data available in 1989 and deflated it for the three previous years based on a "trend table" which it did not initially produce. Although the agency at the hearing did produce the data for 1988, it never produced data for the previous years, and did not produce an explanation for how the figures were deflated for the years prior to 1988.¹³⁹ The court

131. *Id.* at 111.

132. *See id.*

133. *Id.*

134. *Id.* (emphasis omitted).

135. *Id.*

136. *Id.* at 111-12.

137. *See id.*

138. *See id.* at 112.

139. *See id.*

noted that "there is a presumption of regularity in actions taken by a state agency,"¹⁴⁰ but stated that "[t]his does not mean, however, that DMAS may arbitrarily create ranges of data without empirical support."¹⁴¹

The court also found that DMAS failed to supply any evidence in the record to support its adjustments to the executive salary based on geographic considerations.¹⁴² The PRM provided that an executive's reimbursable salary should be determined with reference to "comparable institutions in the same geographic area."¹⁴³ DMAS reduced the reimbursable salary for the executive based on this provision, but did not provide an explanation of how the adjustment was calculated or why the particular region was chosen as the relevant geographic area.¹⁴⁴ The court stated that "DMAS cannot rely on generalities and suppositions to make the types of adjustments which it made here. Record evidence must exist. Because it does not exist with regard to this issue, the adjustment will be disallowed."¹⁴⁵

In two circuit court cases reviewing determinations made by the Department of Social Services (DSS), the trial court reversed the DSS's determinations, holding that the agency adduced no evidence to justify its findings of guilt. In *C.R.G. v. Brunty*,¹⁴⁶ a former Fairfax County schoolteacher challenged the determination by the Commissioner of the DSS that five complaints of sexual abuse against him were "Founded-Sexual Abuse-Level 1."¹⁴⁷ The consequence of DSS making a Level 1

140. *Id.*

141. *Id.*

142. *See id.*

143. *Id.*

144. *See id.* at 112-13.

145. *Id.* at 113.

146. 38 Va. Cir. 431 (Fairfax County 1996).

147. *Id.* at 431. A determination that a sixth complaint should be disposed of with a finding of "Reason to Suspect-Sexual Abuse" was also challenged on appeal. The reason to suspect category was struck down by the Virginia Court of Appeals in *Jackson v. Marshall*, 19 Va. App. 628, 454 S.E.2d 23 (1995), and in C.R.G.'s case, the reason to suspect finding was vacated by DSS. *See id.* at 431 n.1. C.R.G. also appealed on the ground that CPS and DSS failed to comply with various time requirements mandated by Title 63.1. The court, holding that C.R.G. failed to demonstrate that any such failures were anything but harmless error, declined to reverse on this ground. The court cited *J.B. v. Brunty*, 21 Va. App. 300, 464 S.E.2d 166 (1995), for

finding against an individual is that the person's name is "maintained in the Child Abuse and Neglect Information System (CANIS) central registry for 18 years past the date of [the] complaint."¹⁴⁸ Such a finding for a teacher, the court noted, would in effect end his or her career.¹⁴⁹

On appeal, the Fairfax County Circuit Court rejected the factual findings of DSS stating that "the record in this case utterly lacks any evidence of the kind of serious harm or the likelihood of serious harm that would justify [the findings] . . . in any of the five cases before the Court."¹⁵⁰ The court also reversed the agency decision due to the agency's failure to comply with constitutional due process requirements. The court found that due process requirements were not met in this case because the accused was not allowed to challenge his complainants and did not face an impartial decision-maker.¹⁵¹

In reversing the factual findings of DSS, the court found that the agency's findings of Level 1 abuse did not comport with the definition of Level 1 abuse found in the agency's regulations nor the description of the kinds of injuries and conditions that could result in a Level 1 finding found in the CPS Manual.¹⁵² Although the regulation and manual described the types of serious injury that would justify a Level 1 finding, the agency had argued that some of the alleged touches by the teacher to the children took place over a period of time and that there were multiple incidents to equate to the "serious harm" neces-

the proposition that the time requirements are procedural, not directory. *See id.* at 432 n.2.

148. *Id.* at 431 n.1. (citing Virginia Department of Social Services Regulation VR 615-45-1 § 2.2 (1991)).

149. *See id.* at 438.

150. *Id.* at 436.

151. *See id.* at 439-45.

152. *See id.* at 435-36. The court cited VR 615-45-1 § 2.1.A as stating that a Level 1 disposition "includes those injuries/conditions, real or threatened, that result in or were likely to have resulted in serious harm to a child." *Id.* at 435. The court quoted the CPS Manual for the kinds of injuries and conditions which could result in a level one finding: those that "[r]equire medical attention in order to be remediated; the injury is to the head, face, genitals, or is internal and located near a vital organ. Injuries located in more than one place; the injuries were caused by the use of an instrument such as a tool or weapon; and an inappropriate drug was administered or a drug was given in an inappropriate dosage." *Id.*

sary for a Level 1 finding.¹⁵³ The court disagreed and its reasoning reflected its concern with the serious consequences of a Level 1 finding for an accused. The court found that the agency's argument "ignore[d] the DSS regulation that requires injuries or conditions that result or are likely to result in serious harm to a child in order to place an individual's name in the CANIS registry for eighteen years."¹⁵⁴

In reversing the decision for due process violations, the court took issue with the agency's investigation and hearing procedures.¹⁵⁵ The court found that in a case such as C.R.G.'s, "where the decision rests exclusively upon testimonial evidence by the complainants," the process and procedures which must be afforded an accused must include some means of challenging the complainants' statements.¹⁵⁶ The court stated that an accused must be allowed to "probe into and demonstrate inconsistencies in the complainants' statements, their perceptions, and possible bias."¹⁵⁷ The court observed that an accused's "need for cross-examination must be viewed in the context of sexual abuse proceedings involving young children," but it also identified ways to protect both the children and the accused's rights.¹⁵⁸ The court stated that "[a]t a minimum, CPS and other officials conducting interviews of the complainants should audiotape the interviews and give transcripts to the accused."¹⁵⁹ The court explained that this would enable "[t]he accused [to] . . . challenge the statements directly to determine whether inconsistencies exist."¹⁶⁰ This procedure would also permit the accused to "challenge the interrogation techniques which may taint the complainants' perceptions or subtly pressure the child-complainant into providing answers the child

153. *See id.* at 436.

154. *Id.*

155. The court found that the harm to a teacher's career of a finding that the teacher had sexually abused children under his or her care and the placement of the teacher's name in the Child Abuse and Neglect Information System central registry satisfied the first prong of the due process inquiry of a deprivation of a protectible liberty or property interest. *See id.* at 437-39.

156. *Id.* at 441.

157. *Id.*

158. *Id.* at 442.

159. *Id.*

160. *Id.*

believes the interviewer wants to hear."¹⁶¹ In addition, the court noted that such transcripts would enhance the agency's accuracy. The court identified specific discrepancies in the notes of interviews with complainants in the instant case that called into question the accuracy of the information before the agency.¹⁶²

The *C.R.G.* court also agreed with the plaintiff that the bias of the CPS workers and the DSS Hearing Officer denied him due process. The court identified the limitations inherent in a CPS worker conducting the investigation in a sexual abuse case, specifically stating that "CPS workers are not charged with finding the truth, but with protecting children, so if they err they naturally err on the side of the children."¹⁶³ The court also identified specific instances in the investigation of this case where the conduct of the CPS workers demonstrated their bias. The court noted that certain conduct of the CPS workers indicated that they had made a finding of sexual abuse before they completed their investigation, thus demonstrating their bias. The court noted, among other examples, the failure of the workers to review any of the complainants' school records, the failure of the workers to interview the teacher with whom the defendant taught his classes, the failure of the workers to interview the single witness who may have corroborated or discredited one complainant's allegations, the actions of the workers to mail a booklet on young girls and sexual abuse to a complainant before the accused was interviewed, and the referral of a complainant to a victim assistance network before the accused was interviewed.¹⁶⁴

The court also concluded that the Hearing Officer who upheld the CPS workers' disposition was also biased, noting that "the Officer discounted the testimony of a private investigator, two independent psychologists, and substantial undisputed evidence from numerous witnesses that four of the five girls had poor reputations for truthfulness and had been disciplined [by the accused] in class."¹⁶⁵ As additional evidence of the Hearing

161. *Id.* (footnotes omitted).

162. *See id.*

163. *Id.* at 443.

164. *See id.* at 443-44.

165. *Id.* at 444.

Officer's bias, the court also considered the Officer's failure to discuss the serious harm that the abuse allegedly has caused in a Level 1 finding and his failure to mention the complete lack of evidence on the intent of the accused that is required for a finding under the statute.¹⁶⁶ Finally, the court found as indicative of the Officer's bias, her denunciation of the accused for introducing evidence in the hearing to impeach the complainants' credibility and her suggestion that his remembering details about these students indicated his guilt.¹⁶⁷

The court took the unusual action of reversing the findings of the agency and directing DSS to remove the findings from the CANIS registry.¹⁶⁸ Although the court noted its duty, under Virginia Code section 9-6.14:19, to suspend or set aside an agency decision and remand the matter to the agency and not undertake agency action directly, the court found that the procedural defects in the DSS proceedings could not be cured by a remand to the agency. In particular, the court found that DSS failed to comply with the minimum requirements of due process by failing to keep a verbatim transcript of the interviews with the alleged victims.¹⁶⁹

In *J.L.W. v. Virginia Department of Social Services*,¹⁷⁰ the Circuit Court of the City of Virginia Beach also overturned a DSS finding of the sexual abuse of a child. In *J.L.W.*, the accused was the boyfriend of the alleged victim's mother. As in *C.R.G.*, the *J.L.W.* court was troubled by the department's failure to fully investigate the charges against the accused. The question before the court in *J.L.W.* was not whether the accused's due process rights had been violated, but whether there was substantial evidence supporting the agency's determination of sexual abuse. The *J.L.W.* court was troubled, as was the court in *C.R.G.*, by the apparent bias of DSS in its investigation of the complaint and the Commissioner's office in its handling of the appeal.¹⁷¹ The *J.L.W.* court expressed its concern regarding the DSS investigators and hearing officers' ac-

166. *See id.*

167. *See id.* at 444-45.

168. *See id.* at 445.

169. *See id.*

170. 39 Va. Cir. 239 (Virginia Beach City 1996).

171. *See id.* at 241.

ceptance of the child's complaint without thoroughly examining the conflicting evidence presented in support of the accused. The court stated that DSS and the Commissioner had treated the accused as if he "bore the burden of providing an explanation for why this child would fabricate such allegations against him."¹⁷² The court opined that

it was the agency's responsibility, as part of a reasonable investigation, to explore possible motivations for the child's complaint and, in particular, more closely examine her home life and relationship with her mother's boyfriend. Only by conducting thorough and open-minded investigations will the needs of abused children be met and the rights of persons accused of abuse be protected.¹⁷³

In *Ruane v. Virginia Real Estate Board*,¹⁷⁴ Ruane appealed an adverse ruling of the Virginia Real Estate Board (VREB) on her application for a broker's license. This was Ruane's second appeal to the circuit court concerning VREB's denial of her petition for a waiver of the experience requirement contained in VREB regulations.¹⁷⁵ The Circuit Court of Fairfax County in the first appeal ruled that the proceeding should be remanded to the Board for reconsideration consistent with the opinion.¹⁷⁶ On reconsideration, the VREB again denied Ruane's application and she appealed the second denial to the circuit court.¹⁷⁷

In its consideration of this second appeal, the circuit court evidenced its frustration with the VREB. The court reviewed the VREB's seven reasons for denying Ruane's application and found that the board acted arbitrarily and capriciously in its determination.¹⁷⁸ The court found that two of the board's reasons were "totally contrary to the record"; three of the reasons had "no support for [the] finding in the record"; and two of the

172. *Id.*

173. *Id.*

174. 39 Va. Cir. 242 (Fairfax County 1996).

175. *See id.* at 242.

176. *See Ruane v. Virginia Real Estate Board*, 36 Va. Cir. 420 (Fairfax County 1995).

177. *See Ruane*, 39 Va. Cir. at 242.

178. *See id.* at 243.

reasons, if they were a general statement of Ruane's qualifications, were "contradicted by the record."¹⁷⁹

The court again remanded the case to the VREB and set aside the board's order. The court voiced its frustration with the VREB, stating that "while the court cannot dictate to the Board what its decision should be; reason, common sense, and justice suggest only one available course."¹⁸⁰

3. Court of Appeals Interprets Agencies' Statutes

Finally, in two cases appealed to the Virginia Court of Appeals, the court of appeals reversed the circuit court's interpretation of the controlling agency statute. In *Actuarial Benefits & Design Corp. v. Virginia Employment Commission*,¹⁸¹ the employer, Actuarial Benefits & Design Corporation (Actuarial), appealed an order of the Richmond Circuit Court, which affirmed the decision of the VEC that employee Lipcsey was entitled to full unemployment benefits. Lipcsey had worked as a nanny for Actuarial. Following an incident in which Lipcsey was offended by the manner in which Actuarial's president spoke to her, Lipcsey resigned giving two weeks notice.¹⁸² Two days after Lipcsey resigned, Actuarial fired Lipcsey, effective immediately, and only paid Lipcsey for two days of her two-week notice period.¹⁸³ After the VEC awarded Lipcsey full unemployment benefits, Actuarial appealed. A hearing was held and the appeals examiner affirmed the award of benefits. Actuarial offered no evidence at the hearing showing that Lipcsey was discharged for misconduct. Actuarial appealed to the VEC, which affirmed the appeals examiner's decision.¹⁸⁴

On appeal to the Richmond City Circuit Court, the court affirmed the VEC's decision that Lipcsey "was not discharged due to misconduct under [Virginia] Code section 60.2-618(2) and

179. *Id.*

180. *Id.* at 244.

181. 23 Va. App. 640, 478 S.E.2d 735 (1996).

182. *See id.* at 643, 478 S.E.2d at 737.

183. *See id.*

184. *See id.* at 644, 478 S.E.2d at 737.

that the two-week limit of [Virginia] Code section 60.2-612(8) did not apply to Lipcsey's case.¹⁸⁵

On appeal, the court of appeals reviewed the relevant statutes and found that "to receive unemployment benefits, a claimant must be eligible under [Virginia] Code section 60.2-612 and not disqualified under section 60.2-618." The court explained that section 60.2-612 deals with eligibility and section 60.2-618 deals with disqualification; and that "[a] claimant must be eligible for benefits before his disqualification need be inquired into."¹⁸⁶

Under section 60.2-612(8), an employee's eligibility for unemployment benefits is capped at two weeks where an employee "has given notice of resignation to his employer and the employer subsequently made the termination of employment effective immediately, . . . provided, that the [employee] could not establish good cause for leaving work pursuant to § 60.2-618 and was not discharged for misconduct as provided in § 60.2-618."¹⁸⁷ The court of appeals explained the shifting of the burden of proof between the employee and employer under these statutes. Under section 60.2-612, the claimant has the burden of proving the eligibility requirements,¹⁸⁸ once that burden is met, the "burden shifts to the employer to prove that the claimant is disqualified."¹⁸⁹ Under section 60.2-618(1), the burden is on the employer to prove that the claimant left work voluntarily; once an employer meets this burden, the claimant must prove he left work for good cause so as to not be disqualified for benefits.¹⁹⁰

Actuarial claimed the trial court erred because it affirmed the commission's decision that Lipcsey was not disqualified from receiving benefits. The court of appeals affirmed the trial court's decision, holding that because Actuarial failed to prove that Lipcsey left work voluntarily, the burden never shifted to

185. *Id.*

186. *Id.* at 645, 478 S.E.2d at 737 (citing *Dan River Mills, Inc. v. Unemployment Comp. Comm'n*, 195 Va. 997, 1000, 81 S.E.2d 620, 622 (1954)).

187. VA. CODE ANN. § 60.2-612(8) (Repl. Vol. 1992 & Cum. Supp. 1997).

188. *See Actuarial Benefits*, 23 Va. App. at 645, 478 S.E.2d at 737-38.

189. *Id.* at 645, 478 S.E.2d at 738.

190. *See id.*

her to prove good cause and the commission was not required to make a finding on this issue.¹⁹¹

The court of appeals, however, agreed with Actuarial's contention that the trial court erred in affirming the commission's decision that section 60.2-612(8) did not apply to Lipcsey's case and that Lipcsey was entitled to full benefits. The court of appeals noted that the issue of whether the cap on benefits contained in section 60.2-612(8) applies only to a claimant who is terminated immediately after giving notice of his resignation was one of first impression in Virginia.¹⁹² The court of appeals reversed the trial court's holding that Virginia Code section 60.2-612(8) did not apply to Lipcsey's case and that Lipcsey was entitled to full benefits.¹⁹³

The court of appeals took issue with the trial court's and commission's interpretation of section 60.2-612(8). The trial court and the commission had interpreted "subsequently" in the statute to mean "immediately" and determined that Lipcsey's eligibility for unemployment benefits was not capped at two weeks "because she was fired two days after she gave notice of her resignation to appellant."¹⁹⁴ The court of appeals concluded that based on the plain meaning of the word "subsequently" and the obvious intent of the General Assembly, the term "subsequently" as used in Code § 60.2-612(8) means "at any time after notice is given and before the end of the notice period."¹⁹⁵ Further, the court stated that to interpret "subsequently" in the statute so that the two-week cap on benefits applies only to claimants fired immediately upon receipt of their notice of resignation "would create a loophole not intended by the General Assembly and would thwart the purpose of the Unemployment Compensation Act."¹⁹⁶ The court remanded the case to the trial court "with directions to reverse the commission in part and remand the claim to the commission for proceedings to determine whether Ms. Lipcsey's eligibility is limited to the twelve days of her notice period that were unpaid

191. *See id.* at 646, 478 S.E.2d at 738.

192. *See id.* at 646-47, 478 S.E.2d at 738.

193. *See id.* at 646, 478 S.E.2d at 738.

194. *Id.*

195. *Id.* at 648, 478 S.E.2d at 739.

196. *Id.* at 649, 478 S.E.2d at 740.

because she cannot establish good cause for leaving pursuant to Code [section] 60.2-618(1).¹⁹⁷

In *Virginia Employment Commission v. Nunery*,¹⁹⁸ the Virginia Court of Appeals reversed the Richmond City Circuit Court, reinstating the commission's interpretation of its statute. In this appeal, the VEC contended that the circuit court erred in failing to reduce Nunery's unemployment benefits by the amount of the social security disability benefits she received retroactively in a lump sum payment.¹⁹⁹

Nunery received unemployment benefits between 1992 and 1994. In 1993, Nunery applied for social security disability benefits. Her claim was initially denied, but in 1995, an administrative law judge for the Social Security Administration found that she was entitled to social security benefits and for supplemental security income benefits for periods which overlapped with her receipt of unemployment benefits.²⁰⁰ She subsequently received the social security benefits in one lump sum payment.²⁰¹

After the 1995 decision by the Social Security Administration awarded Nunery her social security benefits retroactively, a deputy of the VEC declared Nunery ineligible for unemployment benefits for certain time periods during 1992 through 1994.²⁰² The denial of these benefits was for time periods that overlapped with other periods for which she had been awarded the retroactive social security benefits. In addition, the deputy found Nunery liable for repayment of the unemployment benefits she received during those overlapping periods.²⁰³

Nunery appealed the VEC determination and the VEC appeals examiner conducted an evidentiary hearing.²⁰⁴ The VEC appeals examiner affirmed the deputy's determination. He found that pursuant to Virginia Code section 60.2-604, Nunery

197. *Id.* at 651, 478 S.E.2d at 740-41.

198. 24 Va. App. 617, 484 S.E.2d 609 (1997).

199. *See id.* at 619, 484 S.E.2d at 609-10.

200. *See id.*

201. *See id.* at 620, 484 S.E.2d at 610.

202. *See id.*

203. *See id.*

204. *See id.*

was not eligible to receive unemployment benefits for the time periods that overlapped with her receipt of social security benefits. Thus, the unemployment benefits Nunery received were subject to a dollar-for-dollar reduction in the amount of the social security benefits received for overlapping time periods. The VEC special examiner affirmed the appeals examiner's decision.²⁰⁵

Nunery appealed to the circuit court which reversed the VEC's decision and held that section 60.2-604 required a reduction or offset of unemployment benefits only when the applicant for unemployment benefits "is receiving" concurrent payments for the period during which the unemployment compensation is paid.²⁰⁶ The circuit court found that Nunery's receipt of social security benefits retroactively after her unemployment benefits were paid did not fall under the language of the statute because Nunery was not "receiving" pension or retirement benefits at the same time that she received unemployment benefits.²⁰⁷ The circuit court reasoned that the statute should be liberally construed so as to achieve the primary purpose of the Virginia Unemployment Compensation Act "to provide temporary financial assistance" to workers who are involuntarily displaced from the work force.²⁰⁸ Reversing the VEC's decision, the circuit court held that Nunery was entitled to retain all funds and was not liable for any reduction or set-off amounts.²⁰⁹

The court of appeals disagreed with the circuit court's interpretation of the statute, and reversed its denial of the offset previously determined by the VEC. The court of appeals found that Nunery's eligibility to receive both the unemployment benefits and the social security benefits coincided and the lump sum award for social security benefits was "reasonably attributable" to weeks during which she received unemployment benefits.²¹⁰ Accordingly, the court found the offset provision of Virginia Code section 60.2-604 applied to the overlap of time

205. *See id.*

206. *See* Nunery v. Virginia Employment Comm'n, 39 Va. Cir. 454 (Richmond City 1996).

207. *See id.* at 455.

208. *Id.* at 456.

209. *See id.*

210. *See* Nunery, 24 Va. App. at 624, 484 S.E.2d at 612.

periods during which Nunery received employment benefits and during which she was eligible to receive social security payments.²¹¹

As support for its reasoning, the court of appeals looked to the requirement that the state's unemployment program must be in substantial compliance with the provisions of the Federal Unemployment Tax Act to receive federal benefits.²¹² The court noted that Congress' purpose in enacting the federal statute was "to eliminate duplicative benefits and preserve the fiscal integrity of the unemployment compensation in a rational manner."²¹³

The court of appeals stated that "[t]he practical effect of the federal statute [was] to create, on a uniform basis throughout the United States, a dollar-for-dollar reduction of unemployment insurance benefits by income received from the designated 'wage replacement' sources."²¹⁴ It found that the trial court's interpretation of the statute to restrict the application of the offset requirement "defeats the Congressional rationale and the General Assembly's adherence to the federal directive."²¹⁵ The court also found important the fact that a majority of jurisdictions which had addressed the issue of whether the federal statute requires that unemployment compensation benefits be offset by the amount of Social Security benefits received by the unemployed worker have held that the unemployment compensation benefits must be so offset where the base period employer contributed to the Social Security system.²¹⁶

IV. CONCLUSION

Although the 1997 General Assembly made no substantive changes to VAPA and made several revisions to agency law which affect agency decision making, the most important developments in the 1997 General Assembly for administrative law

211. *See id.*

212. *See id.* at 621, 404 S.E.2d at 611.

213. *Id.* at 624, 484 S.E.2d at 612 (quoting *McKay v. Horn*, 529 F. Supp. 847, 863 (D.N.J. 1981)).

214. *Id.* at 625, 484 S.E.2d at 613.

215. *Id.*

216. *Id.* at 623 n.2, 484 S.E.2d at 612 n.2.

were those indications of changes in VAPA which appear to be on the horizon. Several amendments to VAPA failed, but garnered considerable support. Two bills passed that implement studies and propose changes to VAPA. It does not appear that the Commonwealth's fundamental law of administrative procedure will remain unchanged.

The state circuit courts and the court of appeals also continued to shape administrative procedure through case law. The actions of these courts indicate aggressiveness on the part of the circuit courts to overturn agency decisions and a tendency of the court of appeals to rein in the circuit courts.

